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BY

N. RAMARATNAM, M.A., B.L.

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ABBREVIATIONS EXPLAINED.

Reports.

I.L.R. (1950) All.	Indian Law Reports, Allahabad Series.
A.L.J.	Allahabad Law Journal.
A.L.W.	Allahabad Law Weekly.
A.W.R.	Allahabad Weekly Reporter.
A.Cr.C.	Allahabad Criminal Cases.
A.I. Cr.D.	All India Criminal Decisions.
A.I.R. 1950 All. or 1950 A.	All India Reporter, 1950 Allahabad.
D.L.R. All.	Dominion Law Reporter, Allahabad.
A.M.L.J.	Ajmer-Merwara Law Journal.
A.I.R. 1950 Ajmer	All India Reporter, 1950 Ajmer.
D.L.R. (A.M.)	Dominion Law Reporter, Agmer-Merwara.
A.I.R. 1950 Assam	All India Reporter, 1950 Assam.
I.L.R. (1950) Bom.	Indian Law Reports, Bombay Series.
Bom. L.R.	Bombay Law Reporter.
A.I.R. 1950 Bom. or 1950 Bom.	All India Reporter, 1950 Bombay.
D.L.R. (Bom.)	Dominion Law Reporter, Bombay.
Bur. L.T.	Burma Law Times.
Bur. L.J.	Burma Law Journal.
B.R.	Bihar Reports.
I.L.R. (1950) Cal.	Indian Law Reports, Calcutta Series.
C.L.T.	Cuttack Law Times.
C.L.J.	Calcutta Law Journal.
Cr.L.J.	Criminal Law Journal.
C.W.N.	Calcutta Weekly Notes.
Comp. C.	Company Cases.
A.I.R. 1950 Cal. or 1950 Cal.	All India Reporter, 1950 Calcutta.
D.L.R. (Cal.)	Dominion Law Reporter, Calcutta.
D.R.	Dacca Reports.
D.L.R. (Cuttack)	Dominion Law Reporter, Cuttack.
A.I.R. 1950 Dacca	All India Reporter, 1950 Dacca.
A.I.R. 1950 East Punj.	All India Reporter, 1950 East Punjab.
A.I.R. 1950 F.C.	All India Reporter, 1950 Federal Court.
D.L.R. (F.C.)	Dominion Law Reporter, Federal Court.
Fed.L.J.	Federal Law Journal.
F.C.R.	Federal Court Reports.
A.I.R. 1950 H.P.	All India Reporter, 1950 Himachal Pradesh.
A.I.R. 1950 Hyd.	All India Reporter, 1950 Hyderabad.
A.I.R. 1950 J. & K.	All India Reporter, 1950 Jammu and Kashmir.
I.A.	Law Reports, Indian Appeals.
A.I.R. 1950 P.C. or 1950 P.C.	All India Reporter, 1950 Privy Council.
D.L.R. (P.C.)	Dominion Law Reporter, Privy Council.
I.C.	Indian Cases.
I.T.R.	Income-tax Reports.
K.L.T.	Kerala Law Times.
A.I.R. 1950 Kut.	All India Reporter, 1950 Kutch.
I.L.R. (1950) Lah.	Indian Law Reports, Lahore Series.
A.I.R. 1950 Lah. or 1950 Lah.	All India Reporter, 1950 Lahore.
Lah. L.T. or L.L.T.	Lahore Law Times.
L.B.R.	Lower Burma Rulings.
L.W.	Law Weekly.
I.L.R. (1950) Luck.	Indian Law Reports, Lucknow Series.
I.L.R. (1950) Mad.	Indian Law Reports, Madras Series.
(1950) M.L.J.	Madras Law Journal.
M.L.T.	Madras Law Times.
M.W.N.	Madras Weekly Notes.
A.I.R. (1950) (M.B.).	All India Reporter, Madhya Bharat.
D.L.R. (M.B.)	Dominion Law Reporter, Madhya Bharat.
A.I.R. 1950 Mad. or 1950 Mad.	All India Reporter, 1950 Madras.
D.L.R. (Mad.)	Dominion Law Reporter, Madras.
A.I.R. (Mys.)	All India Reporter, Mysore.
D.L.R. (Mys.)	Dominion Law Reporter, Mysore.
Mys.H.C.R.	Mysore High Court Reports.
Mys.L.J.	Mysore Law Journal.
I.L.R. (1950) Nag.	Indian Law Reports, Nagpur Series.
N.L.J.	Nagpur Law Journal.
A.I.R. 1950 Nag. or 1950 Nag.	All India Reporter, 1950 Nagpur.
D.L.R. (Nag.)	Dominion Law Reporter, Nagpur.
A.I.R. 1950 Orissa	All India Reporter, 1950 Orissa.
A.I.R. 1950 Oudh or 1950 Oudh.	All India Reporter, 1950 Oudh.
O.A.	Oudh Appeals.
O.L.R.	Oudh Law Reports.

O.W.N.	.. Oudh Weekly Notes.
P.R.	.. Punjab Record.
P.L.R.	.. Punjab Law Reporter.
P.W.R.	.. Punjab Weekly Reporter.
Pat. or P.	.. Indian Law Reports, Patna Series.
A.I.R. 1950 Pat. or 1950 Pat.	All India Reporter, 1950 Patna.
D.L.R. (Pat.)	.. Dominilon Law Reporter, Patna.
P.L.J.	.. Patna Law Journal.
P.L.T.	.. Patna Law Times.
P.W.N.	.. Patna Weekly Notes.
A.I.R. 1950 Pesh. or 1950 Pesh.	All India Reporter, 1950 Peshawar.
R.L.W.	.. Rajasthan Law Weekly.
R. or Rang.	.. Indian Law Reports, Rangoon Series.
Rang.L.R.	.. Rangoon Law Reports.
A.I.R. 1950 Rajas.	.. All India Reporter, 1950 Rajasthan.
R.D.	.. Revenue Decisions.
Sau. L.R.	.. Saurashtra Law Reports.
S.L.R.	.. Sind Law Reporter.
S.C.R.	.. Supreme Court Reports.
S.C.J.	.. Supreme Court Journal.
A.I.R. 1950 Sau.	.. All India Reporter, 1950 Saurashtra.
D.L.R. (Sau.)	.. Dominion Law Reporter, Saurashtra.
A.I.R. 1950 Simla	.. All India Reporter, 1950 Simla.
D.L.R. (Simla)	.. Dominion Law Reporter, Simla.
A.I.R. 1950 Sind or 1950 Sind.	All India Reporter, 1950 Sind.
A.I.R. 1950 S.C.	.. A.I.R. 1950 Supreme Court.
D.L.R. (S.C.)	.. Dominion Law Reporter, Supreme Court.
U.B.R.	.. Upper Burma Rulings.
A.I.R. 1950 T. & C.	.. All India Reporter, 1950 Travancore-Cochin.
D.L.R. (Tr. Co.)	.. Dominion Law Reporter, Travancore-Cochin.
A.I.R. 1950 V.P.	.. All India Reporter, 1950 Vindhya Pradesh.
Pak. L.R. 1950	.. 1950 Pakistan Law Reports.

Other Abbreviations.

Appl.	.. Applied.
Appr.	.. Approved.
Comm.	.. Commented.
Cons.	.. Considered.
Cr.	.. Criminal.
Disc.	.. Discussed.
Diss.	.. Dissented from.
Dist. or D.	.. Distinguished.
Doubt	.. Doubted.
Expl.	.. Explained.
Foll.	.. Followed.
F.B.	.. Full Bench.
P.C.	.. Privy Council.
Rel.	.. Relied.
S.B.	.. Special Bench.
Ref. or R.	.. Referred.
Rev.	.. Revenue.

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THE
QUINQUENNIAL DIGEST
CIVIL, CRIMINAL & REVENUE
[1946—1950]
Volume I

ABADI.

See also (1) Custom.
(2) Landlord and Tenant.

——*See* Custom (Punjab)—Abadi. 51 P.L.R. 192.

——*Agricultural village—What is—Character of village if lost by a portion of it being included within municipal limits—Rights of ryot in such a village to transfer house sites—Onus.*

An agricultural village is a village in which the majority of the residents carry on agricultural occupation and in which the bulk of the land is used for agricultural purposes. The character of the village is not lost or altered merely because a portion of it is included within municipal limits.

In such a village the ryots have ordinarily no right to transfer the sites of their houses. Such a custom would usually be recorded in the wajib-ul-arz and its absence would be a strong circumstance going against the ryot. The ryot on whom the onus lies heavily has to prove such a custom with clear and cogent evidence. (*Bind Basni Prasad, J.*) Ram Charan *v.* Ramadhar. 1948 A.W.R. (H.C.) 26=1948 O.A. (H.C.) 26 =1948 A.L.J. 157=A.I.R. 1948 A. 327=1948 A.L.W. 217.

——*Conversion of kachha well into a pucca well —Right of a riyaya.*

A riyaya is competent to sink a well without the permission of his landlord on such portion of the *abadi* land as has been used by him as an appurtenance to his dwelling house. It follows that the conversion of a kachha well into a pucca well in the Abadi, cannot furnish any cause of action to the zamindar to sue for its demolition. (*Ghulam Hasan, C.J.*) Mahomed Amir Ahmad Khan *v.* Bachchoo Singh. 23 Luck. 108= A.I.R. 1948 Oudh 142=1947 A.W.R. (C.C.) 294=1947 O.A. (C.C.) 294=1947 O.W.N. 539.

——Effect of village ceasing to be agricultural village naturally and by operation of statute—Difference—Position of agricultural tenant. [*See* Q.D. 1941-1945, Vol. I, Col. 2.] Hafiz Mahomed *v.* Shiam Lal. 1946 A. (Rul.) 33 (F.B.).

ABADI.

——*Houses in—Power to transfer—Inclusion of portion within municipality—*Iqrar-i-malikhan *—Restrictions mentioned in—Applicability.*

The restrictions as to transfer mentioned in an *iqrar-i-malikhan* apply only to the residents of the agricultural portion of the village and not to residents of that portion which had already been included within a municipality. 1946 A.W.R. (C.C.) 1, Rel. on. (*Malik, C.J. and Chandiramani, J.*) Ratan Ram *v.* Dhanushdhari Ji. I.L.R. (1949) All. 888=1949 A.W.R. 49= A.I.R. 1949 A. 410=4 D.L.R. (A.) 138.

——*House site—Right of tenant—Transfer without consent of zamindar—Custom—Presence of bazaar in village—If alters agricultural character of village.*

The custom is so well-established that it may be treated as the common law of the province, that in the absence of a special grant or contract to the contrary, an agriculturist or an agricultural tenant, or any other person necessary for the village economy, who is allowed by the zamindar to build a house for his occupation in the *abadi* obtains a bare right to use that house for himself and his family so long as he maintains the house, and so long as he does not abandon the house by leaving the village. He is a bare licensee of the site and has no right to alter its user, or to transfer the same without the permission of the zamindar. Nor does the village cease to be an agricultural village by the mere presence of a bazaar in the village, so as to give the tenant a right of transfer without reference to the zamindar. 11 O. L.J. 305; I.L.R. (1944) All. 619, foll. (1942) O.W.N. 368; (1929) P.C. 99; (1926) O.W. N. (Supp.) 282; (1937) O.W.N. 330, ref. (*Chandiramani, J.*) Ram Kishan *v.* Karam Singh. 4 D.L.R. (All.) 64=A.I.R. 1949 A. 673.

——*Position of Reyaya occupying house in—Right to maintain suit against trespasser to protect his rights.*

Though a Reyaya occupying a house in the abadi has got no interest in the land, he cannot

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Note.—Where cases reported before 1945 are subsequently reported in other reports only the catch-words with the references to the reports are given. The columns of Q. D. 1941—1945 where the case is fully digested is also indicated.

be said to be a bare licensee. Where on payment of consideration a Reyaya has acquired the right to build a house in the abadi and live in it, there is no justification in law and in equity why he should not be able to maintain a suit against trespassers for the protection of his rights. (*Malik, J.*) PANNI LAL *v.* ANANT SINGH. 225 I.C. 226=1946 A.W.R. (H.C.) 48=1946 A.L.W. 1=1946 O.W.N. (H.C.) 1=A.I.R. 1946 All. 284.

———*Transfer in a town—Right to—Onus.*

Whether the right of transfer be in respect of site or in respect of the constructions standing on it, it is for the person who asserts a superior title to establish it, and unless a title which prohibits the transfer can be established, the transfer will stand good. So where a plaintiff challenges the right of a tenant in a town to transfer, he must show that either there is a custom or contract which prohibits the transfer of a house or a site by a resident in a town. 7 O.W.N. 271; (1945) O.W.N. 3, rel. on. (*Malik, C.J. and Chandiramani, J.*) RATAN RAM *v.* SHRI DHANUSH DHARIJI BHAGWAN. I.L.R. (1949) All. 888=1949 A.W.R. 49=A.I.R. 1949 All. 410=4 D.L.R. (All.) 138.

ABANDONMENT—Of claim. *See* C. P. CODE, O. 23.

———Of holding. *See* LANDLORD AND TENANT.

———Plea of—Delay in applying for delivery of possession on part of auction-purchaser—Inference of abandonment—Plea, when material. *See* TRAV. LIM. ACT, ART. 164. (1950) K.L.T. 1.

ABATEMENT—Of appeals and suits. *See* C. P. CODE, O. 22.

———Of rent. *See* LANDLORD AND TENANT.

ABETTING. *See* PENAL CODE, S. 34.

ABKARI. *See* BOMBAY ABKARI ACT.

ABUSE. *See* PENAL CODE, S. 499.

ABUSE OF PROCESS OF COURT. *See* C. P. CODE, S. 151.

ACCOMPLICE—Who is—Decoy or spy—If accomplice—Value of evidence—Distinction—Corroboration of evidence—Rule—Bribe giver—Position of. *See* CRIMINAL TRIAL—EVIDENCE. I.L.R. (1940) Cut. 585.

ACCOUNTS.

See also (1) COURT-FEES ACT, S. 7 (*iv*).
(2) PARTNERSHIP.
(3) PARTNERSHIP ACT.
(4) TRUSTS ACT.

———*Oligation to account—When arises.*

A suit for account will lie if the defendant is under an obligation to account and an obligation to account arises only (*i*) if the person upon whom the obligation is sought to be imposed must have received some kind of property not belonging to himself, (*ii*) that the person seeking to impose the liability must be owner or must have some title to that property as would enable him to recover it, (*iii*) that the defendant must have received the property in his possession and control, and (*iv*) there must be fiduciary relationship between the plaintiff and the defendant. (*Guha,*

J.) ASHUTOSH ROY *v.* ARUN SANKAR DAS. A.I.R. 1950 Dacca 13 (2).

———*Settled accounts—Re-opening of—Equity when steps in to grant relief in the matter of.*

It is a well-established principle of law that equity does not step in to grant relief in cases of "folly imprudence or want of foresight" but only in cases of "victimisation", where accounts between parties like principal and agent are sought to be re-opened after a long lapse of time. (*Allsop and Sinha, JJ.*) RAM SWAROOP *v.* PARTAB NARAIN. I.L.R. (1947) All. 424=A.I.R. 1948 All. 138=1947 A.L.J. 402.

———*Settled accounts—Re-opening of— Grounds.*

A settled account can be re-opened only on grounds which are well settled. It may be fraud or mistake or some ground which the Court would accept as having led one of the parties to accept the account as correct which in equity would be considered unconscionable. (*Chagla, J.*) MANEKLAL MANSUKHBHAI *v.* JWALADUTT PILANI. 230 I.C. 461=48 Bom.L.R. 727=A.I.R. 1947 Bom. 135.

———*Settled accounts—Re-opening—Suit for—Facts to be proved by plaintiff—Fiduciary relationship between parties—Effect.*

Where a plaintiff wishes to re-open accounts settled after a long lapse of time, the plaintiff must show error in the accounts to a considerable extent both in amount and in the number of items. But if there is any fiduciary relationship between the parties, it would be enough if a less considerable number of errors and one or more fraudulent omissions or insertions in the accounts are shown. The plaintiff must also specify instances for re-opening the entire account. (*Allsop and Sinha, JJ.*) RAM SWAROOP *v.* PARTAB NARAIN. I.L.R. (1947) All. 424=A.I.R. 1948 A. 138=1947 A.L.J. 402.

———*Settled or stated accounts—What amounts to—Essentials—Acceptance of accounts rendered—Effect of—Express acceptance—Necessity—Conduct—Sufficiency.*

If accounts are submitted and accepted as correct by the other side to whom the accounts are rendered, then in law that amounts to stated or settled accounts. It is not necessary that the settlement should be in writing, nor is it necessary that the parties should sit down, compare accounts and call for vouchers, etc. All that the Court has to ascertain is whether in fact the party to whom accounts were submitted has accepted them as correct. The acceptance need not be express; it can be inferred from conduct. The Court must find that there is sufficient evidence from which a legal presumption can arise that the accounts were settled. (*Chagla, J.*) MANEKLAL MANSUKHBHAI *v.* JWALADUTT PILANI. 230 I.C. 461=48 Bom.L.R. 727=A.I.R. 1947 Bom. 135.

———*Suit for—Cause of action against executor—If survives his death—Liability of his legal representatives—Extent of.*

A cause of action in a suit for account against an executor or other person holding a fiduciary character survives his death and can be enforced against his legal representative. The legal representative cannot be directed by the Court to explain the accounts kept by the dead executor or the other person. But there is no inherent impossibility in the performance of the other acts by the legal representative, namely, to deliver the account papers and support them by vouchers, for the hand of death does not remove papers. To that extent a departure may have to be made from the general rule that a suit has to be tried throughout in all its stages on the cause of action as laid in the plaint and the relief appropriate thereto is to be given, and that a person substituted as legal representative can only take a defence appropriate to his character as legal representative of the deceased defendant. (*Mitter and Chunder, JJ.*) Brij Kishore Singh *v.* Nazuk Bai. I.L.R. (1947) 1 Cal. 117=228 I.C. 299=1947 Cal. (Rul.) 66=83 C.L.J. 1 =A.I.R. 1948 Cal. 19=51 C.W.N. 157.

———Suit for—What is. *See* C. P. Code, O. 7, R. 2. 48 Bom.L.R. 795.

———*Suit for—When lies.*

The proposition that a suit for accounts can only be brought by a principal against his agent, or by one partner against another partner or by a *cestui que trust* against his trustee is too narrow to be acceptable. The correct position is that the plaintiff must satisfy the Court that either because of a particular trade usage, or of the peculiar relations between the parties the defendant is an accounting party or it is not possible for him to get any relief except by calling upon the defendant to render account to him, and if he does that the suit for accounts would lie. (*Teja Singh, J.*) Diwan Chand Sant Ram *v.* Bhagat Ram. 223 I.C. 398=1946 Lah. (Rul.) 269=47 P.L.R. 407=A.I. R. 1946 Lah. 82.

ACCRETION. *See* Hindu Law—Widow.

ACKNOWLEDGMENT.

See also (1) Limitation Act, Ss. 19 and 20.
(2) Mahomedan Law—
(*i*) Legitimacy.
(*ii*) Marriage—Presumption..

———Signature relied on as that of judgment-debtor attacked as forgery—Burden of proof is on decree-holder to prove that the signature was that of judgment-debtor. *See* Evidence. 12 B. R. 615.

———What amounts to—Mortgage—Decree for redemption—Execution application by defendant for amounts due to him—If saves limitation for execution by plaintiff. *See* Cochin C. P. Code, O. 21, R. 9 (2). 5 D.L.R. (T.C.) 51.

ACQUIESCENCE. *See* Evidence Act, S. 115.

———*Acceptance of benefit under order—Right to challenge order—Order allowing amendment of plaint—Order awarding costs to defendant—Acceptance of costs—Subsequent attempt to attack amendment in appeal—Estoppel.*

Where an order allowing the plaint is made, awarding costs to the defendant, and the latter accepts the costs awarded to him, it must be held that the defendant accedes to the order of amendment. He cannot be permitted to subsequently challenge the order of amendment in appeal against the decree in the suit. If the defendant felt aggrieved, he ought, without accepting the costs, to have filed a revision application against such amendment order. (*Nagarkar, J.C.*) Zora *v.* Jawahar Nath. 3 D.L.R. (Aj. Mer.) 39.

ACT OF STATE—Effect—Change in status of individuals and character and authority of Court by reason of Act of State—Effect on vested rights —Principles governing effect of change of law on vested rights—Applicability. *See* Interpretation of Statutes. 52 Bom.L.R. 660.

ACTIONABLE WRONG. *See* Tort.

ACTIVE SERVICES ORDINANCE (X OF 1941)—*If* ultra vires—*Government of India Act, S.* 110.

The Active Services Ordinance is not *ultra vires* the Government of India Act in view of the amendment of that Act by the India and Burma Emergency Act, 1940. (*Roxburgh and Ellis, JJ.*) Evelyn Betty Vivian Perry *v.* Emperor. I.L.R. (1946) 1 Cal. 95.

———*Effect of—Army Act, Ss.* 176 *and* 189.

The effect of the Active Services Ordinance, which extends to the whole of British India, is clearly that all persons covered by the terms of S. 176 (9) and (10) of the Army Act became subject to military law, if employed within British India, for, by virtue of the Ordinance, they are to be deemed to be on Active Service, notwithstanding the actual provision of S. 189 of the Army Act on this point. (*Roxburgh and Ellis, JJ.*) Evelyn Betty Vivian Perry *v.* Emperor. I.L.R. (1946) 1 Cal. 95.

ACTS—Construction. *See* Interpretation of Sratutes.

ADJOURNMENT. *See* C. P. Code, O. 17, R. 1.

ADJUSTMENT—Of decree, or suit. *See* C. P. Code, O. 21, R. 2 and O. 23, R. 3.

ADMINISTRATION—Administrator appointed by foreign Court—If can sue for recovery of immovable property in British India. *See* Q.D. 1941-1945, Vol. I, Col. 8. Jaina Mahomed Sheriff Maracair *v.* Official Assignee, Madras. I.L.R. (1946) Mad. 486=A.I.R. 1946 Mad. 25.

———*Suit for—Competency—Object of suit to have alienation made by deceased set aside.*

If the main object of a suit is to administer the estate, and if the Court, in the suit, has to decide as to the existence or otherwise of an alienation, an administration suit will lie, but where the main object of the suit is to have an alienation, alleged to be made by the deceased, set aside or to obtain possession of property illegally withheld by one of the heirs, an administration suit is not a proper remedy. 45 P.L.R. 261, referred to. (*Harnam Singh and Kapur, JJ.*) Shafi-ul-Nisa *v.* Fazal ul-Nisa. A.I.R. 1950 E. P. 276=52 P.L.R. 217.

———Suit for—Court-fee. *See* Bombay Civil Courts Act, Ss. 8 and 26. 48 Bom.L.R. 110.

———*Suit for—Power of Court to entertain suit —C. P. Code, S.* 9 *and O.* 20, *R.* 13.

It would be incorrect to rely too much on O. 20, R. 13, C. P. Code, or the forms of plaints and decrees prescribed in Sch. I, C. P. Code, for ascertaining the objects of an administration suit. O. 20 bears the title "judgment and decree" and is devoted to the form in which judgments should be delivered and decrees passed in particular cases. The forms are not exhaustive, and R. 13 itself enables the Court to give any directions that it thinks fit. "Administration" means management and disposal of an estate, whether it be that of a deceased person or of any other person. The power to entertain an administration suit is given not by O. 20, R. 13, but by S. 9, C. P. Code, which provides that the Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, and if a suit for the administration of an estate is not barred expressly or impliedly by any provision of law, it must be entertained. It would appear that an administration suit need not necessarily relate to the estate of a deceased person. This conclusion may be drawn from the language of O. 20, R. 13 (1), which speaks of a suit "for an account of any property and for its due administration under the decree of the Court" without any reference to a deceased person, and the force of this language is brought out specifically in sub-R. (2) which makes a special provision for "the administration by the Court of the property of any deceased person". *(Cornelius and Kayani, JJ.)* Mahbub Alam *v.* Razia Begum. A.I.R. 1950 Lah. 12.

———*Trust for benefit of creditors—Decree passed after due advertisement allocating funds to creditors—Effect of—Whether binds all persons interested.*

A deed of trust provided for the payment by the trustees of all the debts of the settlor, and after such payment the trustees were to pay and deliver the residue or surplus to the settlor or his heirs. The deed further provided that if any creditor does not accede to the same he should be excluded from all benefit under the deed and the settlor should be entitled to stand in his place. One of the creditors sued the Official Trustee who was appointed by Court in the place of the trustees under the deed, to have the trusts ascertained and declared and for an account. A decree was passed in that suit classifying the creditors in different groups and setting out the amounts due to them. The Official Trustee implemented the directions given in the decree by making allocations among the creditors named therein and carrying the funds to separate accounts in their names. The decree was made after due advertisement for all persons interested. On a subsequent application by some of the heirs of the settlor under the Official Trustees Act for an order directing the Official Trustee to make over to them the amounts unclaimed by the creditors in terms of the deed of trust,

Held, that (*i*) the allocation and carrying over of the funds to separate accounts in the names of the respective creditors amounted in law to a payment to those creditors of the sums set opposite to their respective names in due course of administration of the trust, that after such allocation and apportionment no surplus remained in the hands of the Official Trustee in respect of which a resulting trust might arise in favour of the settlor or his heirs, and that the decree operated to wind up the administration of the trust created by the deed and created a new trust and that the Official Trustee was in contemplation of law holding the respective amounts in trust for the respective creditors not under the original trust but under the trust created by the decree; (*ii*) that the Court was free after proper advertisements to "allow" the claims of such of the beneficiaries as it could "find" and that the allocation and carrying over of the funds to separate accounts in the names of the creditors' beneficiaries was nothing short of distribution in the eye of the law and all persons interested are bound thereby. *(Das, J.)* *In the matter of* Official Trustees Act. A.I.R. 1946 Cal. 382=227 I.C. 323=1947 Cal. (Rul.) 1.

ADMINISTRATION OF EVACUEE PROPERTY ACT (XXXI OF 1950), Ss. 17 and 46 (d)—*Appointment of Receiver of evacuee property—Power of Court—C. P. Code, S. 51 (d).*

Section 17 of the Administration of Evacuee Property Act only prohibits attachment, distress or sale in execution of an order of a Court and not execution by means of appointment of a Receiver. The appointment of a Receiver under S. 51 (*d*), C. P. Code, is not equitable attachment and is, therefore, not barred by S. 17 of the Act. There is no inconsistency between the provisions of the Act and S. 51 (*d*), C. P. Code, and therefore S. 51, C. P. Code, does not stand repealed *pro tanto* by virtue of S. 4 of the Act. The jurisdiction of the Court to appoint a receiver of evacuee property is also not barred by S. 46 (*d*) of the Act. A.I.R. 1919 Pat. 700, Diss. from. A.I.R. 1925 P.C. 176, 44 P.L.R. 74 and 40 P.L.R. 303, referred to. *(Kapur and Soni, JJ.)* Simla Banking and Industrial Co., Ltd. *v.* Abdul Gafoor. 5 D.L.R. (Simla) 266= A.I.R. 1950 E.P. 312=52 P.L.R. 257.

ADMINISTRATION OF EVACUEE PROPERTY ORDINANCE (XXVII OF 1949), S. 12—*Ejectment of occupier of evacuee property—Power of custodian—Delhi Ajmer-Merwara Rent Control Act, S. 9.*

Under S. 12 of Ordinance XXVII of 1949, the custodian can cancel an allotment of evacuee property made by him and put somebody else in possession. Under the rules framed by the Government of India certain restrictions, however, have been placed on the powers of the custodian. An occupier of evacuee property can be ejected only if the conditions under which a tenant under ordinary law may be ejected are fulfilled. S. 9 (1) (*f*) of the Delhi Ajmer-Merwara Rent Control Act provides that a tenant can be ejected if he has been allotted a suitable residence. A custodian of evacuee property cannot, therefore, eject an occupier of such property unless other suitable residence has been allotted to him. Mere offer of accommodation is not enough. If the custodian does not comply with the requirements of law, a writ of prohibition may be issued against him under Art. 226 of the Constitution. (*Weston, C.J. and Khosla, J.*) Karam Singh Sobti *v.* Custodian of Evacuee Property. 5 D.L.R. (Simla) 309=52 P.L.R. 309.

——**S. 43**—*Civil Court—If includes Courts under Companies Act.*

S. 43 of the Administration of Evacuee Property Ordinance takes away the power of the Civil Court which includes Courts within the meaning of the Companies Act. (*Khosla and Kapoor, JJ.*) Liquidator, Janda Rubber Works, Ltd. *v.* Collector of Bombay. 5 D.L.R. (Simla) 131=1950 Com.C. 141=52 P.L.R. 185 =A.I.R. 1950 E. P. 204.

——**S. 43**—*Claim to evacuee property—Adjudication of—Power of High Court—Bombay Evacuee (Administration of Property) Act, 1949.*

The Bombay Evacuee (Administration of Property) Act, replaced as it is by the Administration of Evacuee Property Ordinance passed by the Central Government, expressly takes away the power of the Civil Courts which would include the High Court to adjudicate upon any claim laid or made by a person objecting to any action taken under the Bombay Act or the Ordinance, and the only remedy open is to resort to the special machinery provided in the Bombay Act or the Ordinance. (*Khosla and Kapoor, JJ.*) Liquidator, Janda Rubber Works, Ltd. *v.* Collector of Bombay. 5 D.L.R. (Simla) 131=1950 Com.C. 141=52 P.L.R. 185=A.I.R. 1950 E.P. 204.

ADMINISTRATION OF JUSTICE AND POLICE IN GARO HILLS DISTRICT RULES, R. 31—*Applicability—Admission of party forming basis of decision.*

Rule 31 of the rules framed for the Administration of Justice and Police in Garo Hills District, which requires the Deputy Commissioner to persuade the parties to agree to the arbitration of a Panchayat, does not apply where the admission of a party forms the basis of the decision of the Deputy Commissioner. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Sonaram Nokma *v.* Joran Nokma. A.I.R. 1950 Assam 88.

——**R. 31**—*Non-observance of provisions—If affects jurisdiction of Deputy Commissioner.*

The non-observance of R. 31 of the rules framed for the Administration of Justice and Police in the Garo Hills District, goes to the root of the jurisdiction of the Deputy Commissioner in the trial of a petition brought by indigenous inhabitants of the District. An order passed by the Deputy Commissioner after hearing the evidence adduced by both parties and without attempting to induce them to submit their case to a panchayat, is, therefore, liable to be set aside. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Monje Mechik *v.* Mechok Mechik. A.I.R. 1950 Assam 85.

——**R. 35**—*Revisional jurisdiction of High Court.*

The revisional jurisdiction under R. 35 of the rules framed for the Administration of Justice and Police in Garo Hills District, now rests in the High Court. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Sonaram Nokma *v.* Joran Nokma. A.I.R. 1950 Assam 88.

ADMINISTRATION OF JUSTICE AND POLICE IN THE NAGA HILLS DISTRICT RULES, R. 22—*Transfer of criminal case from Naga Hills District to another District in Assam—Power of Assam High Court—Cr. P. Code, S. 526.*

R. 22 of the Rules framed for the Administration of Justice and Police in the Naga Hills, does not empower the Assam High Court to transfer a case under S. 526, Cr. P. Code, from the Naga Hills District to any other District in the Province of Assam. A.I.R. 1949 Assam 69, foll. (*Thadani, C.J. and Ram Labhaya, J.*) Ram Saran Kashyap *v.* The King. 51 Cr.L. J. 957=A.I.R. 1950 Assam 100.

ADMISSIONS. *See* (*i*) C. P. Code, O. 12, R. 6; (*ii*) Evidence Act, Ss. 18, 30 and 115.

ADULTERY—Damages—Right of husband against adulterer. *See* Tort—Adultery. 225 I.C. 235.

ADVANCEMENT. *See* (*i*) Benami; (*ii*) Husband and wife—Doctrine of advancement.

ADVERSE POSSESSION. *See also* Limitation Act Ss. 28, 142 and 144.

Acquisition of title.
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———*Acquisition of title—Animus—Necessity.*

There can be no adverse possession without an *animus* or intention. The question of *animus* is a question of personal equation and all depends upon the will of the person in possession. It has no relation to any one else. (*Sinha, J.*) BUDHRAM RAI *v.* BENARSI RAI. 1947 A.W.R. (H.C.) 261=A.I.R. 1948 A. 31=1947 A.L.J. 228.

———Acquisition of title—Archakas in possession of temple lands—If can acquire. *See* RELIGIOUS ENDOWMENT. (1947) 1 M.L.J. 287.

———*Acquisition of title—Conditions necessary for.*

In order to give title by adverse possession such possession must be *nec vi, nec clam, nec precario.* But where the suit is brought and the adverse title is contested, the possession is no longer peaceful. Limitation refers to the bringing of the suit, not to the obtaining of the decree, and if 12 years is exceeded in the course of the litigation and before the decree is obtained, it does not follow that the claim to adverse possession on the part of the defendant had been perfected. (*Ghose, C.J. and Masud Hasan, J.*) DOST MOHD. *v.* MOHD. DIN. 5 J. & K.L.R. 222.

———Acquisition of title—Co-owners, co-sharers and co-tenants. *See* ADVERSE POSSESSION—CO-OWNERS, CO-SHARERS, CO-TENANTS.

———Acquisition of title—Endowed property—Possession of alienee—When adverse. *See* ADVERSE POSSESSION—ENDOWED PROPERTY.

———*Acquisition of title—Entry on land under invalid lease—Open assertion of permanent tenancy rights therein.*

A person who enters on land under an invalid lease is in the position of a trespasser, and if he holds it for a period of twelve years in open assertion of permanent tenancy rights therein, he acquires the right asserted by him and cannot be ejected. The fact that, during this time, he has been paying rents, is no bar to the acquisition of such rights. (1937 Pat. 374, relied on.) (*Reuben and Imam, JJ.*) KALA DEVI *v.* KHELU RAI. A.I.R. 1949 Pat. 124.

———*Acquisition of title—Essentials of—Publicity—What amounts to—Proof—Duty of person claiming adversely to true owner.*

The classical requirements of adverse possession are that the possession must be adequate in continuity, in publicity and in extent. It must be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. But mere exercise of possession exclusively and continuously would not be enough in all cases to show that the true owner, if vigilant, would be aware of what is happening. A claimant basing his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. If possession at its inception was permissive, it must be shown that it has become adverse by some subsequent change in character. (*Meredith and Ray, JJ.*) DIPNARAIN *v.* PUNDEO. 25 Pat. 412=1946 P.W.N. 37=229 I.C. 482 =1947 Pat. (Rul.) 239=13 B.R. 338=A.I.R. 1947 Pat. 99.

———*Acquisition of title—Essentials—Tribe of Arabs camping on land most convenient and accessible according to seasons and occupations followed at the time—Grazing, wood cutting, etc.—Absence of permanent settlement on any one parcel—Effect of—Sufficiency for prescriptive title.*

Where adverse possession ripening into ownership by prescription is set up on the ground of continuous acts of grazing, wood cutting and camping as well as of cultivation of part of the land in question, it must be shown that the acts alleged were exercised as of right for a period in excess of the statutory period.

Where it is found as a fact that it was the custom of a tribe of Arabs to pitch tents in the most convenient and accessible places according to the seasons and the occupations followed at the time, but that there had been no permanent settlement on any one parcel and that they had moved around within the general boundaries of the whole land, that they had taken here and there wild bushes and trees or the new growth round the stumps of trees felled before, using such wood for domestic and not for commercial purposes, and that the Arabs' herds and flocks grazed over the disputed lands and cultivated lands adjoining, after harvest; even if such facts were done without permission, it cannot be held that such acts constitute occupation adverse to the owners so as to be capable of ripening into a prescriptive title to the land in question. (*Lord Morton of Henryton.*) FATIMA AHMED *v.* GOVERNMENT OF PALESTINE. 4 D.L.R. (P.C.) 139.

———*Acquisition of title—Essentials to be proved.*

A person alleging that he has become owner of immovable property by adverse possession must establish that he was in possession of the property peaceably, openly and in assertion of a title hostile to the true owner. (*Weston and Shah, JJ.*) PANDURANG BHIMRAO *v.* MALKAPPA BHIMAGOUDA. 52 Bom.L.R. 146=A.I.R. 1950 Bom. 302= 5 D.L.R. (Bom.) 57.

———Acquisition of title—Guardian and Ward. *See* ADVERSE POSSESSION—GUARDIAN AND WARD.

ADVERSE POSSESSION.

———Acquisition of title—Hindu widow. *See* Adverse possession—Hindu widow.

———Acquisition of title—Independent trespassers. *See* Adverse Possession—Acquisition of title—Successive trespassers.

———*Acquisition of title—Possession by person entering on property during disability of owner—If adverse.*

It cannot be laid down as a general rule that there can be no adverse possession of property belonging to a minor or a lunatic during the continuance of the disability of the owner. The question in each case has to be decided with reference to the anterior relationship between the person taking possession of the minor or lunatic and to whether the person taking possession does so under circumstances which would in law make him only an agent, or bailiff or a guardian or manager. If he takes possession on his own account and asserts rights in denial of the owner under disability, his possession must be held to be adverse even during the disability of the owner. (*Abdul Ghani and Paramasiviah, JJ.*) Madappa *v.* Chennamma. 51 Mys.H.C.R. 140=24 Mys. L.J. 148.

———*Acquisition of title—Possession, if should be brought to knowledge of competitor—Building temporary huts on other's lands.*

It is not necessary that adverse possession should be shown to have been brought to the knowledge of the competitor and it is sufficient that the possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance to be aware of what is happening. (61 C. 262 (P.C.), referred to.)

It is not the law that title by adverse possession cannot be acquired by building temporary huts on other's lands. It all depends on each case and the test is the character and quality of user. (16 B. 338, Dist.) (*Mukharji, J.*) Umarani Sarkar *v.* Kamalabala Dassi. 53 C.W.N. 879.

———*Acquisition of title—Possession if to be brought to the knowledge of true owner.*

It is not necessary that adverse possession to be effective should be brought to the knowledge of the person against whom it is claimed. It is sufficient if the possession be overt, and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due diligence, to be aware of what is happening. 1934 P.C. 23; 1935 P.C. 36, ref. (*Sankarasubba Iyer and Krishna Pillai, JJ.*) Iyyappan Kunjunni *v.* Sankaran Kunju. 4 D.L.R. (Trav.) 111.

———*Acquisition of title—Possession obtained under mistake of law—Effect.*

Possession of property taken under a mistake of law as to the rights of the person entitled to it, does not make the possession any the less adverse to him when he is aware of what is being done and acquiesces in it. [28 B. 87, rel. on.] (*Thadani and Constantine, JJ.*) Aboobucker *v.* Sahibkatoon. I.L.R. (1947) Kar. 224=A.I. R. 1949 Sind 12.

ADVERSE POSSESSION.

———*Acquisition of title—Possession referrable to right consistent with right of ownership subsisting.*

As long as possession can be referred to a right consistent with the subsistence of an ownership in being, at the commencement of such possession, there can be no adverse title. (*Venkataramana Rao, C.J., Venkata Ranga Iyengar and Medappa, JJ.*) Gidde Gowda *v.* Gavare Gowda. 3 D.L.R. (Mys.) 1=54 Mys.H.C.R. 199.

———*Acquisition of title—Possession under order of Court—If can be limited strictly to the property of which he has been in actual possession—Proper test as to possession.*

The principle that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession has no application to a case where the person claiming title by adverse possession, is not a trespasser but one whose predecessor in title was put into possession by an order of Court, rightly or wrongly. In such a case the proper test to be applied is to consider whether the acts of possession which had been proved would legitimately show that the persons concerned had enjoyed dominion over the property in the manner in which such dominion is normally exercised. Proof of actual possession of every square inch of the land is not necessary. (*Sir John Beaumont.*) Hafiz Mohd. *v.* Swarupchand. 29 P.L.T. 23=52 C.W.N. 382=61 L.W. 443=A.I.R. 1948 P.C. 76=1948 A. L.J. 221=50 Bom.L.R. 632=(1948) 2 M.L.J. 70 (P.C.).

———Acquisition of title—Possession under wrong order of Court for over 12 years—Subsequent sale of property in insolvency—Right of purchaser to claim title by adverse possession of predecessor in interest. *See* Limitation Act, S. 28 and Arts. 142 and 144. 29 P.L.T. 23=(1948) 2 M.L.J. 70 (P.C.).

———*Acquisition of title—Shebait of idol—Acquisition by prescription of deity's property—Permissibility.*

The shebait of a deity who has accepted the shebaitship cannot acquire title to the deity's property by prescription. [64 I.A. 203, dist.] (*Mitter and Roxburgh, JJ.*) Anath Nath Banerjee *v.* Sri Iswari Kali Mata. 4 D.L. R. (Cal.) 189=A.I.R. 1949 Cal. 538.

———Acquisition of title—Submerged lands. *See* Adverse Possession—Interruption.

———*Acquisition of title—Successive trespassers—Possession of—If can be tacked on.*

There can be no doubt that if the possession of one trespasser can be regarded as a continuation of the trespass of the previous occupant through whom he claims then the adverse possession of the one can be tacked on to that of the other, and if the total period exceeds 12 years, then that possession ripens into full ownership under S. 28 and Art. 144, Limitation Act. But one trespasser must derive his liability to be sued from or through the other, in order that the adverse possession should enure for the benefit of the second trespasser. The mere fact that the latter claims through the former is not enough Where possession passes from first to the second trespasser, there is constructive restoration, even if a momentary restoration, of the true title to possession. (*Lokur, J.*) Pandappa Mahalingappa *v.* Shivalingappa. 224 I.C. 169=1946 Bom. (Rul.) 172=47 Bom.L.R. 962=A.I.R. 1946 Bom. 193.

———*Acquisition of title—Successive trespassers—Possession of—If continuous and can be tacked on.*

One trespasser cannot add to his period of trespass the period of occupation of another trespasser except when he claims through him or has derived title from him. (*Abdul Ghani and Paramasiviah, JJ.*) Munivenkatappa *v.* Muniswamappa. 52 Mys.H.C.R. 33.

———*Acquisition of title—Successive trespasser's possession if can be tacked—Continuity of possession under some privity of title—Necessity—Privity of title—Meaning to be given.*

The possession of independent trespassers cannot be tacked on for acquiring a title by adverse possession. The possession must be continuous and it must be connected as of right, or under some privity of title. The trespasser who claims adverse possession must not have gone into possession in defiance of the possession of the predecessor. The man who pleads adverse possession must claim under or through his predecessor or predecessors. It is only when these features exist or co-exist that the adverse possession of several people against the true owner could be tacked on. Where possession is traced to the possession of the previous trespasser and is not antagonistic, there is no reason why the necessary privity should not be postulated, which would enable the two periods of possession to be tacked. Privity of estate or contract is a somewhat flexible term and must be given a rather comprehensive meaning when justice has to be done. Where a ridge between two fields has been used and enjoyed by the owners on both sides of it for quite a long number of years, the right of a person who has purchased a plot on one side of it and has been using the ridge for over nine years cannot be interfered with and destroyed, because of the technical rule that independent trespassers should not be allowed to tack on possession. (*Chandrasekhara Aiyar, J.*) Ademma *v.* Penchalu Reddi. 1946 M.W.N. 140=59 L.W. 354=225 I.C. 323=A.I.R. 1946 Mad. 281=(1946) 1 M.L.J. 87.

———*Acquisition of title—Successive trespassers independent of each other—Possession of one—If can be tacked on to other.*

A trespasser cannot add to his own adverse possession that of another independent previous adverse possessor from whom he does not derive his liability to be sued and whom he does not represent by birth, transfer or devise. (*Lokur, J.*) Ningappa Awwappa *v.* Danappa Sharnappa. 48 Bom.L.R. 800=A.I.R. 1947 Bom. 206.

———*Acquisition of title—Successive trespassers—Possession of—Tacking—When allowed.*

Unless a trespasser holds the land in continuation of another trespasser from whom he derives his title, he is not entitled to tack the period of the preceding trespasser to that of his own. (*Lal, J.M. I and Haider, J.M. II.*) Lachmaniya *v.* Seetla Kumar Singh. 1948 R.D. 447.

———Acquisition of title—Successive trespassers—Rights of successor to tack on period of possession of predecessor. *See* Mysore Limitation Act, Art. 144. 53 Mys.H.C.R. 399.

———*Acquisition of title—Tacking of periods of lawful and unauthorised occupation—Permissibility.*

To constitute adverse possession for the statutory period, the period of lawful occupation cannot be tacked on to a period of unauthorised occupation. (*Sultan Ahmad, M.*) Bahoran Singh *v.* Mahi Dayal, (1948) A.W.R. (Rev.) 99=1948 R.D. 139.

———Acquisition of title—Waste lands. *See* Adverse possession—Waste lands.

———*Burden of proof*—Bari *land—Defendant in continuous possession and exercising acts of user—Effect—Duty of plaintiff to prove subsisting title*—Parti *land—Distinction.*

The general rule is of course that possession follows title, and a few isolated acts of user of a piece of *parti* land would not amount to adverse possession or to ouster of the person having title to the land. But in the case of *bari* land which has been in the actual physical possession of the defendant who has exercised continuous acts of possession, it is for the plaintiff (real owner) who seeks to eject the defendant to establish his or her subsisting title. It is not for the defendant to prove that he has perfected his title by adverse possession for more than 12 years. [11 P.L.T. 607; 20 P.L.T. 415, dist.; 16 Bom. 338; 1936 Lah. 615, ref.] (*Das, J.*) Mst. Noor Jehan *v* Philgaon Lakra. 4 D.L.R. (Pat.) 56.

———*Burden of proof—Husband and wife—Husband's possession over wife's property.*

One who pleads adverse possession has a strong burden to discharge and the strength of the burden depends on the circumstances of the case. It is very heavy in a case where a husband's possession over the property of his wife is pleaded to be adverse. Even ordinarily the burden of effective adverse possession cannot be discharged without a clear and convincing evidence that possession is hostile to the real owner and amounted to a denial of such owner's title. This is much more so when the husband or persons claiming through the husband rely upon the husband's possession to be adverse possession. (*Padhye, J.*) Bhagabai *v.* Ghanshamdas. I.L.R. (1948) Nag. 824=A.I.R. 1948 Nag. 328.

———*Burden of proof—Suit for possession—Admission of recent possession by defendant—Proof of title by plaintiff—Sufficiency of—Proof of possession within 12 years—Necessity—Onus.*

Merely because a plaintiff in a suit for possession has proved his title he is not entitled to possession from the defendant who pleads adverse possession. The plaintiff must further prove possession within 12 years of the date of the suit. When the defendant denies the plaintiff's ownership and sets up adverse possession, it is for the plaintiff, who admits recent possession by defendant, to prove affirmatively that he was in possession within 12 years. If he does not prove it, he fails. (*Sen, J.*) BAI GANGA *v.* BAHERAM SHAH DALAL. 49 Bom.L.R. 90=A.I.R. 1947 Bom. 300.

——*Co-owner—Essentials—Purchaser of moiety of interest—Possession by—If and when adverse.*

A co-owner or a co-tenant cannot be considered to acquire adverse possession of the other owners' shares. A person acquiring only a moiety and not the whole of the interest cannot acquire title by adverse possession to the entire property. If at all, his possession is limited to the portion acquired by him. Mere physical possession is not enough to constitute adverse possession; it should be accompanied also by an intention on the part of the possessor to hold exclusively. [1943 Bom. 12; 1942 Cal. 233; 1935 Lah. 651; 53 Mys. H.C.R. 438; 11 Mys.L.J. 138, ref.] (*Balakrishnaiya and Puttaraj Urs, JJ.*) SIDDIAH *v.* RANGA DAS. 4 D.L.R. (Mys.) 140.

——*Co-owners—Ouster—Need for proof—Exclusive possession—If sufficient.*

In the case of co-owners, nothing short of ouster or something equivalent to ouster can result in adverse possession, and in the absence of an open assertion of a hostile title by one, to the knowledge of others, there can be no ouster. The mere fact that the asserter proves non-participation in the profits by the others and exclusive possession by him, would not establish adverse possession. 12 L. 101, rel. on. (*Harnam Singh and Kapur, JJ.*) PREM SINGH *v.* TEJ SINGH. 52 P.L.R. 224=A.I.R. 1950 E.P. 252.

——*Co-owners—Rule—Transferee from co-sharer—Position of.*

In order to establish adverse possession as between co-owners, there must be evidence of an open assertion of a hostile title by one of them to the knowledge of the others. Mere non-participation in the profits by one party and exclusive occupation by the other cannot be considered conclusive. There must be a disclaimer of the title of the co-sharer who is sought to be excluded by open assertion of a hostile title by the co-sharer who claims adversely. A co-owner's transferee or heir is in the same position as the co-owner concerned. (*Meredith and Ray, JJ.*) DIPNARAIN *v.* PUNDEO. 25 Pat. 412=1946 P.W.N. 37=22 I.C. 482=1947 Pat. (Rul.) 239=13 B.R. 338=A.I.R. 1947 Pat. 99.

——*Co-sharers—Exclusive possession of joint property by one—Ouster—Proof of—Necessity.*

Exclusive possession by one co-sharer of joint property would not become adverse to the other sharers in the absence of clear evidence of ouster or of an overt act of which all the sharers have notice that the co-sharer in possession intended to hold the property against the others. (*Sankaran and Govinda Pillai, JJ.*) VARGHESE CHACKO *v.* SIVASANKARA PILLAI. 5 D.L.R. (T.C.) 64.

——*Co-sharers—Joint property—Acquisition of rights in by presumption.*

There can be adverse possession of a share in a joint property though that share has not been divided by metes and bounds. Where possession of a share by a transferee from a co-sharer of that share has been incompatible with the exclusive ownership claimed by the other co-sharers, it amounts to ouster of the co-sharers concerned from the share in question. (*Meredith and Beevor, JJ.*) PUNIT MAHTON *v.* KISHUNDEYAL MAHTON. 25 Pat. 821=228 I.C. 217=1947 Pat. (Rul.) 97=13 B.R. 160=A.I.R. 1947 Pat. 380.

——*Co-sharers—Person entering into possession adversely subsequently becoming a co-sharer—Adverse possession if interrupted.*

When a person has been in possession of property asserting title hostile to the owner and continues to be so, the fact that, after a time, he becomes entitled to a share in the property as a co-sharer, does not interrupt his original adverse possession when in fact he continues to assert his hostile title. (*Thadani and Constantine, JJ.*) ABOOBUCKER *v.* SAHIB KHATOON. I.L.R. (1947) Kar. 224=A.I.R. 1949 Sind 12.

——*Co-tenants—Possession by one—Effect of—Purchaser of interest of one member of Hindu joint family—Transferee from—Position of—Possession of other coparceners—If adverse to transferee.*

Amongst tenants-in-common the possession of one is presumed to be for the benefit of all and in order to make such possession adverse there must be an open assertion of hostile title on the part of the co-tenant setting up adverse possession and overt acts of dispossession amounting to an ouster of the other co-tenants. A person who takes a transfer from a co-tenant steps into the shoes of his transferor. Limitation for a suit by a purchaser from one of the co-tenants for possession will therefore start from the date his title is denied to his knowledge and there is ouster or exclusion in law.

Where an alienee or an auction-purchaser of the interest of one of the coparceners in a Hindu joint family property is not put in possession of his share, the legal position of the alienee is that of a tenant-in-common with the non-alienating coparceners and the possession of the latter must be regarded in law as the possession of the alienee or purchaser, until there is ouster or exclusion in law of the alienee or purchaser. Mere non-participation in the profits by a co-tenant or co-sharer would not amount to such ouster. [11 Bom.H.C.R. 72; 13 Bom.H.C.R. 138; 13 All. 309; 28 All. 627; 5 Cal. 644; 8 Cal. 871; 18 Cal. 10; 6 Luck. 170; 21 Mad. 153; 27 M.L.J. 600; 42 M.L.J. 364; 52 M.L.J. 203; 44 Mad. 883, ref.] (*Venkataranga Iyengar and Medapa, JJ.*) VEERAPPA *v.* ANANTHARAMAN. 53 Mys.H.C.R. 438.

——*Co-sharers—Possession of one—If exclusive or adverse—Decree in suit between co-sharers declaring rights of all parties within statutory period—Co-sharers submitting to decree—Plea of hostile title—If open.*

There can be no adverse possession as between co-sharers, whatever be the nature of the possession of the several co-sharers, when the rights of the several parties have been recognised in a decree of a competent Court passed in a suit to which all the co-sharers are parties, within two years of suit, and when all the co-sharers have submitted to such decree. A plea of adverse possession in such a case is untenable.

(*Krishna Pillai, C.J., Govinda Pillai and Simon, JJ.*) Isabi *v.* Abdulla. A.I.R. 1950 T.C. 60 (F.B.).

———*Co-sharers—Sole possession by one—When adverse to others—Ouster—Principle—Co-sharer coming in as representing all—Possession by—Nature of.*

It is well-established that uninterrupted sole possession by co-owner of undivided property does not by itself amount to ouster of the co-owners and is not sufficient to establish his adverse possession against them, unless it was exclusive. In the absence of any intention on his part to hold adversely and exclusively, of which the others have notice, his possession will be treated as being on behalf of all, his possession being referred to his lawful title as co-owner. This principle applies even more strongly in a case where it is found that the co-owner in possession came in as representing all the co-sharers and nothing has occurred to change that position. 17 I.A. 110; 28 C.L.J. 437 (P.C.); 29 C.W.N. 34 (P.C.), ref. (*Reuben and Jamuar, JJ.*) Suraj Prasad *v.* Ram Charitar Singh. A.I.R. 1950 Pat. 298.

———Endowed property—Archakas in long possession—If get adverse possession. *See* Religious Endowments. (1947) 1 M.L.J. 287.

———*Endowed property—Possession by alienee—When adverse—Lease and sale—Involuntary transfer—Principle applicable—Alienation void* ab initio *or voidable—Distinction.*

An alienation of endowed property by the manager, or shebait, by way of sale is valid during his term of office; hence possession by the alienee does not become adverse until the alienating *mahant* or *shebait* ceases to be such by death, retirement or otherwise. So also in the case of a permanent lease, there is no adverse possession until the determination of the office of the alienating *mahant.* The possession of the alienee is adverse from the moment that he is without title to the property. If the alienation is void *ab initio,* possession is adverse from the date of the transfer. But if it is not void *ab initio* but is only voidable at the instance of the snucceeding *mahant* or *shebait,* it does not become adverse until the termination of the office of the alienating *mahant* or *shebait.* If the alienor acts in negation of the rights of the trust or deity, the transaction is void *ab initio.* The same principle would apply to involuntary alienation. (*Mukherjea and Sharpe, JJ.*) Hemanta Kumari Bose *v.* Iswar Sridhar Jin. I.L.R. (1946) 2 Cal. 38=224 I.C. 398=50 C.W.N. 629=1946 Cal. (Rul.) 251=A.I.R. 1946 Cal. 473=82 C.L.J. 238.

———*Essentials—Suit for declaration of title on basis of prescription—Allegation by defendant of acts of possession during currency of plaintiff's title.*

Where in a suit by the plaintiff for a declaration of his title to certain lands on the allegation that he had perfected a title by prescription, the defendant alleges that his predecessors-in-title were exercising acts of possession during the currency of the title of the plaintiff, the quality of these acts may be sufficient to destroy that legal adequacy and exclusiveness of possession and continuity and may amount to interruption of possession claimed by the plaintiff. 44 M. 883 (P.C.), referred to. (*Bannerji, J.C.*) Narain *v.* Balabh Das. A.I.R. 1950 H.P. 6.

———*Extent of—If limited to area actually held by trespasser or extends to other areas also—Entry under defective grant by owner—Adverse possession—If extends to whole property—Intention.*

Where a person without any colour of right wrongfully takes possession as a trespasser of the property of another, any title which he may acquire by adverse possession will be strictly limited to what he had actually so possessed; and in the case of a mine there is no presumption in law that the possession of a part of seam is possession of the whole seam, much less of all seams in the mineral field in which part of a seam has been worked. Possession, however, is a question of fact and the extent of the possession may be an inference of fact. In a proper case even a trespasser is entitled to an inference of constructive possession; where the property in suit can be regarded as forming one unit along with other property of which the trespasser is in actual or indirect or immediate possession. In the case of a trespasser coming upon property without any claim or right, there can be no presumption that he intends to hold anything more than what he actually holds; there is the constructive possession of the owner in respect of the part not held by the trespasser directly or actually, which requires to be displaced by something positive done by the trespasser. Where the entry of the trespasser is under a defective grant, it must be taken that the trespasser intends to take possession of the whole of the property, and not merely of the part of which he has been in actual possession or direct possession. Where there is the necessary *animus possidendi,* the adverse possession will extend to the limit of possession. This possession may be confined to the area actually held, or may be increased by the manner of possession showing that a larger area is intended to be appropriated or possessed than is in actual immediate possession. Such extension will also arise by the consent of the owner when in pursuance of a defective grant, he lets another into possession of the property. 51 I.A. 83; 1931 P.C. 186; A.I.R. 1942 Cal. 1; 3 Pat. 85; 3 Pat. 915; 18 Pat. 215; 1 P.L.T. 94; 29 P.L.T. 23, ref. (*Reuben and Narayan, JJ.*) Sailajananda Pandey *v.* Lakhichand Sao. 30 P.L.T. 388.

———*Guardian and Ward—Father entering into possession of minor daughter's property as guardian—Right to set up adverse title—Marriage of daughter subsequently—If alters character of possession.*

A father who enters into possession of property as guardian of his minor daughter to whom the property belongs, must be deemed to hold it as trustee on her behalf, and it would not be open to him to set up hostile title or adverse possession either in himself or in another. He is not entitled to do anything which would be adverse to his *cesti que trust*. Even after the daughter has attained majority the possession will remain non-adverse. The marriage of the daughter would not make any difference and would not effect any change in the character of the possession held by the father. (*Venkataramana Rao, C.J. and Venkata Ramaiya, J.*) Gangabai v. Bale Yediyur. 3 D.L.R. (Mys.) 82=54 Mys.H.C.R. 308.

———*Hindu widow—Nature of possession—Presumption—Estate prescribed—Absolute or limited—Widow of predeceased son of last male owner.*

Where on the death of a member of an undivided Hindu family, his widow assumes possession of the family property or a portion thereof, there is no presumption that she has been allowed this for her mere consolation or in lieu of maintenance; unless the surviving member proves an arrangement making her possession permissive, it would be deemed to be adverse.

Where on the death of an absolute Hindu proprietor, his widow, on assuming possession of his property, renounces her character as a limited owner by asserting an absolute title and remains in possession of the property for over 12 years, she prescribes a full estate for herself to the exclusion of her husband's heirs. But where she, making no such renunciation or assertion, acquires adverse possession over a certain property and retains it for the full statutory period, she prescribes only a limited estate in respect of that property which, on her death, would revert to her husband's heirs.

The question of the widow's possession as limited owner can arise only if she claims through the last male owner, that is to say, if she is his heir and not otherwise. *A fortiori*, if she is not the heir of the last male owner and is the widow of his predeceased son, her possession is adverse to the heirs of the last male owner, and after the lapse of 12 years the property becomes her stridhan, descendible on her own heirs. (*Mushtaq Ahmad, J.*) Ulfat Rai *v.* Kamla Devi. A.I.R. 1949 All. 458.

———*Hindu widow — Possession against—If adverse to reversioners—Decree against widow—Effect on reversioners.*

It is well settled that possession cannot be adverse against a person who has no present right to possess. Hence possession adverse to a Hindu widow cannot affect the reversioner to the estate of her husband, because his right to possession accrues only after her death or surrender. A decree against a female (or limited) holder of the estate which would be binding on the succeeding reversioner is one which involves the decision of a question of title and not a mere question of possession. Hence the reversionary heir in matters of limitation is entitled to rely upon Art. 141 of the Limitation Act and claim that his title is not barred by lapse of time against the widow of the last male holder. (*Misra and Madeley, JJ.*) Lalit Mohan Tandon *v.* Lachmi Raj Kuar. 224 I.C. 537=1946 A.W.R. (C.C.) 120=1946 O.W.N. 195=1946 Oudh (Rul.) 193=1946 A.L.W. (C.C.) 144=(1946) O.A. (C.C.) 120=A.I.R. 1946 Oudh 213.

———*Hindu widow—Possession by her—If can be adverse to reversioner.*

The possession of a Hindu widow which can be referable to her title as heiress of her husband, cannot be adverse to the reversioner who has no right to possession of the estate during her lifetime. Being entitled to a woman's limited estate, the widow cannot acquire an absolute title. I.L.R. (1946) Nag. 159, referred to. (*Mangalmurti and Kaushalendra Rao, JJ.*) Sheoshankardayal *v.* Kamalabati. I.L.R. (1950) Nag. 589.

———Hindu widow—Possession—If can be adverse to reversioners—Benefit of acquisition by adverse possession against strangers—If enures for benefit of reversioners as accretion to estate. *See* Hindu Law—Widow. I.L.R. (1949) Bom. 843.

———*Hindu widow—Possession of—If possession as limited owner or as absolute owner—Tests—Burden of proof.*

Where the possession of a Hindu woman is adverse it has to be decided what her *animus possidendi* was; that, whether she asserted an absolute title in herself or whether she claimed to hold the property as the heiress of any person. The latter would be the ordinary presumption and he who claims for her anything more than a widow's limited estate must prove since when she began to assert absolute title in herself. The test is always to be found in the origin of the widow's possession. When she enters on land under a title as heir, which is necessarily a limited title under the Hindu law, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. (*Lokur, J.*) Pandappa Mahalingappa *v.* Shivalingappa. 224 I.C. 169=1946 Bom. (Rul.) 172=47 Bom.L.R. 962=A.I.R. 1946 Bom. 193.

———*Hindu widow—Whether can prescribe for an absolute estate.*

A woman governed by Hindu Law can, although she has no right of succession to it, prescribe either for a limited or an absolute estate. But where she enters on an estate as a qualified heir, she cannot subsequently prescribe by adverse possession an absolute title to it as against the last owner's reversionary heirs. (*Grille, C.J. and Hemeon, J.*) Raja Chattar Singh *v.* Diwan Roshan Singh. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

———*Interruption—Declaration in decree—Effect of—Compromise decree—Admission by defendant of title of plaintiff and undertaking to hold by permission—Effect of.*

A mere declaration in a decree that the plaintiff in the suit has title to a land of which the defendant has been in actual adverse possession on the date of the suit and who continues in possession in spite of the declaration in the decree against him does not interrupt the adverse possession. But where the defendant by a compromise decree himself admits the plaintiff's title to the land in dispute, and undertakes to give up possession, treating himself as a person holding permissive possession it must be held that the prior adverse possession is terminated, and the possession of the defendant after the decree is *prima facie* only permissive possession. A.I.R. 1923 P.C. 175, dist. (*Das and Panigrahi, JJ.*) Atti Bibi *v.* Krishna Sahu. 16 Cut.L.T. 147 =A.I.R. 1950 Orissa 250.

———*Interruption—Decree for possession followed by unsuccessful execution—Effect of—Character of possession, if altered.*

There is no warrant for holding that a decree for possession even when followed by an unsuccessful execution can be deemed as a matter of law to have the effect of either interrupting adverse possession or altering its character. It is purely a question of fact to be decided in the circumstances of each case. If the decree does not in fact result in the defendant giving up possession of the property or having possession of the property taken from him, it cannot be said that it has interrupted possession; nor can it in law affect the nature of the possession unless it does so in fact. (*Macklin and Gajendragadkar, JJ.*) Dagadabai Fakirmahomed *v.* Sakharam Gavaji. 49 Bom.L.R. 767=A.I.R. 1948 Bom. 149.

———*Interruption—Decree, if interrupts adverse possession.*

A recognised principle is that in order to give title by adverse possession such possession must be *nec vi nec clam nec precario*. But where the suit is brought and the adverse title is contested, the possession is no longer peaceful. Limitation refers to the bringing of the suit, not to the obtaining of the decree, and if 12 years is exceeded in the course of the litigation and before the decree is obtained, it does not follow that the claim to adverse possession on the part of the defendant had been perfected. (*Ghose, C.J. and Masud Hasan, J.*) Dost Mahomed *v.* Mahomed Din. 5 J. & K.L.R. 222.

———Interruption—Independent trespasser's possession—If can be tacked on. *See* Adverse Possession—Acquisition of title—Independent trespassers possession.

———*Interruption—Person in adverse possession becoming co-sharer—Effect of.*

The fact that a person in adverse possession becomes a co-sharer, is not sufficient to interrupt his original adverse possession, if in fact he continues to assert his hostile title. [43 M. 244 (P.C.) applied.] (*Thadani and Constantine, JJ.*) Aboobucker *v.* Sahibkhatoon. A.I.R. 1949 Sind 12=I.L.R. (1947) Kar. 224.

———*Interruption —Submerged land—Submergence—Effect.*

On submergence of land liable to inundation, there is a break in adverse possession, whenever a plea of adverse possession is set up. The break continues for the period of submergence, until the land emerges from submergence. (*Nagarkar, J. C.*) Zora *v.* Jawahar Nath. 3 D.L.R. (Aj.-Mer.) 39.

———*Interruption—Submerged land — Submergence during rainy season—If destroys continuity of possession.*

It is true that as soon as the land becomes derelict by reason of submergence the possession of the trespasser ceases, and the rightful owner is deemed to be in possession during the period of time when the land remains derelict. It is also true that the length of the period of submergence is not material and that it may be long result of rainfall only, a piece of low-lying land derelict the submergence must be the result of *vis major*. The word *vis major* imports something abnormal and with reference to the context means that the property by the act of God had been rendered useless for the time being, that is to say, it was rendered incapable of any enjoyment. Rainfall in Bengal at certain parts of the year is a normal occurrence, and if as a result of rainfall only, a piece of low-lying land is simply covered with water it cannot be said that the submergence so occasioned is the result of *vis major* and so land is to be regarded as derelict during the time it remains under water. It may be that during the period of submergence the trespasser could have exercised acts of possession and could have derived some benefit, for example, by taking the wild grass that grew on the submerged soil. But the fact that he had not chosen to exercise acts of possession during that period, could not be deemed to have caused a break in his possession. (*R. C. Mitter and Amiruddin Ahmed, JJ.*) Apcharaddin Abdul Gani *v.* Gurudayal Kapali. I.L.R. (1948) 2 Cal. 101=A.I.R. 1949 Cal. 335=83 C.L.J. 108.

———*Interruption—Symbolical possession given where actual possession possible.*

The delivery of symbolical possession, whether, through mistaken application by the plaintiff or otherwise, in circumstances in which actual possession should have been asked for or could have been delivered, and minor irregularities not materially affecting the degree of publicity attending the delivery proceedings, do not prejudice the effect of the proceedings in relation to the parties to the suit and if one of these parties is the party in possession, such proceedings will have the effect of determining such possession, and giving rise to a fresh cause of action in favour of the party placed in possession as a result of the proceedings, should he be dispossessed again. 7 C. 418 and I.L.R. (1941) Lah. 328, foll. (*Cornelius and Kayani, JJ.*) Miru *v.* Nur Mahomed. Pak.L.R. 1949 Lah. 737=A.I.R. 1949 Lah. 252.

———*Interruption—Trespass—Death of owner followed by minority of his successor—If stops running of time.*

The appellant's grandfather resumed possession of certain lands and was in possession of the same until his death in 1913. Thereafter the estate was under the Court of Wards as the appellant's father was a minor. He attained majority on 6th April, 1919, on which date the estate was ordered to be released by the Court of Wards. He, however, died a few days later, and as the appellant was a minor, the Court of Wards remained in possession until 10th August, 1937, when the appellant became a major. During the appellant's minority the Court of Wards, in 1926, sued the respondents for possession of the lands on which they had trespassed in 1913, but the suit was dismissed. The Court of Wards did not prefer an appeal, though they were advised to appeal. The appellant brought a suit in 1940 in respect of the same subject-matter and for the same relief alleging that the Court of Wards were guilty of gross negligence in not having appealed against the decision in the suit.

Held: (1) that time having begun to run against the appellant's father when he attained majority in April, 1919, his death followed by the minority of the appellant himself did not operate to interrupt the running of time, and the appellant's right to sue was clearly barred after the lapse of 12 years from April, 1919;

(2) that the proper remedy of the appellant was to have applied immediately after attaining majority on 10th August, 1937, for extension of time to file an appeal against the decree which was not appealed from by the Court of Wards.

Quaere: Whether having regard to the alleged gross negligence of the Court of Wards in not having appealed against the dismissal of the suit for possession, the decision in the suit would operate as *res judicata* between the parties. (*Manohar Lall and Bennett, JJ.*) Kamakhya N. Singh *v.* Fateh Narain. 26 Pat. 220=A.I.R. 1948 Pat. 300.

——*Landlord and tenant—Possession against lessee—If adverse to lessor—Lessor in receipt of rent—If dispossessed.*

Adverse possession against the lessee in possession as such, as distinguished from the lessor, cannot be held to be adverse to the true owner (lessor). So long as the lessor is in receipt of the rent and so long as such rent is not intercepted by the trespasser, he cannot be said to have been dispossessed. (*Sinha and Bennett, JJ.*) Ramlakhan *v.* Digbijaynarain. 26 Pat. 278=A.I.R. 1948 Pat. 274.

——*Landlord and Tenant—Surrender by tenant—Possession adverse to tenant prior to surrender—If also adverse to landlord—B. T. Act, S. 86.*

The general proposition of law that adverse possession against the tenant is not adverse against the landlord during the continuance of the lease applies to a case where the tenancy is surrendered by the lessee, (*e.g.*) surrender of a *raiyati* holding under S. 86 of the B. T. Act. In the absence of a statutory provision to the contrary, a surrender of a lease operates as a determination or extinction of the tenancy and not a mere transfer of the outstanding term of the tenure, and possession which was adverse to the tenant prior to the surrender is not adverse to the landlord till the date of surrender. (*Mukherjea and Sharpe, JJ.*) Rahim Bux Pramanik *v.* Osman Gani. I.L.R. (1946) 2 Cal. 344=51 C.W.N. 306=A.I.R. 1948 Cal. 71.

——Landlord and tenant—Tenant acquiring interest by encroachment—Encroached land—Rights of tenant and landlord. *See* Limitation Act, Arts. 142 and 144. A.I.R. 1950 Pat. 484.

——*Landlord and tenant—Tenant acquiring title by adverse possession against third person—If acquires for himself.*

If a tenant during his tenancy encroaches the land of a third person and holds it with his tenure, such tenant is considered to have made the encroachment not for his own benefit but for that of his landlord and if the tenant has acquired the title against the third person by adverse possession, such tenant has acquired for his landlord and not for himself. This principle is known as the doctrine of "tenant stealing for the landlord". [10 C. 820 and 63 C. 497, referred to.] (*Mukharji, J.*) Umarani Sarkar *v.* Kamalabala Dassi. 53 C.W.N. 879.

——*Landlord and tenant—Tenant in chief and sub-tenant—Continuous record in revenue papers as such—Sub-tenant's possession, when can become adverse to that of the tenant in chief.*

Where there has been a continuous entry in the village records for a number of years of the plaintiff and the defendant as tenant in chief and sub-tenant respectively, the latter's possession can be deemed to have become adverse only when it is shown that he had changed his allegiance and declared himself to be no longer the sub-tenant of the plaintiff but was holding from the zamindar. (*Nethersole, S. M. and Pedley, J.M.*) Balkaran Kurmi *v.* Timal. 1947 A.W.R. (Rev.) 56.

——Landlord and tenant—Tenant not paying rent for over 12 years—Effect—If affects landlord's right to recover possession. *See* Landlord and Tenant. (1948) 1 M.L.J. 96 (F.B.).

——Landlord and tenant—Transferee of non-transferable holding not ejected for 12 years—Effect—Acquisition of status of tenant—Landlord's right to proceed against original tenant for rent if lost. *See* Landlord and Tenant—Non-transferable holding. 224 I.C. 560.

——*Landlord and tenant—Zamindari—Possession of tenant against Zamindar—Rights acquired by tenant.*

There is a clear and well-defined distinction between a plea of adverse possession, in normal circumstances and such a plea by a tenant against the Zamindar—while in the former case the person setting up the plea, acquires, after the lapse of twelve years, the entire bundle of rights, in the latter case the tenant acquires only a restricted right—immunity from dispossession for himself and immunity from demolition for any construction which he may have put up, without detriment to the proprietary right of the Zamindar. (*Sinha, J.*) Umrao Singh *v.* Partap Singh. 1947 A.L.J. 667=1947 A.W.R. (H.C.) 431.

——*Landlord and tenant—Zamindari inalienable and impartible—Lessee from Zamindar—If can acquire permanent tenancy right by prescription.*

If a Zamindari property is impartible and inalienable and if succession thereto is restricted in a particular manner, the Zamindari is only in the nature of a life estate and any transfer or alienation made by the Zamindar will not and cannot enure beyond his lifetime and be binding upon his successor. No lessee of Zamindari property can, therefore, acquire permanent tenancy rights by prescription against the Zamindar from whom he holds the property. [47 Bom. 798 (P.C.) and 47 M. 337 (P.C.), applied; 6 N.L.R. 72; 44 M. 831 (P.C.); 55 B. 21; 12 P. 251 (P.C.) and 59 M. 809 (P.C.), referred to.] (*Shevde, J.*) Karimullah Khan *v.* Thakur Bhanu Pratap

SINGH. I.L.R. (1948) Nag. 978=A.I.R. 1949 Nag. 265=4 D.L.R. (Nag.) 87.

———*Law in Kutch.*

In Kutch there was no law of limitation to title by acts of adverse possession. (*Trivedi, J.C.*) BHURA DHANA v. KALA. A.I.R. 1950 Kut. 69.

———*Licensor and licensee—Assertion of hostile title to the knowledge of licensor—Necessity for.*

Unless the party prescribed against has reason to know that a hostile title was being asserted, adverse possession cannot begin. This fact need not be brought to the notice of the party, but from the evidence it should appear that the party prescribed against could by the exercise of due diligence have known about it. Particularly in a case where the initial possession begins in a license, it must be shown that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence. A.I.R. 1924 P.C. 150, rel. on; 27 B. 43; 45 B. 1020; A.I.R. 1935 P.C. 53 and 25 P. 412, referred to. (*Hidayatullah, J.*) MOHAMMAD DAWOODKHAN v. **BANUBI.** I.L.R. (1949) Nag. 862=A.I.R. 1950 Nag. 127=1950 N.L.J. 163.

———*Minor—Adverse possession against—Acquisition of title.*

It cannot be stated as a general proposition that there can be no adverse possession of property which belongs to a minor during the continuance of the minority of the owner, and the question in each case has to be decided with reference to the anterior relationship between the person taking possession and the minor and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent, bailee or trustee of the minor. (*Pollock and Shevde, JJ.*) MALTIBAI v. WAMANRAO. I.L.R. (1948) Nag. 874=A.I.R. 1948 Nag. 253.

———Minor—Death of owner of property on which there is a trespasser—Minority of successor—If interrupts adverse possession. *See* ADVERSE POSSESSION—INTERRUPTION—TRESPASS. 26 Pat. 220.

———*Minor—Possession against—If becomes adverse only after he becomes major—Rule.*

The notion that limitation will commence to run against a minor only after he attains majority is correct. The true rule is that the limitation will start against the minor from the same point as against an adult, but the minor would be entitled to a period of three years from the date of his attaining majority within which he can file the suit. [1945 Bom. 63, ref.] (*Sankarasubba Iyer and Krishna Pillai, JJ.*) AYYAPPAN KUNJUNNI v. SANKARAN KUNJU. 4 D.L.R. (Trav.) 111.

———*Mortgaged property—Equity of redemption—Acquisition by prescription—Rule as to.*

The equity of redemption may be destroyed by adverse possession, like any other rights. It is, however, necessary for the person setting up title by adverse possession to prove that possession was acquired and retained with an assertion of hostile title to the knowledge of the mortgagor. [27 Bom. 43; 38 Mad. 903; 8 T.L.J. 336, foll. 35 All. 227; 1947 Bom. 471, rel. on.] (*Sankarasubba Iyer and Krishna Pillai, JJ.*) AYYAPPAN KUNJUNNI v. SANKARAN KUNJU. 4 D.L.R. (Trav.) 111.

———*Mortgagee in possession—Adverse possession against—If adverse to mortgagor—Notice of hostile title to mortgagor—Necessity.*

Where a mortgagee in possession is dispossessed by a stranger on grounds affecting his right only to possession, such dispossession will not imperil or call in question any right of the mortgagor and the possession of the stranger, though adverse to the mortgagee cannot be adverse to the mortgagor and cannot cause time to run. In order to constitute such possession adverse to the mortgagor, the trespasser must prove notice to the mortgagor that possession is held against him also and it must be shown that the possession was acquired and retained with an assertion of adverse title to the knowledge of the mortgagor. (*Sen and Rajadhyaksha, JJ.*) DIGAMBER SHRIDHAR v. RAMRATAN. 49 Bom.L.R. 281=A.I.R. 1947 Bom. 471.

———*Mortgagee—Mortgagee purchasing mortgaged property at sale in execution of decree for sale on his mortgage—Position and rights of—Possession of—If adverse to purchaser at money sale—Right of redemption.*

It is not open to a mortgagee who claims as a mortgagee and obtains delivery of possession of the property in execution of a decree for sale on the mortgage to set up adverse possession as against the purchaser of the equity of redemption in the mortgaged property in execution of a money decree. The possession obtained by the mortgagee in pursuance of the purchase in execution of his decree on his mortgage is on the basis of his right as mortgagee, and he cannot be allowed to plead that he had given up his position as mortgagee and to take up the position of a trespasser exercising rights of possession adversely to the real owner; and the purchaser of the equity of redemption who is willing to pay up the mortgage dues must be permitted to redeem the mortgage. (*Rama Prosad Mookerjee, J.*) SARAT CHANDRA v. PALAN CHANDRA. A.I.R. 1949 Cal. 683=4 D.L.R. (Cal.) 41.

———*Mortgagor and mortgagee—Mortgagee in possession—Adverse possession against—If adverse to mortgagor.*

It is well-settled that possession cannot be adverse to a person who has no present right to possession. When the mortgagor is not entitled to possession, which is with the mortgagee, during the period of the mortgage, there can be no adverse possession against him, merely because it is adverse to the mortgagee, unless there is a denial of the mortgagor's title to his knowledge. A person holding adversely to the mortgagee only acquires the rights of the mortgagee to possession, and the mortgagor does not lose his right to redeem. A.I.R. 1927 All. 177; 1935 All. 542; 1925 Bom. 465; 1924 Cal. 357; 1934 Lah. 315; 1914 Mad. 903; 1929 Pat. 639, ref.; 12 Bom.H.C.R. 180, rel. on. (*M. B. Rege, J.*) KHYALIRAM v. ONKARLAL. 5 D.L.R. (M.B.) 1=A.I.R. 1950 M.B. 41.

——*Mortgagor and mortgagee—Mortgagee or assignee claiming independent title as owner—When becomes adverse to mortgagor.*

Adverse possession by a mortgagee or a person claiming under him as against the mortgagor can only start from the time that he denies the title of the mortgagor and such denial is known to the mortgagor. Until there is an open denial to the knowledge of the mortgagor possession of the mortgagee claiming adversely or his assignee cannot become adverse to the mortgagor. (*Venkataranga Iyengar and Paramasiviah, JJ.*) Easwarappa *v.* Chickanna. 53 Mys.H.C.R. 193.

——*Mortgagor and mortgagee—Possession of mortgagee—If adverse to mortgagor.*

A mortgagee cannot deny his mortgagor's title and the possession of the mortgagee cannot be adverse to the mortgagor. As long as the mortgagee is in possession, he and persons claiming under him represent the mortgagor's possession. (*Venkataramana Rao, C.J. and Venkata Ramaiya, J.*) Gangabai *v.* Bale Yediyur. 3 D.L.R. (Mys.) 82=54 Mys.H.C.R. 308.

——Mortgage with possession of inalienable property—Mortgagee left in possession undisturbed and unchallenged—Subsequent sale—Sale not challenged and vendee continuing in possession—Effect—Title by adverse possession—Acquisition of. *See* Limitation Act, Arts. 144 and 148. 26 Pat. 717.

——*Nature of possession—Possession referable to lawful title.*

Possession is never considered adverse if it can be referred to a lawful title. 11 N.L.R. 164 and I.L.R. (1942) Nag. 781, referred to. (*Sen, J.*) Chandel *v.* Hiralal.

I.L.R. (1949) Nag. 883.

——*Nature of—Possession—Proof—Nature of subject—Relevancy.*

The nature of the requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. 61 C. 262 (P.C.), referred to. (*Bannerji, J.C.*) Narain *v.* Balabh Das. A.I.R. 1950 H.P. 6.

——*Plea—If to be specifically raised in pleading—Mode of pleading—Question of fact.*

Whether possession is adverse or not is a question of fact to be decided on the evidence led in the case. Where a plaintiff alleges hostile title to and possession of the property in pursuance of the hostile title and leads evidence of possession for the statutory period which, if accepted, would extinguish the title of the true owner, it is not necessary for him to plead, in terms, adverse possession; for whether such possession is adverse or not is a question of evidence and not a matter of pleading. The absence of the word "adverse" from the pleadings is not of any significance. (*Thadani and Constantine, JJ.*) Aboobucker *v.* Sahib Khatoon. I.L.R. (1947) Kar. 224=A.I.R. 1949 Sind 12.

——*Presumption of—Possession ostensibly in his own right for a long time—No evidence as to permissive possession.*

Where there is no evidence to show that the long possession of a person ostensibly on his own behalf was permissive, Courts can presume that it was adverse against all the world. (*Seth, J.*) Nannhey Khan *v.* Gomti. 1948 A.L.W. 338=A.I.R. 1949 A. 289=1948 O.W.N. 340.

——*Projections or chajjas over another's land—Nature and extent of right conferred by their existence for over 12 years—Right to column of air beneath and above the projections.*

Where projections or chajjas' over another's land exist, possession of such projections for a period of 12 years gives the owner of them a title by adverse possession against the owner of the soil over which the constructions project. But the ownership of the projection does not of necessity carry with it the ownership of the column of air above such projection. The column of air is owned by the owner of the soil immediately underneath. (*Harries and Rachhpal Singh, JJ.*) Indore State Samasthana *v.* Ashutosh Bhattacharya. 1947 A.L.W. 38.

——*Question when may arise.*

Questions of adverse possession arise only when ownership is proved or established and in the absence of proof of title, the question of adverse possession is irrelevant. (*Rege, J.*) Keshav *v.* The Municipal Commissioner, Indore City. 5 D.L.R. (M.B.) 47.

——Submerged land. *See* Adverse Possession—Interruption.

——Successive trespassers—Possession of—If can be tacked. *See* Adverse Possession—Acquisition of—Successive trespassers.

——*Transfer of khata to name of wrong person—Effect of.*

The wrong transfer of khata by the Revenue authorities to the name of a person cannot be taken as indicating that the person in whose name it is transferred is in possession of the property covered by the khata adverse to the true owner from the date of such transfer. (*Abdul Ghani and Paramasiviah, JJ.*) Madappa *v.* Chennamma. 51 Mys.H.C.R. 140=24 Mys.L.J. 148.

——Trespassers. *See* Adverse possession—Acquisition of title—Successive trespassers.

——*Trust.*

A trust is also subject to the law of limitation. If a person came into possession of trust property and treated it as his own and not as property belonging to the trust, and continued to exercise his right in defiance of the trust for a number of years, he will, after the requisite period of limitation, acquire good title to the property. (*Sinha, J.*) Ram Narain *v.* Sri Ram Lachman. A.I.R. 1948 All. 195.

——*Trust property—Trustee as such, entering into possession of—Assertion of his right as beneficial owner—Onus as to character of possession.*

Though in law a title by adverse possession can be established against wakf property, a trustee for a charity entering into possession of the property belonging to the charity cannot, whilst remaining a trustee, change the character of his possession and assert that he is in possession as a beneficial owner. The burden of proving that the possession of the person so entering into possession was that of a trustee and not that of a beneficial owner is upon those who assert it. (*Sir John Beaumont.*) HAFIZ MOHD. *v.* SWARUP CHAND. 52 C.W.N. 382=29 P.L.T. 23=50 Bom.L.R. 632=A.I.R. 1948 P.C. 76=1948 A.L.J. 221=61 L.W. 443=(1948) 2 M.L.J. 70 (P.C.).

——*Trustees—Whether can claim—Trusts Act, S. 14.*

Trustees are not entitled to assert adverse possession against the trust. However flagrant the breaches of duty be on the part of the trustee or the mutwalli he acts on behalf of the trust and has no right to claim adverse possession. That is also the principle underlying S. 14 of the Trust Act. Persons who enter into possession as trustees are estopped from setting up an adverse title until they obtain a proper discharge from the trust. (*Grille, C.J. and Puranik, J.*) ABDUL RAHIM KHAN *v.* FAKIR MAHOMED SHAH. I.L.R. (1946) Nag. 518=1946 N.L.J. 511=A.I.R. 1946 Nag. 401.

——*Under-proprietary right—Acquisition of.*

A person who has no under-proprietary title cannot acquire a proprietary title by prescription and his execution of simple mortgages cannot improve his position. (*Chandiramani, J.*) ANANT RAM *v.* PARSHOTTAM DEO. I.L.R. (1949) All. 337.

——*Waste land—Constructive possession of plot forming part of larger area over which physical acts of ownership are exercised—Effect.*

Adverse possession may be established over a piece of waste land when such land forms part of a plot of land with defined boundaries, over other portions of which acts of ownership have undoubtedly been exercised, and where there has been an assertion of right *qua* the whole land.

While it is quite true that ordinarily the doctrine of constructive possession cannot be used in favour of a trespasser, it is established that in a case where the plot trespassed upon forms part of a larger plot with defined boundaries over which there have been physical acts of ownership and where there has been assertion of title over the whole plot throughout, even that portion or plot, over which no physical acts of ownership have been exercised, cannot be treated as a separate entity; and it cannot be held that the party in possession has not been prescribing for such plot or portion. [16 Bom. 338, dist. 50 Bom.L.R. 632; 10 Pat. 407; 99 I.C. 692, rel. on.] (*Achhru Ram, J.*) RAMPRASAD *v.* BHAGMAL. 4 D.L.R. (Simla) 185.

——*Waste land—Possession—Presumption as to possession following title.*

In the case of waste and jungle land, in the absence of specific acts of ownership exercised over the plots in question, it must be presumed that possession is with the person who has title to the land. (*Ananthakrishna Iyer and Govinda Menon, JJ.*) P. K. VARKEY *v.* KURIYAN. 4 D.L.R. (Coch.) 99.

——What constitutes—"Dispossession"—What is. *See* LIMITATION ACT, ARTS. 142 AND 144. I.L.R. (1949) Cut. 804.

AGE—*See* EVIDENCE ACT, S. 35.

AGENCY. *See* (1) CONTRACT ACT, CHAP. X.
(2) PRINCIPAL AND AGENT.

AGENCY—*Proof—Election case—Law as to—Ordinary law of principal and agent—Distinction.*

The law of agency in election cases goes much further than the ordinary law of principal and agent. Though there may be no direct proof of an actual appointment of an agent, a man may be proved to be agent of a candidate on various facts and circumstances leading to an inference of agency. (*Das and Sarjoo Prasad, JJ.*) JAMUNA PRASAD *v.* JOGENDRA PRASAD. 29 Pat. 581=5 D.L.R. (Pat.) 211.

AGENCY RULES—R. 19 (2) (ii)—*Applicability—Settling issues though not obligatory, if "hearing"—Compromise of suit after framing issues—Plaintiff, if entitled to refund of half the court-fees.*

Though the Agency Rules do not contemplate the framing of issues before trial of every suit to which they are applicable, when the Agency Court thinks fit to settle issues in any particular suit, it should be regarded as "hearing" the suit when it frames the issues arising for determination after hearing the parties. Accordingly where a compromise is presented to the Court after settling issues, rule 19 (2) (*ii*) of the Agency Rules has no application and the plaintiff is not entitled to a refund of one half of the court-fee paid on the plaint. (*Patanjali Sastri and Bell, JJ.*) RECEIVER, BHADRACHALAM ESTATE *v.* BUCHIRAMAYYA. I.L.R. (1948) Mad. 276=60 L.W. 446=1947 M.W.N. 425=A.I.R. 1948 Mad. 151=(1947) 2 M.L.J. 144.

——R. 48—*"Decree"—Order remanding suit for disposal according to law—Revision to High Court—Competency.*

The word "decree" in R. 48 of the Agency Rules must be read as meaning something corresponding generally to the definition of that term contained in the first sentence of S. 2 (2), C. P. Code. It cannot be read as possessing any wider meaning than it has in the opening sentence of the definition in S. 2 (2), C. P. Code. There is nothing in the Agency Rules to exclude the passing of a preliminary decree in a proper case and such a decree would be a decree within the meaning of the Agency Rules.

An order by the Agency Subordinate Judge, on appeal, remanding a suit to the Agency Munsiff for disposal according to law, is not a decree within the meaning of the Agency Rules. The High Court cannot therefore revise such an order. (*Bennett and Beevor, JJ.*) LINGARAJ SANTRA *v.* JOYKRUSHNA. 26 Pat. 127=A.I.R. 1948 Pat. 67=13 Cut.L.T. 29.

AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887). *See* BENGAL CIVIL COURTS ACT.

AGRA PRE-EMPTION ACT (XI OF 1922)—*If and how for exhaustive.*

The Agra Pre-emption Act is exhaustive on the subject of pre-emption in regard to territories to which it is applicable. Hence when an "interest in land" in any such area is transferred no right of pre-emption can be enforced except in accordance with the provisions of the Act. (*Malik and Bind Basni Prasad, JJ.*) RAM KIRPAL *v.* SHRI KRISHNA DEO PRATAP SINGH. I.L.R. (1947) A. 798=1948 A.L.J. 11=1948 O.W.N. 67=2 D.L.R. 361=A.I.R. 1948 A. 108=1948 A.L.W. 64=1948 R.D. 89.

——Right to pre-emption—If arises in a case of transfer in lieu of *Karach-i-pandan*. *See* T. P. ACT, S. 54 AND AGRA PRE-EMPTION ACT, S. 4 (10). 1948 A.L.W. 290.

——**s. 3, 6 and 11 and U. P. E. E. Act (XXV of 1934), S. 28**—*Sale by Collector under S. 28 of the U. P. E. E. Act—Nature of—Right of pre-emption in regard to.*

When a collector executes a sale deed of unprotected land of the indebted landlord under S. 28 of the U. P. E. E. Act he does so to execute the decree and as such it is one in execution of a decree. Hence, in view of Ss. 3, 6 and 11 of the Agra Pre-emption Act no right of pre-emption can arise in respect of such a sale. (*Malik, C.J., Dayal and Prasad, JJ.*) THAN SINGH *v.* LAKHPAT SINGH. **I.L.R. (1948)** A. 323=2 D.L.R. 529=A.I.R. 1948 A. 265=1948 R.D. 215=1948 A.W.R. (H.C.) 310 (2)=A.I.R. 1948 A. 265 (F.B.).

——**S. 3**—*Transfer of grove—Transfer intended for enjoyment of possession of the land and the trees—If a transfer of an "interest in land".*

It will be very difficult to hold that the transfer of a grove, not with the object that the transferee should cut the trees and clear the ground but with the object that the transferee should enjoy possession of the land and the trees of make appropriate use of it, is not a transfer of "interest in land". (*Malik and Bind Basni Prasad, JJ.*) RAM KIRPAL *v.* SHRI KRISHNA DEO PRATAP SINGH. I.L.R. (1947) A. 798=1948 O.W.N. 67=2 D.L.R. 361=A.I.R. 1948 A. 108=1948 A.L.W. 64=1948 R.D. 89=1948 A. L.J. 11.

——**S. 4 (1) and (7)**—*Right to pre-emption—Co-sharer—Conditions to be satisfied—Person acquiring specific plot in mahal.*

On a consideration of the definitions of "co-sharer" and "petty proprietor" in the Agra Pre-emption Act it follows that there is no presumption that a person acquiring title in a specific plot in a mahal also acquires an interest in the joint lands of the mahal or in the administration of its affairs, nor does the absence of an exclusion clause in the deed that he has not acquired such a right necessarily suggest that he has acquired it so as to cast a burden on the vendee defendant to prove that the plaintiff pre-emptor has not acquired the same.

Where he is also found jointly liable for the payment of the entire land revenue of the mahal along with the other co-sharers, he must be deemed entitled to have an interest in the administration of the affairs of the mahal and as such would be a "co-sharer" within the meaning of the Agra Pre-emption Act and entitled to claim pre-emption. (Case-law fully discussed). (***Harish Chandra and Mushtaq Ahmad, JJ.***) BALWANT *v.* JIRAM. I.L.R. (1949) A. 908=1949 A.L.J. 72=A.I.R. 1949 A. 415=1949 A.W.R. 175.

——**S. 4 (12)**—*Applicability—Document called* Kafiyat hal.

A document called *Kafiyat hal* which is nothing more than evidence which had been recorded in the course of the settlement operations for the purpose of determining the village rights and customs, cannot be said to fall within the definition of "*Wajib-ul-arz*" as contained in S. 4 (12) of the Agra Pre-emption Act. (*Waliullah and Bind Basni Prasad, JJ.*) CHHATRADHARI *v.* UTTAM CHAND. I.L.R. (1948) A. 105=1948 A.L.J. 177=1948 A.L.W. 203=A.I.R. 1948 A. 303=(1948) A.W.R. (H.C.) 57=1948 O.A. (H. C.) 57.

——**S. 5**—*Basis of custom of pre-emption—Record of custom in surrounding villages.*

From the fact that it is recorded that there is a custom of pre-emption in surrounding villages it cannot be said that it amounts to a recognition of the right of pre-emption in that particular village also. (*Waliullah and Bind Basni Prasad, JJ.*) CHHATRADHARI *v.* UTTAM CHAND. I.L.R. (1948) A. 105=1948 A.L.J. 177=1948 A.L.W. 203=A.I.R. 1948 A. 303=(1948) A.W.R. (H. C.) 57=1948 O.A. (H.C.) 57.

——**S. 5 (1) (a)**—*Scope and effect of—Right of pre-emption found to be prevalent in one of several villages comprised in a single mahal—Right of pre-emption if must be deemed to exist in the entire mahal.*

There is nothing in the language of S. 5 (1) of the Agra Pre-emption Act to justify the extension of the right of pre-emption from a village to an entire mahal simply because the village happens to be situate within the precincts of that mahal. Nor is there anything in the section to justify the extension of the right from one village to another solely on the ground that the villages happen to be comprised within the ambit of a single mahal. (*Waliullah and Bennett, JJ.*) RAM CHARITTAR SINGH *v.* TEJ PRASAD TEWARI. I.L.R. (1946) A. 536=228 I.C. 132=1946 A. L.W. 495=1947 A. (Rul.) 52=1947 A.L.J. 160=1947 A.W.R. (H.C.) 186=A.I.R. 1947 A. 275.

——**S. 6**—*Applicability—Sale by Collector under Cl. 5 of the U. P. E. E. Act.*

No right of pre-emption accrues when a sale is made by the Collector under the provisions of Ch. V of the U. P. E. E. Act because such a sale has to be regarded as a sale in execution of a decree of a Civil Court. (*Bind Basni Prasad, J.*) DEEP CHAND *v.* MANIA. 1947 A.L.J. 668=A.I.R. 1948 A. 194=1947 A.W.R. (H. C.) 429.

——**S. 6**—*'Ex-proprietary tenant' and 'Ex-proprietary tenancy'—Meaning and interpretation.*

The words 'ex-proprietary tenant' and 'ex-proprietary tenancy' are words of art and have a special meaning in the United Provinces. They are defined in the Rent Acts and they must be interpreted to have the same meaning in the Pre-emption Act as in the Rent Acts. They certainly could not mean, that an ex-proprietary tenant was a tenant who had at one time been a proprietor. *(Malick and Waliullah, JJ.)* BALDEO SINGH *v.* KAILASH SINGH. I.L.R. (1946) A. 850=228 I.C. 448=1947 O.W.N. (H.C.) 15=1947 A.L.W. 29=1947 A.W.R. (H.C.) 75=1947 A. (Rul.) 81=1947 R.D. 103=A.I.R. 1947 A. 345.

———**Ss. 6 (a) and 11**—Applicability—"Sale in execution of the decree of a civil or revenue Court"—Sale by Collector under S. 28, U. P. Encumbered Estates Act—Right of pre-emption, if accrues. *See* AGRA PRE-EMPTION ACT, Ss. 3, 6 AND 11. 1948 A.L.J. 126 (F.B.).

———**Ss. 10, 12 and 20**—*Transfer of share in* abadi *and retention of share in agricultural area—Re-sale by vendee to one of the vendors—Right of pre-emption, if arises.*

There was a transfer of a share in the *abadi* appertaining to certain khewats and a retention with them by the vendors of their share in the agricultural area. There was a re-sale by the vendees of portion of the property to one of the vendors. On a question whether there was a right of pre-emption,

Held, the vendor being a co-sharer of an equal degree having an equal right of pre-emption, the sale cannot be pre-empted. *(Agarwala, J.)* AMIR MOHAMMAD KHAN *v.* MOHD. ASHAN KHAN. A.I.R. 1950 All. 491=1950 A.W.R. 500.

———**S. 11**—Applicability—Sale by Collector under S. 28, U. P. Encumbered Estates Act—Pre-emption—Right of—If exists. *See* AGRA PRE-EMPTION ACT, Ss. 3, 6 AND 11. 1948 A.L.J. 126 (F.B.).

———**S. 11**—*Right of pre-emption—When can arise.*

No right of pre-emption can accrue after the enactment of the Agra Pre-emption Act, except when a *proprietary* interest in land is sold or foreclosed. *(Malik and Bind Basni Prasad, JJ.)* RAM KIRPAL *v.* SHRI KRISHNA DEO PRATAP SINGH. I.L.R. (1947) A. 798=1948 A.L.J. 11=1948 O.W.N. 67=1948 A.L.W. 64=A.I.R. 1948 A. 108=1948 R.D. 89=2 D.L.R. 361.

———**S. 12**—*Preferential right of pre-emption—Several sub-divisions in mahal without separate land revenue assessment—Co-sharer in sub-division of mahal, where property is situated and co-sharer vendee in another sub-division of the mahal—Preference.*

A co-sharer with a vendor in a sub-division of the mahal where the property sold is situated has a preferential claim to pre-emption as against the vendee who is a co-sharer in another sub-division where there are several divisions of the mahal and the mere fact that separate land revenue was not assessed on them would be of no consequence in regard to the question of preference. *(Agarwala, J.)* GAURI SHANKAR RAI *v.* SHRI THAKURJI RAMCHANDRA. 1950 A.W.R. 40=A.I.R. 1950 All. 244.

———**Ss. 14 and 15**—*Absence of formal notice under S. 14—Conduct of co-sharer making the vendee believe that he had waived his right of pre-emption—Estoppel.*

If by his conduct a co-sharer has led the vendee to believe that he had waived his right of pre-emption, then the estoppel will remain against him even though under the circumstances, it was thought not at all necessary to issue a formal notice to him under S. 14 of the Agra Pre-emption Act. [I.L.R. 48 All. 491 and 1925 All. 645, Rel. on.] *(Harish Chandra and Sapru, JJ.)* RAM NARAIN *v.* JOTI SARUP. 1948 O.W.N. 369=1948 A.L.W. 367.

———**Ss. 16 and 12**—Plaintiff included as co-sharer in different sub-division by an imperfect partition prior to decree—Effect. [*See* Q. D. 1941—1945, Vol. I, Col. 37.] GANDA SINGH *v.* KUNDAN SINGH. 18 R.A. 90.

———**S. 17**—*Market value—Question of—When can arise—Relevancy when Court able to fix the price.*

According to the scheme of the Agra Pre-emption Act the question of the ascertainment of the market value of the property does not arise where the Court is in a position to come to a definite conclusion upon the question of what the actual price of the property is. Under S. 17 of the Act the question of the market value of the property arises only where and when the Court is unable to arrive at the actual price of the property. To find out the market value and then to brush aside the actual consideration as unnecessary is to reverse the correct process and deal with the question in a manner opposed to the true meaning of S. 17. *(Pathak, J.)* AHMADULLAH KHAN *v.* MOHD. TAQI. 224 I.C. 386=1946 A.W.R. (H.C.) 250=1946 A. (Rul.) 372=1946 A.L.W. 464=A.I.R. 1946 All. 493.

———**S. 20**—*Right to resist pre-emption—Acquisition of right by vendee by exchange prior to sale of other property.*

If a transaction precedes the sale, it is enough to arm the vendee with the right of resisting a right of pre-emption. A vendee who acquires under an exchange protected property with the necessary permission, can on the strength of that exchange resist a suit for pre-emption in respect of other property sold to him at any time after the transaction of exchange. *(Sinha, J.)* MANPHOOL SINGH *v.* RAM BILAS. 1947 A. W. R. (H.C.) 287=1947 R.D. 370=A.I.R. 1948 All. 99=1947 A.L.W. 527=1947 A.L.J. 556.

———**S. 20**—*Vendee exchanging property with another after sale—When can resist suit for pre-emption.*

Where after the date of the sale the vendee exchanges the property with another person, he should convey an indefeasible title before he is entitled to successfully resist a suit for pre-emption. *(Sinha, J.)* RAGHUNATH SINGH *v.* NAKI RAM. A.I.R. 1948 All. 27.

———**S. 21**—*Meaning of the words "sues jointly" used in S. 21—Plaintiffs claiming pre-emption falling into two groups of rival claims—No claim for joint decree—Claim for a decree in the alternative—Rights of plaintiffs, if affected.*

The words "sues jointly" used in S. 21 of the Agra Pre-emption Act mean when pre-emptors join with them strangers or pre-emptors of a higher class join pre-emptors of a lower class and they ask for a joint relief as opposed to an alternative relief, that is, if they claim a joint decree and want to pre-empt the sale jointly.

Where the plaintiffs claiming pre-emption fall into two groups, and no claim for a joint decree is made but only for an alternative one, it cannot be said that the plaintiff's rights are affected by reason of S. 21. (*Malik and Bind Basni Prasad, JJ.*) MADHO PRASAD *v.* SHIB CHARAN. 1947 A.L.W. 531=1947 A.W.R. (H.C.) 367=1947 A.L.J. 600=1947 R.D. 374=2 D.L.R. 197=A.I.R. 1949 A. 457=I.L.R. (1947) A. 788.

——**S. 24**—*Pre-emptor's rights—Nature and extent of—When arises.*

A right of pre-emption is an incident of the property. In other words, the sale of the property in question is subject to a certain right. But till such a suit is instituted, a decree obtained, the money deposited and possession taken, the transaction of sale is a good transaction and the title passes to the vendee. It is only when all the abovementioned steps are taken that the right of the vendee comes to an end and the pre-emptor is substituted in his place. But it cannot be said that there is no transfer by the vendor in favour of the vendee by reason of the existence of a right of pre-emption. (*Sinha, J.*) RAM BHADRA PRASAD *v.* DEBI DUTT. 1947 A.W.R. (H.C.) 422=2 D.L.R. 525.

AGRA TENANCY ACT (III OF 1926), Ss. 14 and 15—Surrender of ex-proprietary rights—When becomes effective—Agreement to surrender on date of transfer of proprietary rights, but sanction under S. 15 granted subsequently—Rights of parties in the intervening period. [*See* Q.D. 1941-1945, Vol. I, Col. 43.] DIN DAYAL *v.* QUADAM SINGH. 1946 A. (Rul.) 248=223 I.C. 134.

——**S. 23**—*Property in possession of mortgagee of the occupancy holding—Liability of mortgagee's right to attachment and sale in execution.*

S. 23 of the Agra Tenancy Act merely makes the interest of an occupancy tenant non-transferable except in certain specified cases. But a mortgagee of the occupancy holding who is in possession has a right to the holding till he is dispossessed and as it is a right to property such rights can be attached and sold in execution of decrees. (*Agarwala, J.*) JOKHAN MISRA *v.* MAHESH PANDIT. 1949 A.W.R. 125=A.I.R. 1949 A. 637.

——**Ss. 24 and 25**—*Surrender by widow in 1935 who died in 1941—Right of husband's collateral.*

Where a collateral claims succession to a holding inherited by a widow who had surrendered it in 1935 and died in 1941, his right under the law opened in 1935 and he cannot succeed unless he proved co-sharing. He cannot claim that the succession opened only in 1941 and that as co-sharing was not necessary under U. P. Tenancy Act, he was the lawful heir. (*Sultan Ahmad, M.*) ALGOO *v.* SHYAM NARAIN. 1948 R.D. 149=1948 A.W.R. (Rev.) 143.

——**Ss. 35 and 99**—*Rent free grantee—Position of.*

A rent free grantee was not a tenant under the Agra Tenancy Act and so S. 35 of the Act did

not apply to him. Though he could sue by virtue of S. 99 of the Act, there was no provision in it under which his rights could be extinguished, corresponding to S. 200 of the U. P. Tenancy Act. (*Lal, J.M. I.*) GHANSHYAM SINGH *v.* RAM DIAL GIR. 1948 A.W.R. (Rev.) 201=1948 R.D. 369.

AGREEMENT—*Binding nature of—Muchilika agreeing to division by a panchayat—Mention of invalid transfers by gift or will—If bar to subsequent questioning of the validity of such transfer.*

A coparcener executing a muchilika agreeing to a division of properties by a panchayat mentioning certain invalid transfers by gift or will, will not be barred from questioning their validity by the application of any principle of election or ratification or doctrine of approbate and reprobate as even an admission made on a wrong impression of law will not bind the party. (*Wadsworth and Rajamannar, JJ.*) NACHIAPPA CHETTIAR *v.* MUTHUKARUPPAN CHETTIAR. I.L.R. (1946) Mad. 858=228 I.C. 506=1947 Mad. (Rul.) 87=59 L.W. 227=1946 M.W.N. 240=A.I.R. 1946 Mad. 398=(1946) 1 M.L.J. 310.

AGRICULTURAL INCOME-TAX.

See (1) ASSAM AGRICULTURAL INCOME-TAX ACT (IX OF 1939).
(2) BENGAL AGRICULTURAL INCOME-TAX ACT (IV OF 1944).
(3) BIHAR AGRICULTURAL INCOME-TAX ACT (VII OF 1938).

AGRICULTURE.

See also (*i*) MADRAS DISTRICT MUNICIPALITIES ACT, S. 81.
(*ii*) MADRAS ESTATES LAND ACT, Ss. 3 (1), 77 AND 189.

——Legislation relating to. *See* GOVERNMENT OF INDIA ACT (1935), SCH. VII, LIST 2, ITEMS NOS. 9 AND 21.

AGRICULTURISTS' LOANS ACT (XII OF 1884), S. 5—*Scope—Power of Collector to recover loan by sale of any immovable property of defaulter—Sale without service of notice on mortgagee of property—Validity—Suit disputing sale—Limitation.*

For the recovery of a loan advanced under the Agriculturists' Loans Act it is open to the Collector to sell any part of the immovable property belonging to the defaulter, and the remedy is not confined to that particular property in respect of which or for whose improvement the loan had been taken. For the sale of the property of a defaulter it is not essential that notices should be served on persons holding a mortgage over the defaulter's property. A sale will not be illegal and null merely by reason of the non-service of any notice on the mortgagee of the property. A suit disputing the legality of such a sale must be filed within six months from the date on which the cause of action arose according to S. 59 of the Madras Revenue Recovery Act which applies. (*Yahya Ali, J.*) BHOJARAJAPPA *v.* KOLARHALLI HALAPPA. 1946 M.W.N. 176=A.I.R. 1946 Mad. 226=59 L.W. 61=(1946) 1 M.L.J. 57.

AJMER ALIENATION OF LAND REGULATION (III OF 1914), S. 2—*"Land"—Meaning of—Pucca built house with garden and paraphernalia of sheds, stables, etc.*

The term "land" as defined in S. 2 of the Ajmer Alienation of Land Regulation (1914) cannot cover a property which consists of a plot of land with a pucca built house with a very large paraphernalia of sheds, stables, etc., in the compound, such property having the appearance of a city dweller's country house and orchard, rather than a *bona fide* agriculturists' property, though the house has an extensive garden at the back of it. (*Nagarkar, J.C.*) MANJI BHAI *v.* AMBALAL. 4 D.L.R. (A.M.) 34.

AJMER COURT'S NOTIFICATION No. 1121|L XXX, dated 26th July, 1947—*Applicability—Suit filed before repeal of the Ajmer-Merwara—Control of Rent and Eviction Order—Decree—Appeal—Forum—Law determining.*

Where in a suit filed under the Ajmer-Merwara Rent Control Act before its repeal a decree is passed the procedural law for filing an appeal against it is not the general procedural law but only the procedural law as laid down in the Ajmer-Merwara Court's Notification No. 1121|L XXX, dated 26th July, 1947. (*Atma Charan, J.C.*) CHITAR MAL *v.* KALYAN MAL. A.I.R. 1950 Ajmer 48=5 D.L.R. (A.M.) 27.

AJMER COURT'S REGULATION, Ss. 6 and 19—*Additional District Judge—Jurisdiction to hear appeals pending in District Judge's Court—Implied permission of District Judge—Case sent to Sub-Judge on remand—Transfer of case to Additional Sub-Judge without orders of District Judge—Irregularity in distribution of business—Effect of—C. P. Code, S.* 99.

An Additional District Judge can be appointed under S. 6 of the Ajmer Court's Regulation. The Chief Commissioner may appoint any person to be Additional District Judge and the Court of the Additional District Judge, constituted by such an appointment is to be deemed as the Court of the District Judge for the performance of such of the duties of the District Judges, as may be assigned to him. Presumably, therefore, he could exercise all the powers of the District Judge and he would have the jurisdiction to hear all the appeals pending in that Court if and when made over to him by the District Judge. If there is no express direction from the District Judge, it will be presumed that his implied permission existed. [1941 A.M.L.J. 89, foll.]

S. 19 of the Ajmer Court's Regulation permits the District Judge to distribute judicial business amongst the Courts of the three lower grades under him. Additional District Judge's Court is not one of the Courts included in the three lower grades. The Judicial Commissioner has not been given any authority to distribute business in the District Judge's Court. When the District Judge and Additional District Judge are exercising concurrent jurisdiction, the business would naturally be distributed with the permission of the District Judge. There is nothing in the Regulation to show that such distribution is contrary to law. If the appeal comes before the Additional District

AJMER LAWS REGN. (1877), S. 8.

Judge and then before the second Additional District Judge and on remand to the Sub-Judge it is sent to Additional Sub-Judge as a result of new appointments for clearing arrears, the distribution of business is with the permission, express or implied, of the District Judge. But even if there is an irregularity in the distribution of business, the jurisdiction of the Additional District Judge or the Additional Sub-Judge will not be affected, and if the objection is not taken at the proper time the decree cannot be set aside in appeal by virtue of the provisions of S. 99, C. P. Code. [1923 Pat. 242, rel.] (*Ram Labhaya, J.C.*) BENI GOPAL *v.* GANGADHAR. 4 D.L.R. (A. & M.) 61=A.I.R. 1949 Ajmer 23=1949 A.M.L.J. 104.

AJMER EXCISE REGULATION, S. 33 (a) and (f)—Bona fide *belief that* Hakim *was entitled to keep "liquor" and apparatus for manufacture of "liquor" without licence—If affects liability for conviction under S.* 33 (a) *and* (f) *of the Ajmer Excise Regulation.*

The *bona fide* belief of a *Hakim* that he was entitled to keep "liquor" as defined in the Ajmer Excise Regulation, for medicinal purposes without a licence would not in any way affect his liability to be convicted under S. 33 (*a*) and (*f*) of the Regulation when he is found in possession of "liquor" and apparatus for manufacture of "liquor" without the necessary licence. (*Oak, J. C.*) FATEH CHAND *v.* STATE. A.I.R. 1950 Ajmer 74.

AJMER LAND AND REVENUE REGULATION (II OF 1877), S. 29—*Property protected by.*

The only part of an Istimrari estate protected by S. 29 of the Ajmer Land and Revenue Regulation is the property actually finding a place in the Istimrari Sanad. So if the Istimrardar purchases other property whether out of the Istimrari profits or not, that property will not be protected unless it is added in the Istimrari Sanad. (*Davies.*) SHIMBHOO SINGH *v.* MOTI LAL. 1946 A.M.L.J. 1.

———**Ss. 119, 24 and 25**—*Order of Chief Commissioner recognising succession to non-sanadi estate—Jurisdiction of Civil Court.*

S. 119 (*b*) of the Ajmer Land and Revenue Regulation precludes the Civil Courts only from entertaining any suit for obtaining an order or decision which "under this Regulation" the Chief Commissioner *inter alia* is empowered to make or pronounce. An order of the Chief Commissioner recognising the succession of the defendant to an estate in respect of which an Istimrari Sanad has not been granted, is not authorised by S. 24; nor is it a decision under S. 25. Consequently a suit by the Istimrardar for a declaration of his title to and for possession of that estate is maintainable, and the Civil Court is not precluded from entertaining it. (*Lord MacMillan.*) CHANDRA SINGH *v.* MOD SINGH. 228 I.C. 248=60 L.W. 11=13 B.R. 237=1947 P.C. (Rul.) 38=A.I.R. 1947 P.C. 37=I.L.R. (1947) Kar. (P.C.) 54 (P.C.).

AJMER LAWS REGULATION (1877), S. 8—*Custom of pre-emption owing its birth to*

Mahomedan law—Custom existing in sub-divisions of Ajmer City—If relevant to prove its existence in civil lines.

A custom of pre-emption may owe its existence or its birth to Mahomedan Law but the only basis which S. 8 of the Ajmer Laws Regulation recognizes is one of custom.

The fact that a custom of pre-emption exists in several sub-divisions of Ajmer City is a relevant consideration though by itself it would not prove that custom exists in the locality known as civil lines. [38 P.R. 1906, ref. to.] (*Ram Labhaya, J.C.*) Gopi Nath *v.* Nand Kishore. A.I.R. 1949 Ajmer 2=4 D.L.R. (A. & M.) 73=1949 A.M.L.J. 128.

———S. 9—*"Proprietary tenure", meaning of—Property, if can come under that.*

A tenure is partly an incorporeal right to occupy. Ordinarily the term property cannot be applied to an incorporeal right; so property cannot be a "proprietary tenure". If the phrase "proprietary tenure" in S. 9 can apply to property at all, there is no reason why it should not apply to a house or an open site. (*Davies.*) Chitar *v.* Ladu. 1946 A.M.L.J. 11.

———Ss. 10 and 11—*Scope—Waiver of right of pre-emption—Acquiescence in sale in express terms or by conduct.*

Ss. 10 and 11 of the Ajmer Laws Regulation merely provide a convenient method by which a person having a right of pre-emption may be given the option to purchase. Other modes of acquiescence in the sale are not excluded by them. It is therefore open to the defendant in a suit for pre-emption to show that the plaintiff has waived his right of pre-emption by agreeing to the sale in express terms or by acquiescing in the sale by his conduct. [1929 Lah. 265, applied.] Where a sale is consented to by the plaintiff, the right of pre-emption stands waived. [1929 All. 589, referred to.] Waiver and acquiescence on the part of the pre-emptor may be inferred from the circumstances, and there need not be an offer and refusal or express consent to the sale. [21 Luck. 598, relied on.] (*Ram Labhaya, J.C.*) Gopi Nath *v.* Nand Kishore. A.I.R. 1949 Ajmer 2=4 D.L.R. (A. & M.) 73=1949 A.M.L.J. 128.

———S. 33—*Scope and effect of—Interest awardable—Limit to.*

Under S. 33 of the Ajmer Laws Regulation, the amount of interest which can be awarded to a plaintiff in a suit cannot exceed the principal received by the defendant prior to the institution of the suit. (*Nagarkar, J.C.*) Dharam Chand *v.* Bahadur Mal. A.I.R. 1949 Ajmer 46=4 D.L.R. (A.M.) 21.

AJMER TALUQDARS LOAN REGULATION (1911), Ss. 6, 7 and 18—*Istimrardar succeeding his father—Existence of notice under S. 6—Effect.*

When an Istimrardar succeeds for his father where a notice under S. 6 of the Ajmer Taluqdars Regulation has issued and a notice under S. 18 has not followed, he is precluded under the terms of S. 7 (*a*) in exactly the same way as his father from entering into any of the transactions mentioned in the section. Where an Istimrardar makes himself responsible for a Khata Baqi it amounts to becoming involved in a pecuniary liability. (*Davies.*) Balchand *v.* Onkar Singh. 1946 A.M.L.J. 4.

———S. 7—*Scope and effect of.*

According to the provisions of S. 7 of the Ajmer Taluqdar's Loan Regulation, from the date of the publication of a notice under S. 6 all suits and proceedings in respect of any claim against the Taluqdar concerned are to be stayed. (*Davies.*) Collector, Ajmer-Merwara *v.* Sita Ram. 1946 A.M.L.J. 18.

AJMER MUNICIPAL REGULATION (VI OF 1925), S. 176—*Charging of fees for permission—Basis.*

The wording of S. 176 of the Ajmer Municipal Regulation is inclined to lead to the supposition that the thing to be charged for is "the permission". But it is plain that such a supposition would be unreasonable, the object of the permission being the occupation. It is not the permission which is to be paid for but the permission to perform or abstain from performing a certain action. (*Davies.*) Municipal Committee, Ajmer *v.* Beni Gopal. 1946 A.M.L.J. 36.

AJMER-MERWARA EXTENSION OF LAWS ACT (1947)—*If* ultra vires *the Dominion Parliament.*

The Ajmer-Merwara Extension of Laws Act, 1947, is not *ultra vires* the Dominion Parliament. (*Ramabhadram.*) Hari Data *v.* District Magistrate. 1949 A.M.L.J. 49=A.I.R. 1949 Ajmer 61=51 Cr.L.J. 227.

AJMER-MERWARA REDEMPTION OF MORTGAGES REGULATION (1928), Ss. 7 to 11—*Proceedings under—C. P. Code, O. 22—If applicable.*

O. 22, C. P. Code, relating to abatement of suits, is not applicable to the proceedings in the Court of the Collector under the Ajmer-Merwara Redemption of Mortgages Regulation. (*Ram Labhaya, J.C.*) Godha *v.* Chagna. A.I.R. 1949 Ajmer 16=4 D.L.R. (A. & M.) 51=1949 A.M.L.J. 85.

———S. 8—*Scope—Order dismissing petition—Limitation for suit.*

An order of collector dismissing a petition for redemption on the ground that the petitioner has failed to show that he is the heir of the original mortgagor and as such has the right to redeem, is clearly on the merits and is covered by S. 8 of the Ajmer-Merwara Redemption of Mortgages Regulation. A suit for setting aside that order must be instituted within a year from the date of that order under Art. 14 of the Limitation Act. (*Ram Labhaya, J.C.*) Godha *v.* Chagna. A.I.R. 1949 Ajmer 16=4 D.L.R. (A. & M.) 51=1949 A.M.L.J. 85.

———S. 13—*Suit under—Limitation—Limitation Act, Art.* **14.**

If a suit under S. 13 of the Ajmer-Merwara Redemption of Mortgages Regulation is in substance for setting aside the Collector's order under Ss. 7 to 11 of that Regulation, although no prayer to that effect is included in the plaint, it is governed by Art. 14 of the Limitation Act and the period of limitation is one year from the date of the order. [1938 Lah. 638, applied.] (*Ram Labhaya, J.C.*) GODHA *v.* CHAGNA. A.I.R. 1949 Ajmer 16=4 D.L.R. (A. & M.) 51=1949 A. M.L.J. 85.

ALIYASANTHANA LAW—*Decree against the karnavan of a Malabar tarwad or the kartha of an aliyasanthana family—Gross neglect or breach of duty on the part of the kartha—If a ground for holding that the decree is not binding on the junior members—C. P. Code (V of 1908), S. 11, Explanation VI—Applicability of principle of.*

A decree obtained against the karnavan of a Malabar tarwad or the kartha of an aliyasanthana family cannot be held to be not binding on the junior members merely on the ground of gross negligence or breach of duty on the part of the karnavan or kartha as such neglect or breach of duty cannot be treated as tantamount to fraud on the power of representation vested in him. The principle governing the situation is to be found in Explanation VI to S. 11 of the Code.

A person must be deemed to have litigated in good faith or *bona fide* within the meaning of Explanation VI of S. 11, C. P. Code, if he did litigate honestly, whether he did so negligently or not. The onus of proving want of *bona fides* in respect of the previous litigation is on the party seeking to avoid the previous decision and proof of negligence is not sufficient to establish such want of *bona fides.*

Where negligence is the complaint there is no distinction between a case where the manager remains *ex parte* and a case where he appears but does not put forward a good available defence. [Case-law discussed.] (*Horwill and Raghava Rao, JJ.*) NAGAMMA SHEDTHI *v.* KORATHU HENGSU. I.L.R. (1950) Mad. 326=A. I. R. 1950 Mad. 546=62 L.W. 622=(1949) 2 M.L. J. 413.

ALLAHABAD HIGH COURT RULES, Chap. VI, Rr. 4 and 5—*Posting of cases on receipt of findings on remitted issues—If should be posted before the same Judge who remitted the issues.*

R. 5 of the Allahabad High Court Rules has to be read as subject to R. 4, according to which the allotment of work is to be made by the Hon'ble the Chief Justice of the Court. The authority which allots works may also withdraw that work. There is no prohibition to be found in these Rules that a case once allotted to a Judge cannot be withdrawn from him. Hence, it cannot be contended that on receipt of findings on certain remitted issues, the case should be posted before the same Judge who remitted the issues. (*Seth, J.*) NANNHEY KHAN *v.* GOMTI. 1948 A. L. W. 338=A.I.R. 1949 A. 289=1948 O.W.N. 340.

ALLUVION AND DILUVION. *See* BENGAL ALLUVION AND DILUVION REGULATION.

———Lankas in tidal and navigable river—Right to—Reformed land—Right of previous owner—Crown's right to ownership of river-bed—Rule. [*See* Q.D. 1941-1945, Vol. I, Col. 96.] PROVINCE OF MADRAS *v.* JAGANNADHA RAJU. 221 I.C. 324=1946 Mad. (Rul.) 38.

AMENDMENT. *See* (1) C. P. CODE, S. 152.
(2) OF PLEADINGS. *See* C. P. CODE, O. 6, R. 17.

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———*Absence of respondent—Appeal if can be allowed on that ground.*

No appeal can be allowed without dealing with the merits of the case. Where a respondent is absent, the appeal cannot be straightaway allowed. The appeal has to be examined and if found to be baseless has to be thrown out even though the respondent is absent. (*Sultan Ahmad, S.J.M. and Singhal, M.*) SHAMBHU OJAHA *v.* BHAGELU. 1947 A.W.R. (Rev.) 175 (1)=1948 R.D. 47.

———*Additional evidence—When to be allowed—Grounds.*

Parties should not be allowed to adduce additional or fresh evidence in appeal without sufficient reason and without any complaint from any party that he was prevented from adducing full evidence in the lower Court. To do so would be to set up an undesirable precedent and would tend to encourage the parties to believe that it is not obligatory on them to adduce all the evidence in the lower Court. Such an idea must be discouraged. (*Ananthakrishna Iyer, C.J. and Mampilli, J.*) CHIEF SECRETARY TO GOVERNMENT *v.* ANANTAKRISHNA IYER. 4 D.L.R. (Coch.) 164.

———*Admission by party's counsel on mixed question of fact and law—Party, if can resile from.*

An admission made by a party's counsel on a mixed question of law and fact in the trial Court can be resiled from by the party at the stage of appeal, if no part of the argument or evidence depended on the admission of the counsel and the opposite party was not prevented by that admission from placing the Court in possession of any facts. 22 Pat. 220, Dist. (*Kayani and Cornelius, JJ.*) JALLA *v.* NAURANGA. A.I.R. 1950 Lah. 62.

———*Appellate Court—Finding of fact—Interference—Finding based on inferences from facts.*

An appellate Court should, no doubt, attach great weight to the findings of fact of a Judge

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of first instance who sees and hears the witnesses and is in a position to assess their credibility from his own observation, and should be reluctant to interfere with such findings. But where the trial Judge bases his finding—and his opinion of a witness—on a theory derived from the documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached, the right of the appellate Court to review this inferential process cannot be denied. (*Lord MacDermott.*) Bank of India, Ltd. *v.* J. A. H. Chinoy. A.I.R. 1950 P.C. 90=77 I.A. 76 (P.C.).

———*Appellate Court—Finding of fact—Power to review evidence.*

An appellate Court is entitled to review the evidence and form its own conclusion on the evidence recorded in the case, although it has to attach great weight to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manners. 47 C. 1043, referred to. (*Sen, J.*) Mohanlal Jagannath *v.* Kashiram Gokul. I.L.R. (1950) Nag. 105=1950 N.L.J. 297=A.I.R. 1950 Nag. 71.

———*Appellate Court—Remand—When may be made—Inability of Court to make up its mind.*

Where the parties have produced all their evidence, the Court must decide the case as best it can. No Court is entitled to order a remand for rehearing of a case merely because it finds itself in some difficulty in making up its mind. (*Harries, C.J.*) Raj Narayan Kundu *v.* Sheikh Murad Ali. 52 C.W.N. 671.

———*Burden of proof—Alteration of judgment appealed from.*

In every appeal, it is incumbent upon the appellant to show some reason why the judgment appealed from should be disturbed. There must be some balance in his favour when all the circumstances are considered, to justify the alteration of the judgment that stands. 63 I.C. 898 and 65 I.C. 305, referred to. (*Das. C.J. and Harnam Singh, J.*) Governor-General in Council *v.* Indar Mani. 5 D.L.R. (Simla) 180=A.I.R. 1950 E. P. 296=52 P.L.R. 107.

———Competency—Order refusing to revoke probate of will—Appeal. *See* Mys. Probate and Administration Act, S. 84. 50 Mys.H.C.R. 317.

———*Competency—Plaintiff granted one of alternative reliefs claimed—If can appeal.*

It is doubtful if a general rule can be laid down that in all cases where an alternative relief has been granted, the plaintiff has no right of appeal for getting a decree for the other relief which he has claimed in the plaint. Where a plaintiff claims possession or in the alternative a mortgage decree by sale of the property, and the Court grants him a simple money decree, it cannot be said that the plaintiff has succeeded in getting one of the two reliefs claimed by him. (*Manohar Lall and Das, JJ.*) Amir Mahton *v.* Sheopujan Missir. 25 Pat. 1=221 I.C. 683=1946 Pat. (Rul.) 78=12 B.R. 218=A.I.R. 1946 Pat. 231.

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———*Competency—Small Cause Suit tried as original suit—Appeal—Jurisdiction of appellate Court.*

Where a Court wrongly acts under an appealable provision of law and passes an order a party is not deprived of the right of appeal though on the facts the order should not have been passed under that provision. When a suit of a small cause nature is tried as an original suit an appeal is competent. The appellate Court will in such a case have no jurisdiction to reverse the decree on merits but could entertain the appeal and send the case to be tried by the proper Court. (*Horwill and Satyanarayana Rao, JJ.*) Oor Nayakkan *v.* Arunachala Chettiar. 60 L.W. 774=1947 M.W.N. 702=A.I.R. 1948 Mad. 245 =(1947) 2 M.L.J. 496.

———*Competency—Suit for ejectment of lessee—Sub-lessee impleaded—Decree—Appeal by sub-lessee—Competency of—No appeal by lessee and decree becoming final as against him—Effect.*

A decree for ejectment passed against the lessee would be binding on the sub-lessee and can be executed against him even if sub-lessee were not made a party to the suit. But it cannot be said that he is not a proper party to the suit against the lessee as he is in actual possession, though he might not be a necessary party. Where the lessor (plaintiff) chooses to implead the sub-lessee also and obtains a decree for ejectment, it cannot be held that he is not adversely affected by the decree. In such a case he has a right of appeal. Where, however, the lessee does not file an appeal and the decree for ejectment becomes final, his lease gets determined; and the sub-lessee who has derived his rights from the lessee (his lessor) can no longer claim any rights based upon the lease, and cannot take up any defence by way of defence which might have been open to the lessee had he appealed. [1931 Lah. 614, dist. 1932 Cal. 241, ref.] (*Bhide, C.J. and Mehta, J.*) Shankar Rao Naik *v.* Kishanlal. 4 D.L.R. (M.B.) 18.

———*Court-fee—Appeal filed by several defendants having same interest and appearing by same proctor—One of them added as defendant subsequent to filing suit—Court-fee as on one appeal—If sufficient.*

An action for ejectment was brought against 11 defendants, who were all represented by one proctor. During the course of the proceedings, defendant No. 12 was added as a necessary party. He adopted the defence of the other defendants and elected to be represented by the same proctor. Judgment was given in the action for the plaintiff and all the defendants decided to appeal and one notice of appeal was given on their behalf by the same proctor who was still acting for them all.

Held, that although defendant No. 12 had been brought in as an added party, once he was brought in, his position was the same as though he had originally been made a defendant and as he had given a proxy to the same proctor and had adopted the defence of the other defendants, he was not in any different position to any one of the other eleven. He was acting jointly with them and there was never more than one appeal. Therefore the appeal petition was properly stamped although it bore a stamp sufficient to cover only one appeal. *(Lord Goddard.)* K. BILINDI *v.* W.A. THERO. 223 I.C. 617=12 B.R. 504=1946 P.C. (Rul.) 151=A.I.R. 1946 P.C. 48 (P.C.).

——*Cross-objections—Appeal against principal debtor and surety—Filing of cross-objections by surety—Abatement of appeal owing to death of principal debtor—Right of surety to argue his memorandum of cross-objections.*

In an appeal against a principal debtor and a surety, a memorandum of cross-objections was filed by the surety. As the principal debtor died during the pendency of the appeal, the appeal abated against him. On a question as to whether the surety was entitled to argue his memorandum of cross-objections,

Held, that the case against the principal debtor and the surety cannot be separated, the liability of the one being co-extensive with the liability of the other and when the appeal against the principal debtor has to be dismissed by reason of the abatement the appeal is no longer maintainable against the surety and so his memorandum of cross-objections has also to be dismissed. *(Horwill and Satyanarayana Rao, JJ.)* MUNICIPAL COUNCIL, CHICACOLE *v.* SATYANARAYANA SARMA. 60 L.W. 633=1947 M.W.N. 641=2 D.L.R. 607=(1947) 2 M.L.J. 339.

——*Decree for specific performance fixing time for deposit—Appellate Court dismissing appeal and confirming decree of lower Court—Time for deposit—If extended and fresh start provided.*

Where an appeal is preferred from a decree directing specific performance of a contract of sale of land and possession thereof on a deposit being made in Court by the plaintiff within a fixed period and is dismissed, the mere fact of such dismissal does not necessarily imply an extension of the time fixed for such deposit or provide a fresh starting point of time. When the appellate Court confirms the decree of the lower Court after dismissing the appeal, such confirmation gives rise to a fresh period during which the deposit can be made by the successful party. A fresh start and extension of time is necessarily implied in such confirmation. 1927 Pat. 345, Dist. 4 Pat. 378, foll. 18 All. 223; 25 Cal. 311; 26 C. W. N. 440; 31 Mad. 28, not foll. 15 Bom. 370; 27 I.A. 209, ref. 19 Bom. 259; 39 Bom. 175; 11 All. 346, rel. on. *(Shearer and Reuben, JJ.)* MT. SITA KUMARI *v.* RAMANATH NANIA. 4 D. L. R. (Pat.) 122=A.I.R. 1949 Pat. 514.

——*Duty of Court of first appeal to decide finally all questions of fact.*

The first appellate Court under the law is entrusted with a very important duty, *i.e.*, to decide finally all questions of fact on which the disposal of the suit might depend; that Court has to the best of its power, to weigh and balance the evidence, facts and considerations appearing on both sides. It must appear from the judgment of the lower appellate Court that it has made an honest endeavour to make a proper appraisement of the merits of the case put forward by the parties. The lower appellate Court should never make it appear that it has agreed with the trial Court simply because it was not inclined to take much trouble over the case. If that Court does not examine the facts and the evidence for itself and does not even mention the points which the case raises, it will be certainly failing in its duty. A.I.R. 1940 Pat. 33, ref. *(Reuben and Narayan, JJ.)* SAILAJANANDA PANDAY *v.* LAKHICHAND SAO. 30 P.L.T. 388.

——Finding of fact—Concurrent findings of fact are not likely to be disturbed in an appeal to the P.C. or S.C.; gross negligence is largely a question of fact. *(Oak, J.C.)* PANMAL *v.* NARAIN SINGH. A.I.R. 1950 Ajmer 62.

——*Finding of fact—Interference—Appreciation of evidence of witnesses.*

Where the trial Court, having had the advantage of seeing and hearing the witnesses in the box, has arrived at a finding of fact, an appellate Court which does not obviously have the same advantage will not lightly interfere with the finding or conclusion of the trial Court. *(Sankaran, Govinda Menon and Mathew Muricken, JJ.)* MUTTATHI PARAMBIL *v.* KURIA KOSE. A.I.R. 1950 T. C. 55 (F.B.).

——*Finding of fact—Interference—Defamation—Whether words complained amount to libel or no—Verdict of jury on—Interference.*

Where in a case of an action for damages for libel the words complained of are capable of a defamatory meaning, the issue of libel or no libel is purely one of fact, in other words one peculiarly within the province of the jury; but it does not follow that the verdict of the jury is altogether unassailable or that the Appellate Court cannot interfere with the finding of the trial Court on the question of fact. It is, of course, well-settled that such a verdict must not be disturbed lightly or merely because the reviewing or appellate tribunal would itself have arrived at a different conclusion; but a finding which reasonable men could not reach on the material available for their consideration has no special immunity. If the verdict or finding is such that no jury could have found as reasonable men, it cannot stand, and the appellate or reviewing Court can interfere with the same and set it aside. *(Lord MacDermott.)* SAMUEL SEWARD TODDINGS *v.* E. G. GIBBONS. 1948 A.L.J. 460=61 L.W. 752=A.I.R. 1949 P.C. 30=4 D.L.R. (P.C.) 60 (P.C.).

——Interference—Finding of act. Finding as to execution and attestation of will. [*See* Q.D. 1941—1945, Vol. I, Col. 102.] MANINDRA CHANDRA *v.* MAHALUXMI BANK, LTD. I.L.R. (1945) Kar. (P.C.) 225.

——*Finding of fact—Interference—Finding based on inference from facts.*

Where the trial Judge bases his finding—and his opinion of a witness—on a theory derived from the documents and a series of inferences and assumptions founded on a variety of facts and circumstances which, in themselves, offer no direct or positive support for the conclusion reached, the right of the appellate Court to review this inferential process cannot be denied. *(Lord MacDermott.)* BANK OF INDIA, LTD. *v.* J. A. H. CHINOY. 77 I.A. 76=A.I.R. 1950 P.C. 90.

——*Finding of fact—Interference by appellate Court—General principles.*

An appeal is a rehearing of the cause, but when the findings of a trial Judge are based upon his opinions of the credibility of witnesses he has seen and heard, which advantage is denied to an appellate Court, that Court should not interfere merely because it doubts the correctness of the findings and as a result of its own comparisons of the witnesses and its own view of the probabilities; but it can interfere if convinced that the trial Judge was wrong; if he has not subjected the evidence to an adequate scrutiny, has not carefully checked it by a critical examination of the whole of the evidence and, had he done so, a different conclusion would have followed; and if there are determinant and indisputable facts, such as some conclusive document or documents, or other *data* which constitute positive evidence falsifying the findings by refusing the oral evidence of a witness who has been believed or, it follows, confirming the evidence of a witness who has been disbelieved. (*Gentle and Ormond, JJ.*) DAKHINESWAR SARKAR *v.* RATHINDRA NATH MUKHERJI. I.L.R. (1947) 1 Cal. 509.

——*Finding of fact—Interference—Power of appellate Court—Finding of trial Court on evidence—Weight to be attached—Power of appellate Court to reverse finding of trial Court.*

It is not open to a Court of appeal to set aside a finding of a trial Court unless it appears unmistakably from the evidence that in reaching his conclusions the trial Court has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of the circumstances admitted or proved. Though the appellate Court is free to reverse his conclusions if the grounds given by him are unsatisfactory by reason of material inconsistencies or inaccuracies or if he has misdirected himself in law, the greatest weight should be attached to his opinion because he saw and heard the witnesses. (1949) 1 M.L.J. 97, ref.

Das, J.—Considerable weight is to be attached to the view of the trial Court on the evidence. (*Das and Panigrahi, JJ.*) RAJKISHORE MOHANTY *v.* BANBEHARI PATNAIK. I.L.R. (1949) Cut. 593.

——*Finding of fact—Interference—Power to review evidence.*

An appellate Court is entitled to review the evidence and form its own conclusions on the evidence recorded in the case, although it has to attach great weight to the opinion of the Judge of the primary Court who had the advantage of seeing the witnesses and noticing their look and manners. 47 C. 1043, referred to. (*Sen, J.*) I.L.R. (1950) Nag. 105=A.I.R. 1950 Nag. MOHANLAL JAGANNATH *v.* KASHIRAM GOKUL. 71=1950 N.L.J. 297.

——*Finding of fact—Interference—When justified.*

It is true that a Judge of first instance can never be treated as infallible in determining on which side the truth lies, and like other tribunals he may go wrong on questions of fact; but on such matters if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at, the appellate Court should not lightly interfere with the judgment, unless very cogent grounds exist for reversing that conclusion. (*Kania, C.J., Mahajan, Fazl Ali and Mukkerjea, JJ.*) MADHOLAL SINDHU *v.* OFFICIAL ASSIGNEE OF BOMBAY. 1949 F.C.R. 441=A.I.R. 1950 F.C. 21=1949 F.L.J. 374=4 D.L.R. (F.C.) 182=51 Bom.L.R. 906 (F.C.).

——*Finding of fact—Trial Court—Court hearing oral evidence and inspecting locality as to boundary and arriving at finding—Interference in appeal.*

When the question is as to what was the boundary fixed in respect of a certain tribal area, and facts have been fully and carefully investigated by the trial Court which not only heard the oral evidence but also inspected the locality and formed conclusions on the spot, the appellate Court would be very reluctant to reject the conclusions of the trial Court on the question of fact. (*Lord Simonds.*) HAYIBOR TEPRE *v.* DAMANKA IV. 3 D.L.R. (P.C.) 61.

——*Finding of fact by trial Court on evidence—Interference by appellate Court on conjectures and surmises—Propriety.*

A finding of fact arrived at by the trial Court after examination of the evidence placed before it should not be set aside by the appellate Court on a mere hypothesis that another version is likely or on mere surmises. Conjectures and surmises are no substitutes for proof and findings of fact, arrived at by the trial Court on evidence properly before it, should not be lightly set aside on speculation by the appellate Court. If the appellate Court in such circumstances reverses the trial Court's findings, it acts erroneously and the findings of the appellate Court cannot be final as they are vitiated by absence of facts to support it. (*Ray, C.J. and Panigrahi, J.*) KHUDRAT ALI *v.* HADU MAHOMED. I.L.R. (1949) Cut. 534.

——*Findings of fact—When entitled to weight—Trial Court misdirecting itself and not commenting on demeanour of witnesses but forming opinions on inferential basis—Interference—If justified.*

Though the appellate Court, as a general rule, will not lightly interfere with the findings of the trial Court on questions of fact, where the trial Court has misdirected itself in arriving at its conclusions, and when its opinions on the credibility of the witnesses are based on an inferential reasoning and not on that demeanour and bearing in the box, the findings of the trial Court are not of much weight so as to be immune from interference in appeal. In such cases the appellate Court is in as good a position to judge of the matter as the trial Court. (*Venkataranga Iyengar and Medapa, JJ.*) MUNIYELLAPPA *v.* VENKATAMMA. 53 Mys.H.C.R. 80=28 Mys.L.J. 124.

——Findings of fact not drawn from demeanour of witnesses—Interference. [*See* Q.D. 1941-1945, Vol. I, Col. 97.] AL. VR. ST. VIRAPPA CHETTIAR *v.* PERIA KARUPPAN CHETTIAR. 221 I.C. 451=12 B.R. 231=1946 P.C. (Rul.) 85=I.L.R. (1945) Kar. (P.C.) 174 (P.C.).

——Interference—Admission of secondary evidence by trial Court—Discretion—Interference in appeal. *See* EVIDENCE ACT, S. 65. 47 Bom.L.R. 962.

———*Interference—Appreciation of evidence—Finding of trial Court about credibility of witness—Value of.*

While a finding that a witness is speaking the truth, is of the greatest value when it is made by a Judge who saw all the witnesses or at least the most important witnesses on each side, such a finding by a Judge who saw none of the witnesses is of small value. *(Lord Normand.)* PEARY LAL *v.* NANAK CHAND. 50 Bom.L.R. 643=1948 A.L.J. 231=3 D.L.R. (P.C.) 16=A.I.R. 1948 P.C. 108=61 L.W. 437=52 C.W.N. 785 (P.C.).

———*Interference—Application of evidence—Opinion of trial judge.*

The rule that an appellate Court should not ordinarily disturb the opinion of the trial Judge as regards those witnesses whose evidence he has recorded himself, is not so inflexible as to deprive an appellate Court of its legitimate powers even if it feels satisfied that the trial judge has evidently gone wrong in the matter. *(Din Mahomed and Mahomed Sharif, JJ.)* SETH GANGASAGAR *v.* INAM ILAHI. 224 I.C. 117=1946 Lah. (Rul.) 325=48 P.L.R. 195=A.I.R. 1946 Lah. 387.

———*Interference—Damages for tort for injury or mental or nervous shock—Award by Trial Court—Interference by Appellate Court—When justified.*

An appellate Court will not usually interfere with an award of general damages by the trial Court in respect of injury or mental or nervous shock. Pain and mental suffering cannot be measured in terms of money or money's worth and unless the award of damages by the trial Court is so grossly unreasonable, outrageous or obviously wrong as to shock the conscience, the appellate Court will not ordinarily interfere. The mere fact that the appellate Court might if it had tried the suit have awarded a slightly greater or lesser amount would not be a sufficient ground to disturb the trial Court's award. *(Vivian Bose and Sen, JJ.)* GOVERNOR-GENERAL-IN-COUNCIL *v.* SURAJMAL. I.L.R. (1948) Nag. 989=A.I.R. 1949 Nag. 256=1949 N.L.J. 44=3 D.L.R. (Nag.) 98.

———Interference—Discretion of lower Court exercised correctly—If can be interfered with. *See* PRACTICE—DUTY OF COURT. 4 D.L.R. (A.M.) 28.

———*Interference—Discretion of lower Court—Appellate Court holding different view as to proper order to be made in the case to that of the lower Court—Sufficiency.*

An Appellate Court is not justified in interfering with the exercise of discretion by the lower Court on the mere ground of a difference of opinion between the appellate Court and the lower Court as to the proper order to make in the case. That is not a sufficient ground for interference. There must be something more, namely, that there has been an unjudicial exercise of discretion or an exercise of discretion which no Court could reasonably do whereby an injustice has been done to a party. *(Lord Roche.)* H. K. SHAH *v.* OSMAN ALLU. 2 D.L.R. 100 (P.C.).

———*Interference—Discretion of trial Court—When to be reversed.*

While an appellate Court is always reluctant to interfere with the discretion of a trial Court, where the trial Court has not given proper weight to considerations which should be decisive in determining the relief to be granted, and its judgment does not contain sufficient findings of fact to support its conclusions, the appellate Court would properly interfere with the decision of the trial Court. *(Lord Simonds.)* JOSEPH KLEIN *v.* ELIAHU. 3 D.L.R. (P.C.) 14=A.I.R. 1949 P.C. 53.

———*Interference—Duty of Appellate Court—Reference to and reliance on judgment not operating as* res judicata *and reversal on basis of—Propriety and legality.*

Once it is held that the decision in a previous suit between the parties has not the effect of *res judicata* and does not bar the trial of an issue in the later suit, that judgment has absolutely no relevancy, and affords no justification for an appellate Court for setting aside the judgment of the trial Court who has arrived at his own conclusion in the later suit on the evidence in the case before him. An appellate judgment which sets aside the judgment of the trial Judge simply because the appellate Court had previously expressed different opinions from those expressed by the trial Judge cannot be approved or upheld. It is illegal for an appellate Court to reverse the decision of the trial Judge on surmises and conjectures without any foundation in the evidence of either of the parties. *(Kania, C.J., Mahajan, Fazl Ali and Mukherjea, JJ.)* MADHOLAL SINDHU *v.* OFFCIAL ASSIGNEE OF BOMBAY. 1949 F.L.J. 374=4 D.L.R. (F.C.) 182=1949 F.C.R. 441=A.I.R. 1950 F.C. 21=51 Bom.L.R. 906 (F.C.).

———*Interference—Question of fact—Principles which should guide the appellate Court in deciding whether to reverse the trial Judge on a question of fact.*

The principles which should guide the High Court in deciding whether to reverse the trial Judge on a question of fact are these:

(1) Where a question of fact has been tried by a Judge without a jury and there is no question of misdirection of himself by the Judge, an Appellate Court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial Judge's conclusion.

(2) The Appellate Court may take the view that without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

(3) The Appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the Appellate Court. *(Lord Morton.)* PREM SINGH HYANKI *v.* DEB SINGH

Bisht. 60 L.W. 784=1947 A.L.J. 613=2 D.L.R. 354=1948 A.L.W. 5=A.I.R. 1948 P.C. 20=1948 O.W.N. 33 (P.C.).

———*Interference—Power of appellate Court—Finding of trial Court on evidence—Weight to be attached—Power of appellate Court to reverse finding of trial Court.*

It is not open to a Court of appeal to set aside a finding of a trial Court unless it appears unmistakably from the evidence that in reaching his conclusions the trial Court has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of the circumstances admitted or proved. Though the appellate Court is free to reverse his conclusions if the grounds given by him are unsatisfactory by reason of material inconsistencies or inaccuracies or if he has misdirected himself in law, the greatest weight should be attached to his opinion because he saw and heard the witnesses. (1949) 1 M.L.J. 97, ref.

Das, J.—Considerable weight is to be attached to the view of the trial Court on the evidence. (*Das and Panigrahi, JJ.*) Rajkishore Mohanty *v.* Banbehari Patnaik. I.L.R. (1949) Cut. 593.

———*Interference—Powers of Appellate Court—Interference with findings of trial Court—Rule as to—Limits of rule.*

The general rule is that a lower appellate Court should not discard the finding of the trial Court which has, by its personal observation of the demeanour of witnesses, special means of assessing the value of their evidence. But this rule is not intended to supersede the general rule that a finding of fact given by a lower appellate Court should be accepted unless it is perverse or based on no evidence or involves a legal misconception. The lower appellate Court is entitled on the same evidence to come to a conclusion different from that of the trial Court. 1939 R.D. 325, referred. (*Lal, J.M. I and Faiyaz Ali, J.M. II.*) Qabdul *v.* Ramdas. 1949 R.D. 394.

———*Interference—Powers of an appellate Court to differ from trial Court in regard to appreciation of evidence.*

The general rule that it is not safe for an appellate Court to disbelieve the evidence and upset the judgment of the trial Court based on inference drawn from the evidence and demeanour of the witnesses would not apply to a case where the trial Court has not recorded any notes in the statements of witnesses about their demeanour. 1939 R.D. 216, dist. (*Faiyaz Ali, J.M. II.*) Bhikha *v.* Launga. 1949 R.D. 413.

———*Interference — Restitution — Interest on mesne profits allowed at 12 per cent.—Appellate Court reducing interest to 6 per cent.—If unauthorised.*

The appellate Court has power to reduce interest on mesne profits from 12 per cent. per annum awarded by the original Court in restitution proceedings to 6 per cent. which is the Court's rate. (*Sir Madhavan Nair.*) Mehr Chand *v.* Shiblal. 3 D.L.R. (P.C.) 44=A.I.R. 1948 P.C. 178.

———Interference—Sufficiency of evidence—Finding of Appellate Court—Power of Appellate Court to interfere—Appeal from order granting review. *See* C. P. Code, O. 47, R. 4 (2), Proviso (*b*). 4 D.L.R. (Nag.) 108.

———Interference—Trial Court's oservations as to demeanour of witness—Value of—Trial Judge himself examining and cross-examining witness—Effect. *See* Practice—Procedure. 4 D.L.R. (Bom.) 84.

———*Main judgment delivered in one of two connected second appeals—One L. P. Appeal filed mentioning numbers of both second appeals and paying full Court-fee—Whether may be treated as two memoranda of appeal.*

There were two connected second appeals. The main judgment was delivered in one of them, and reference was made to that judgment in the judgment delivered in the other. A Letters Patent Appeal was filed paying full court-fee and the memorandum of appeal not only mentioned the numbers of the two second appeals, but the grounds mentioned therein were also common to both.

Held, that it might be treated as two memoranda of appeal on the same paper. (*Bose and Mangalmurti, JJ.*) Rambhau *v.* Nagarmal. I.L.R. (1947) Nag. 674=A.I.R. 1948 Nag. 94=1948 N.L.J. 54.

———Maintainability. *See* Appeal—Competency.

———*New law coming into force prior to disposal of—Law to be applied by the appellate Court.*

An appellate Court is bound to take into account the state of law as it exists on the date when the appeal comes up for hearing. (*Wanchoo and Seth, JJ.*) Niranjan Lal Bhargava *v.* Mt. Ram Kali Devi. 5 D.L.R. (All.) 173=1950 A.L.J. 642=A.I.R. 1950 A. 396.

———*New plea.*

A point not taken in a Court below will not be permitted to be raised in the Appellate Court except possibly where the point may be described as involving a question of public policy, and then too the point will be allowed to be argued only if it can be decided upon the materials before the Court and does not involve a decision of a question of fact. 1931 All. 35 Foll. (*Lal, J.M. I.*) Maluka *v.* Rati Ram. 1949 R.D. 231.

———*New plea—Amendment of plaint—Application for, becoming infructuous owing to position taken up by plaintiff—Plea in appeal challenging rejection of amendment application—Maintainability.*

Where a plaintiff takes up a position at the trial which renders his application for amendment of the plaint unnecessary, it would not be open to him to urge in appeal that he was induced to take up that position because his application for amendment of the plaint was rejected. Nor can he be permitted to change his position once again in appeal and to introduce a new point or points and thus ask for a remand of the case for a retrial. (*Ghulam Hasan, C.J. and Kaul, J.*) Raj Brijraj Singh *v.* Shatranjai Singh. 21 Luck. 463=226 I.C. 154=1946 Oudh (Rul.) 220=A.I.R. 1947 Oudh 45.

———*New plea—Bar of O. 2, R. 2, C. P. Code—Mixed plea of law and fact.*

Any plea based on the bar contained in O. 2, R. 2, C. P. Code involves a statement of fact and is therefore a mixed plea of law and fact and as such it cannot be raised in appeal and the evidence recorded cannot be looked into. (*Pollock and Hidayatullah, JJ.*) Amarsingh Gajjan Singh *v.* Tulsiram Dayal. I.L.R. (1948) Nag. 853=1948 N.L.J. 277=A.I.R. 1949 Nag. 195.

———*New plea—Bar of R. 9 of O. 9, C. P. Code—If can be raised.*

A plea as to the bar under R. 9 of O. 9, C. P. Code, which has not been specifically raised in the lower Courts and is mentioned for the first time only in the grounds of second appeal cannot be allowed to be raised, particularly, when the materials necessary for the decision of the point are all not on record. (*Prasad, J. M. II.*) Bharosey *v.* Tulsi. 1950 R.D. 5.

———*New plea—Bar under Art.* 35 (11), *Provincial Small Cause Courts Act—If can be raised for first time in second appeal or revision.*

The question whether the bar under Art. 35 (11), Provincial Small Cause Courts Act on the ground of the act of removal of profits being wrongful is not a pure question of law and hence a plea of the bar under that Article cannot be raised for the first time in second appeal or revision, when it has not been pleaded in any of the Courts below. (*Reuben and Das, JJ.*) Raja Ram Singh *v.* Kanhaya Rai. 5 D.L.R. (Pat.) 177=A.I.R. 1950 Pat. 284.

———*New plea—Ejectment suit—Plea of want of proper notice to quit under S.* 106, *Transfer of Property Act—If can be taken for first time in appeal or second appeal—Party succeeding on technical plea in appeal—Costs.*

A plea of want of proper notice to quit under S. 106, Transfer of Property Act, in a suit for ejectment can be raised at any time, and even in the Court of appeal and second appeal. But the defendant who succeeds on such a technical point not raised in the lower Courts cannot be given costs. 13 Mys.C.C.R. 207; 20 Mys.L.J. 194, ref. (*Balakrishnaiya and Mallappa, JJ.*) Siddarama Setty *v.* Kalappa. 5 D.L.R. (Mys.) 52=A.I.R. 1950 Mys. 63.

———*New plea—If can be allowed in appeal.*

The procedure of allowing parties to adduce evidence on points which arise on the evidence led by the parties but were not raised in the pleadings or issues is irregular and should not be allowed without amending the pleadings and raising the necessary issues. To allow in appeal a new case which is an after thought, it having never been alleged or even suggested in the pleadings or issues, is contrary to the rules of procedure. (*Venkataramana Rao, C.J. and Venkataramaiya, J.*) United Pictures *v.* Anjaneyalu. 52 Mys. H. C. R. 56.

———*New plea—If can be allowed to be raised in appeal when it involves taking of additional evidence.*

A new plea that a suit was not maintainable as the subject-matter was governed by S. 47 of the C. P. Code cannot be allowed to be raised in the appellate Court for the first time where that would involve the necessity for letting in further evidence and also an investigation into the various alienations. (*Kuppuswamy Ayyar, J.*) Kamaraju *v.* Mallayya. 59 L.W. 699=1947 M.W.N. 35=A.I.R. 1947 Mad. 194=(1946) 2 M.L.J. 432.

———New plea—Landlord and tenant—Ejectment suit—Decree—Execution—Appeal—Claim of right to remove trees—If can be entertained and allowed. *See* T. P. Act, S. 108 (*h*). 4 D.L.R. (Bom.) 204.

———*New plea—Letters Patent appeal—If can be raised in.*

A party would not be allowed to raise a new point in the High Court in Letters Patent appeal and particularly when it raises questions of fact. (*Malik, C.J. and Bhargava, J.*) K. R. Sardar Singh *v.* Hardwargir. 1948 A.W.R. 236 (1)=A.I.R. 1949 A. 608=1949 A.L.J. 135.

———*New plea—Letters Patent Appeal—Plea not raised in second appeal—If can be raised.*

A new plea, not raised in second appeal, cannot be raised for the first time in Letters Patent Appeal. (*Pollock and Padhye, JJ.*) Vinkar Mandal *v.* Narayanarao. I.L.R. (1948) Nag. 449=2 D.L.R. 921=A.I.R. 1948 Nag. 327=1948 N.L.J. 285.

———*New plea—No question of jurisdiction or principle involved—Question of fact—If can be raised in appeal for first time.*

Where a new point is raised for the first time in appeal and the question involved in it is not one of jurisdiction or of any particular principle but one essentially of fact, it ought not to be allowed to be raised. (*Sinha and Mootham, JJ.*) Badam Khan *v.* Maharaj Suraj Narain. 1947 A.W.R. (H.C.) 81=1947 A. L. J. 40=1947 A.L.W. 140=A.I.R. 1947 A. 299.

———*New plea—Objection to admissibility of document for want of registration.*

An objection to the admissibility of a document on legal grounds (*e.g.*) want of registration, may always be taken in appeal. (*Cornelius, J.*) Munshi Ram *v.* Baisakhi Ram. 49 P.L.R 79=A.I.R. 1947 Lah. 335.

———*New plea—Objection to admissibility of secondary evidence.*

When a document is tendered and no objection whatever is taken to it either as to its being secondary evidence or as to its being tendered in circumstances, that would justify its being received as secondary evidence, it is too late in appeal to take the point that it should not have been received. A.I.R. 1937 Nag. 13, foll. (*Bhandari, J.*) Mt. Gurdevi *v.* Mangal Ram. 52 P.L.R. 14.

———*New plea—Permissibility.*

A new plea which was never raised in the Court below, and which requires investigation into facts and evidence cannot be permitted for the first time in appeal, so as to allow the appellant to resile from the position taken in the trial Court. (*Govinda Menon and Muricken, JJ.*) Koyakkutti *v.* Kunhipathu. A.I.R. 1950 T. C. 33.

———New plea—Plea of abandonment—When to be raised—Question of fact. See Trav. Lim. Act, Art. 164. (1950) K.L.T. 1.

———*New plea—Plea of jurisdiction.*

If it appears to an Appellate Court that an order against which an appeal is brought has been made without jurisdiction, it can never be too late to admit and give effect to the plea that the order is a nullity. (*Lord Simonds.*) Kwame Asante *v.* Kwame Tawa. A.I.R. 1949 P.C. 171=4 D.L.R. (P.C.) 209.

———*New plea—Plea of jurisdiction involving questions of fact—If can be raised in appeal for the first time.*

Where a question of jurisdiction is not a pure question of law but depends upon proof of facts, a plea as to jurisdiction cannot be allowed to be raised for the first time in appeal. (*Ghulam Hasan, C.J. and Kidwai, J.*) Ram Pheran *v.* Sri Ram. 22 Luck. 164=230 I.C. 50=1947 Oudh (Rul.) 107=1947 O.A. (C.C.) 23=1947 A.W.R. (C.C.) 23=1947 O.W.N. 59=A.I.R. 1947 Oudh 174.

———*New plea—Plea of limitation.*

A plea of limitation, where it is not a pure question of law, will not be permitted to be argued in appeal, if it was not raised in the trial Court and it has not been set up in the grounds of appeal. (*Bhandari and Harnam Singh, JJ.*) Gopal Fateh Singh *v.* Sis Ram. A.I.R. 1949 E. P. 283.

———*New plea—Plea of limitation—Permissibility.*

A plea of limitation cannot be taken for the first time in appeal, when it has not been raised in the trial Court. (*Kidwai, J.*) Ram Sukh *v.* Ram Pher. 1946 O.A. (C.C.) 228=1946 A. W.R. (C.C.) 228=1946 O.W.N. 341=227 I. C. 577=1947 Oudh (Rul.) 8=A.I.R. 1947 Oudh 91.

———*New plea—Plea of non-joinder—If maintainable for first time.*

A plea that a necessary party has not been impleaded in the suit and that the suit could not proceed in his absence, which was not taken in the Court below and on which no issue was framed cannot be raised for the first time in appeal. (*Shearer and Das, JJ.*) Gangamoni Devi *v.* Chandra Mazumdar. A.I.R. 1950 Pat. 478.

———*New plea—Plea of* res judicata *raised in trial Court not pressed—If can be raised in appeal.*

Where a plea of *res judicata* though raised was not pressed in the trial Court in view of the state of the law then can be raised once again in appeal when there is a change in law and all the necessary evidence to substantiate the plea is on the record in as much as there is no prejudice to the other party. (*Kidwai, J.*) Husain Mirza *v.* Raghubar Dayal. 22 Luck. 37=228 I. C. 225=1947 Oudh (Rul.) 22=1946 O.W.N. 349=1946 A.W.R. (C.C.) 257=1946 O.A. (C. C.) 257=A.I.R. 1947 Oudh 122.

———*New plea—Plea that suit is premature—If can be raised for first time in second appeal.*

Where a point involved cannot be considered to be a point of mere law, it would not be proper to permit an appellant to raise and agitate the point for the first time in second appeal; to so permit it would work hardship on the opposite side. A plea that the suit is premature, which for its determination, depends upon the construction of a document and the subsequent acts and conduct of the parties, cannot be raised for the first time in second appeal. 1948 T.L.R. 174, ref. (*Koshi and Muricken, JJ.*) Kuruvilla Thoma *v.* Govinda Menon. 1950 K.L.T. 19=5 D.L.R. (T. C.) 344.

———New plea—Plea under S. 18, Limitation Act—Raising in Letters Patent Appeal. *See* C. P. Code, S. 151 and O. 21, R. 90. (1947) 1 M.L.J. 10.

———*New plea—Point not raised in pleadings—If can be raised in appeal.*

A point which was never put in issue and on which the other party was never called upon to plead or adduce evidence cannot be raised in appeal. A party cannot be allowed to proceed upon a claim which is outside their pleadings. (*Sinha and Reuben, JJ.*) Murlimanohar Prasad Singh *v.* Ramlakhan Singh. 224 I. C. 177=12 B.R. 489=1946 Pat. (Rul.) 264.

———*New plea—Point not specifically pleaded by defendant in suit but fair notice given to plaintiff.*

Although a point has not been specifically pleaded by the defendant in the suit, the appellate Court will not stress the structure of the pleadings in the suit too strictly if fair notice of the case to be made out by the defendant had been given to the plaintiff. (*Pollock and Shevde, JJ.*) Hazarilal *v.* Halkulal. I.L.R. (1948) Nag. 662=A.I.R. 1948 Nag. 236=1949 N.L.J. 22.

———*New plea—Point of limitation not raised at trial or in memo of appeal—If can be permitted at stage of arguments.*

A new plea of limitation, which was not raised in the trial Court not set out in the grounds of appeal cannot be permitted to be raised in the course of arguments in appeal, when it is not a pure question of law, but involves investigation into further facts. [1932 P.C. 118, dist.] (*Bhandari and Harnam Singh, JJ.*) Sri Gopal *v.* Sis Ram. 4 D.L.R. (Simla) 226.

———*New plea—Privy Council appeal—Defendant resting his defence in Courts in India on right by title—Whether can plead before Privy Council claim based on possession.*

Where in a suit for possession of certain properties the defendant rested his defence on his right by title in the Courts in India which found against him and in favour of the plaintiff, he cannot in appeal before the Privy Council depart altogether from the only ground upon which he maintained his defence in the Courts in India and attempt to found his appeal against the decision of those Courts on a claim based upon possession, a ground which was neither maintained nor maintainable upon the pleadings in those Courts. (*Lord Normand.*) Nataraja Pillai *v.* Subbaraya Chettiar. 62 L.W. 40=A.I.R. 1949 P. C. 43=4 D.L.R. (P.C.) 109=(1949) 1 M.L. J. 134 (P.C.).

———New plea—Pure question of law. [*See* Q.D. 1941-1945, Vol. I, Col. 110.] Badrinarain *v.* Beni Madho. 18 R.P. 153.

———*New plea—Question of fact—Validity of lease granted by managing shebait to other shebaits.*

The question whether a lease granted by a managing shebait to the other shebaits is valid or not ought not to be allowed to be raised for the first time at the appellate stage, as it may be necessary to investigate facts. (*Mitter and Amiruddin Ahmad, JJ.*) GOSTHA BEHARI DE *v.* PURNA CHANDRA DE. 82 C.L.J. 327=A.I.R. 1948 Cal. 219.

———*New plea—Right of appellant to withdraw from position finally taken up in trial Court.*

It is not open to an appellant to withdraw in appeal from a position finally taken up by him in the trial Court, though that position was taken up in the belief that it would be favourable to him. (*Lord Simonds.*) HAYIBOR TEPRE *v.* DAMANKA IV. 3 D.L.R. (P.C.) 61.

———*New plea—Second appeal—Legal necessity for sale—Plea that mortgage to discharge which sale is effected is invalid.*

Where the legal necessity for a sale was the discharge of a prior mortgage, it is not open to the appellant to attack the validity of the mortgage in second appeal when its validity was not challenged in the plaint or earlier. (*Passey, J.*) MOHAN SINGH *v.* SEWA SINGH. 5 D. L. R. (Pepsu) 31=A.I.R. 1950 (Pepsu) 42.

———*New plea—Second appeal—Plea of adverse possession.*

In the absence of a plea of adverse possession in the Courts below, it is not open to the appellant to raise that plea in second appeal. 2 C. 418, 31 M. 531 & 13 L. 677, foll. (*Sen, J.*) CHANDEL *v.* HIRALAL. I.L.R. (1949) Nag. 883.

———New plea—Second appeal. *See also* C. P. CODE, S. 100—NEW PLEA.

———*New plea—Second appeal—Point not pressed in trial Court and first appellate Court—If can be raised afresh in second appeal at hearing.*

Where a point is not pressed either in the trial Court or in the first appellate Court, though raised in the memo of appeal to that Court, it is not permissible to the appellant to raise that point afresh at the hearing in second appeal and ask for a remand of the suit on that point, when the point pressed by him in two Courts turns out to be unfavourable to him. (*Nagarkar, J.C.*) ZORA *v.* JAWAHAR NATH. 3 D.L.R. (Aj. Mer.) 39.

———*New plea—Second appeal—Point of law—If can be raised.*

A pure point of law may be raised in second appeal for the first, even when not raised in either of the Courts below. (*Shearer and Imam, JJ.*) RAMBILAS *v.* LOKENATH. 27 Pat. 143=A.I.R. 1949 Pat. 405.

———*New plea—Second appeal—Shifting of basis of claim in suit.*

A plaintiff who has set up a claim to property as heir in both the Courts below, cannot shift the basis of his claim in second appeal and claim the property in his own right. (*Reuben and Imam, JJ.*) KALA DEVI *v.* KHELU RAI. A.I.R. 1949 Pat. 124.

———*New plea—Suit for declaration of title on ground of purchase and for possession—Defendant setting up prior agreement to sell in his favour—Suit decreed against him—New plea by him in appeal that he is tenant and is entitled to notice to quit—Permissibility.*

Where in a suit for a declaration of title of the plaintiff to a certain land on the ground of his purchase and for *khas* possession, the defendant contends that he has acquired title by virtue of a prior agreement to sell to him, and the Court of first instance decrees the suit against him, he cannot set up a new plea in appeal that he is a tenant and that a notice to quit is necessary. (*Lodge, C.J. and Thadani, J.*) KASEM ALI SARKAR *v.* BAHAJUDDIN SHEIKH. A.I.R. 1949 Assam 22.

———*New plea—Suit for specific performance—Plea that agreement was not complete until drawn up in writing.*

In a suit for specific performance, a plea that it was contemplated by the parties that the agreement was not to be considered as complete and binding until it was drawn up in writing and executed, cannot be taken for the first time in appeal. (*Lord Du Parcq.*) SHANKARLAL NARAYANDAS *v.* NEW MOFUSSIL CO., LTD. 73 I.A. 98=I.L.R. (1946) Bom. 694=I.L.R. (1946) Kar. (P.C.) 94=1947 A.L.W. 109=224 I.C. 598=59 L.W. 370=12 B.R. 596=48 Bom.L.R. 456=1946 A.L.J. 326=1946 P.C. (Rul.) 198=1946 M.W.N. 598=48 P.L.R. 450=1946 O.A. (P.C.) 160=1946 A.W.R. (P.C.) 160=50 C.W.N. 603=A.I.R. 1946 P.C. 97=(1946) 2 M.L.J. 259 (P.C.).

———*New plea—Suit on promissory note by endorsee—Payee party to suit—Plea that endorsement not formally proved—If sustainable in appeal.*

Where the promisee of a promissory note is a party on record, and the note also in Court, the plea in appeal about the absence of formal proof of the endorsement of the instrument in favour of the plaintiff is not worthy of consideration and has to be rejected. (*Koshi and Govinda Pillay, JJ.*) K. KOCHIDICHANDI *v.* GHEEVARUGHESE. A.I.R. 1950 (T.C.) 11.

———*New plea—When can be raised—Question of jurisdiction.*

If it appears to a Court that an order against which an appeal is brought has been made without jurisdiction, it can never be too late to admit and give effect to the plea that the order is a nullity. A plea of want of jurisdiction though abandoned in one court, can be raised in another and could be entertained although not specifically raised. I.L.R. 53 Cal. 88; 41 I.A. 197, rel. on. (*Bannerji, J.C.*) DAULATIA *v.* JAIYA. A.I.R. 1950 H.P. 36.

———*Parties—Decree in favour of several plaintiffs—One of them not impleaded as respondent—Order reversing decree—Legality.*

In an appeal from a decree passed in favour of several plaintiffs, the Appellate Court has no jurisdiction to reverse the decree when one of the plaintiffs has not been impleaded as a respondent in the appeal. (*Manohar Lall, J.*) RAM DAS SINGH *v.* RAM ANUPLAL. A.I.R. 1949 Pat. 90.

———*Parties—Karta of family impleaded as respondent—Minor sons, if must also be impleaded.*

Where the karta of a family is impleaded as respondent in an appeal, it is not necessary to implead his minor sons separately, particularly when no appearance was put in the Lower Court on behalf of the minors and in the decree that has been prepared, against which the appeal has been filed, the names of the minors do not appear and the decree is in favour of the respondent alone. (*Malik, C.J. and Bind Basni Prasad, J.*) MT. SAHODRA *v.* RAM BABOO. A.I.R. 1949 All. 49=1949 A.W.R. 94.

———Parties—Powers of appellate Court—Transposition of respondent to category of appellant. *See* C. P. CODE, O. 1, R. 10 AND O. 41, RR. 4 AND 33. A.I.R. 1949 Pat. 309.

———*Presentation to Judge in his house—If proper presentation—Acceptance—Matter of discretion.*

The presentation of the plaint or memorandum of appeal after the usual Court hours is a valid presentation and the Judge has jurisdiction to receive the same. But it is at the discretion of the Judge to accept it or not. He is not obliged to accept it. (*Kidwai, J.*) MT. LAKSHMI DEVI *v.* TARA BAI. A.I.R. 1950 All. 104.

———*Remand—Appeal beyond jurisdiction of Court—Order of remand—If nullity—Proceedings on remand—Legality.*

Where an appellate Court cannot entertain an appeal because the value of the suit from which the appeal arises exceeds the limits of its pecuniary jurisdiction, but it entertains and disposes of the appeal and orders a remand, the order of remand is a nullity, and all subsequent proceedings taken upon such remand are void and have no legal effect. 29 T.L.J. 1043, rel. (*Krishna Pillai, C. J., and Habeeb Mahomad, J.*) P. C. VARGHESE *v.* CHACKI PAPPI. 5 D.L.R. (T.C.) 417.

———*Remand—Grounds for—Trial Court framing issue and taking all evidence adduced by both parties and coming to a finding after consideration of all evidence—Remand and direction by Appellate Court to reconsider evidence—Propriety of.*

Where the Trial Court has framed an express issue on a material point in the case, and evidence has been adduced by both the parties upon that point, and the Trial Court in its judgment has taken great pains to deal with all the evidence in the case, the Court of First Appeal is not justified in remanding the case after setting aside the finding of the Trial Court or to direct that Court to reconsider the evidence. There is no point in such a case in compelling the Trial Court to review the evidence again in the hope that, perhaps, it might come to a different finding on that point of fact. The First Appellate Court being itself a Court of Fact, and having all the evidence in the case to face it, is entitled on that evidence to come to a different finding or a contrary finding on that evidence if, in its opinion, the Trial Court's finding was wrong. A remand order in such circumstances is unjustified. (*Shearer and Reuben, JJ.*) PURNA CHANDRA *v.* GOBINDA. 27 Pat. 572.

———*Remand — Request by defendant-appellant in appeal for purpose of adducing evidence—Grant of—Consideration—Defendant failing to adduce evidence in spite of adjournments and in spite of warning by Court—Right of—Absence of* bona fides.

Where the defendants-appellants were found, from the progress-diary in the case, to have taken several adjournments for adducing evidence, and that off and on were only making half-hearted attempts to take steps for some witnesses, but that in spite of the warning of the Court below at the final stage that no further time would be granted, they did not care to take heed and obey the Court's order, they cannot have the indulgence in appeal of a remand of the suit for the purpose of enabling them to adduce evidence. Their prayer for a remand, being without *bona fides,* must be turned down. (*Krishna Pillai, C.J., and Simon, J.*) OUSEPH VARKEY *v.* PETER JOHN. A.I.R. 1950 (T.C.) 82.

———*Right of—Agreement between parties to abide by decision of Court—Question of fact in each case whether right of appeal abandoned—Case of no evidence—Decision based upon statements from the bar—Right of appeal abandoned.*

A mere agreement between the parties that the Court may dispense with certain rules of procedure and evidence without giving up the right of appeal does not deprive the parties of the right of appeal, but it is a question of fact in each case whether the circumstances merely amounted to a deviation more or less from the ordinary procedure or whether the agreement between the parties was that the Court should give a decision more in the nature of an award than an adjudication on the evidence in the case, complete or incomplete; and the intention can only be ascertained by the events which happened in the particular case.

Where in a suit for maintenance, the defendant (husband) denied his liability in his written statement, but at the time of the trial agreed as a matter of compromise to give the plaintiff such amount as may be fixed by the Court and both sides left the question to be determined by the Judge not on any evidence—actually no evidence had been adduced—but on statements made by counsel from the Bar.

Held, it was a case where there was no evidence on which the appellate Court could come to a conclusion different from that of the trial Court and the appellant was not entitled to attack in appeal the decree passed by the trial Court. (*Rajamannar, O.C.J. and Rajagopalan, J.*) KUNJAMMAL *v.* RAJAGOPALA IYER. 61 L.W. 612=1948 M.W.N. 654=A.I.R. 1949 Mad. 267=4 D.L.R. (Mad.) 68=(1948) 2 M.L.J. 291.

———*Right of—Defendant parting with his interest in suit property before decree—Whether can appeal against decree.*

A defendant who parts with his interest in the suit property during the pendency of the suit before the decree is passed, has a right to file an appeal against the decree although he has no subsisting interest in the result of the litigation. (*Reuben, J.*) SHEOKUMAR TEWARI *v.* CENTRAL CO-OPERATIVE BANK, DINAPUR. A.I.R. 1947 Pat. 477.

———*Right of—Inherent power of High Court to hear appeal from wrong order.*

Appeals are creatures of statute and a Court can never have an inherent right to hear an appeal from another Court unless the law so expressly provides, and a litigant has no right of appeal from a decision of one Court to a Higher Court unless the law expressly gives him that right. It is not open to the High Court to sit in appeal from an order in the exercise of its inherent powers, merely on the ground that the order in question is wrong and likely to cause substantial injustice. (*Chagla, C.J. and Gajendragadkar, J.*) P. V. RAO *v.* AHMED HAJI. 3 D.L.R. (Bom.) 82=A.I.R. 1949 Bom. 125=50 Bom. L.R. 711.

——*Right of—Person not party to suit or proceeding in first Court—Right to appeal—Leave of Court of appeal—Necessity—Discretion to grant leave.*

Though the C. P. Code does not in terms lay down as to who can be a party to an appeal, only a party against whom a decision is given has a right to prefer an appeal. It is, however, recognised that a person who is not a party to a suit or proceeding may prefer an appeal if he is affected by the order of the Court, provided he obtains leave from the Court of Appeal, which may in its discretion allow a person not a party to the suit to prefer an appeal. [57 Mad. 670, ref.] (*Chagla, C.J. and Bhagwati, J.*) PROVINCE OF BOMBAY *v.* WESTERN INDIA AUTOMOBILE ASSOCIATION. 51 Bom.L.R. 58=A.I.R. 1949 Bom. 141=I.L.R. (1949) Bom. 591.

——*Right of—Principle that party taking benefit of decree cannot appeal—Scope of.*

The principle that a party who has taken the benefit of an order or decree of the Court cannot thereafter prefer an appeal, is inapplicable except upon the basis that he is seeking to challenge an order after accepting the benefit of a term or conditions imposed upon the opposite party at whose instance the order was made. So far as the final decree in a suit is concerned, there is no reason for saying that the plaintiff cannot approbate the decree in respect of the sum which it awards to him and reprobate it in respect of the sum which it refuses to him. (*Mitter and Sharpe, JJ.*) JAGADISH CHANDRA CHAKRABARTI *v.* BRAJENDRA MOHAN MAITRA. I.L.R. (1945) 1 Cal. 474=A.I.R. 1949 Cal. 427.

——*Right of—Sub-lessee if can appeal against ejectment of lessee and the sub-lessee—Effect of lessee not appealing.*

Where in a suit for ejectment against the lessee the sub-lessee is also impleaded and a decree is obtained, it cannot be said that the latter is not adversely affected by the decree and so can appeal against the decree. But if the lessee had not appealed and the decree had become final, the sub-lessee cannot base any claim on the lease and he must be held bound by the decree against the lessee. (*Bhide, C.J. and Mehta, J.*) SHANKAR-RAO *v.* KISANLAL. A.I.R. 1950 M.B. 19.

——*Second appeal—Concurrent decisions—Interference.*

Concurrent decisions of the two Courts below should not be interfered with in second appeal in the absence of sufficient grounds to justify such a course. (*Govinda Menon and Simon, JJ.*) **ANKAN CHETTY *v.* CHINNAPPA KUNDAN.** A.I.R. 1950 T.C. 38.

——*Second appeal—New point—Question of law—Question as to nature of patta right in land —If can be raised for first time in second appeal.*

The question as to the nature of a patta right in land is one of pure law, going to the very root of the case, and hence can be raised in second appeal for the first time. (*Naik, C.J. and Ansari, J.*) ANTHYA *v.* GATTADU. A.I.R. 1950 Hyd. 58.

——*Subsequent events—If can be looked into.*

The High Court in the exercise of its appellate jurisdiction has power not only to correct errors in the judgment under appeal but also to make such disposition of the case as justice requires, and the Court is bound to consider any change, either in fact or in law which has supervened since the judgment was rendered. (*Misra and Madeley, JJ.*) HAR PRASAD *v.* RAM ANAND PRASAD. 224 I.C. 230=1946 O.A. (C.C.) 140 =1946 A.W.R. (C.C.) 140=1946 O.W.N. 188=1946 Oudh (Rul.) 181=1946 A.L.W. (C.C.) 137=A.I.R. 1946 Oudh 223.

——Subsequent events—If can be looked into. [*See* Q.D. 1941-1945, Vol. I, Col. 98.] TARAK CHANDRA DAS *v.* ANUKUL CHANDRA. 223 I.C. 502=1946 Cal. (Rul.) 187=A.I.R. 1946 Cal. 118.

——*Subsequent events—Right to take notice of.*

As a general rule, a Court of appeal, in considering the correctness of the judgment of the Court below, will confine itself to the state of the case at the time such judgment was rendered, and will not take notice of any facts arising subsequently. But in exceptional cases the Court will depart from their rule, especially, where by so doing, it can shorten the litigation and best attain the ends of justice by preserving the rights of the parties. (*Manohar Lall and Imam, JJ.*) DEOPATI *v.* MAHABIR. 25 Pat. 529=A.I.R. 1947 Pat. 293.

APPOINTMENT—*See* Will.

APPROBATE AND REPROBATE—*See also* ESTOPPEL.

——*Applicability of principle.*

If the parties have taken up a particular position before the Court at one stage of the litigation, it is not open to them approbate and reprobate and to resile from that position. (*Pathak, J.*) UDREJ SINGH *v.* RAM BAHAL SINGH. I.L.R. (1946) All. 549=224 I.C. 278=1946 A. L.J. 234=1946 A.W.R. (H.C.) 209=1946 All. (Rul.) 366=1946 A.L.W. 286=A.I.R. 1946 All. 436.

——Applicability—Order of Court having no jurisdiction—If can be pleaded as estoppel. *See* EVIDENCE ACT, S. 115. A.I.R. 1950 Pat. 318.

——*Duty of litigrant.*

The principle is well-established that a litigant cannot play fast and loose, blow hot and cold, approbate and reprobate either in the course of the proceedings in the same suit or in a different suit between the parties to the detriment of his opponent. 39 C.L.J. 40 and 53 I.A. 64, foll. (*Mitter and Chunder, JJ.*) Ram Kumar Maskara *v.* Gopi Krishna. 53 C.W.N. 284.

——*Party accepting costs—Whether can question order.*

Where a party accepts costs under an order which, but for the order, would not at that time be payable, he cannot afterwards say that the order was made without jurisdiction, unless of course, at the time of realising the costs he expressly reserved his right to challenge the order. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) Moolsingh *v.* Jagirdar Busi. 1947 M.L.R. 41 (Civ.).

——*Party setting up title in himself in ejectment suit against him and in subsequent title suit by him—Whether precluded from claiming relief under S. 17 of Calcutta Rent Ordinance on basis of being tenant.*

A party who repudiates the status of a tenant and sets up full title in himself in an ejectment suit against him as well as in a title suit subsequently instituted by him, is not precluded from claiming relief under S. 17 of the Calcutta Rent Ordinance on the basis of being a tenant. There is nothing to prevent him from trying to establish his higher title in a title suit and from saying at the same time that in any event he is entitled to the advantages attaching to the lower status which the Court has found in the ejectment suit. (*Chakravartti, J.*) Sayama Charan Samanta *v.* Bikash Chandra Sanyal. 83 C.L.J. 191 =A.I.R. 1949 Cal. 686.

APPROPRIATION—Appropriation of payments towards debts. *See* (1) Contract Act, S. 60; (2) Limitation Act, S. 20.

——*Demand of employee for work done—Cheque sent by employer for lesser amount in full satisfaction of claim—Acceptance by employee—Subsequent claim by him for balance—If maintainable.*

An employee claimed a certain amount for work done. But the employer sent a cheque for a lesser amount stating that it was in full satisfaction of the employee's claim. The latter accepted the cheque and cashed it and then claimed the balance due according to his calculation.

Held, it was not open to the employee to accept the amount without the condition attached to it. He must either accept it in full satisfaction of his claim or refuse it and then claim the full amount due according to him. [1922 P.C. 26, applied.] (*Malik, C.J. and Bhargava, J.*) Ram Kirpal Pandey *v.* Shiromani Sugar Mills. 1948 O.W.N. 357=1948 A.L.W. 355.

ARBITRATION.

- **Agreement to refer.**
- **Arbitrator.**
  - Functions of.
  - Jurisdiction.
  - Misconduct.
  - Powers of.
- **Award.**
  - Award governed by Arbitration Act.
  - Construction.
  - Effect of.
  - Finality.
  - Grounds for challenging.

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  - Judge as arbitrator.
  - Power of Court to interfere with.
  - Separate sets of contracts.
  - Setting aside.
  - Validity.
- **Clause in contract.**
- **Reference.**
  - Modification.
  - Validity.
- **Umpire.**

——Agreement to refer. *See* Arbitration Act (X of 1940), S. 2 (a).

——*Agreement to refer—Association having rules and regulation providing for reference of disputes to arbitration—Applications for membership agreeing to observe and follow rules—Effect of.*

Where the rules and regulations of an Association provide that differences arising between members or between members and non-members should be referred for decision to the arbitrators mentioned in the panel of arbitrators nominated by the Association, and persons signing applications for membership agree thereby to observe and follow the rules and regulations of the constitution, both present and future, it must be held that there is binding agreement of arbitration in respect of every difference which may arise. (*Bhagwati, J.*) Chimanram Motilal *v.* Vandravandas Gordhandas. 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

——*Agreement to refer—Clause in contract—Frustration of contract—Effect on arbitration clause.*

The parties to a contract can agree that an arbitration clause in it remains alive even where there has been frustration of the contract. Where an arbitration clause provided that all disputes arising out of or in consequence of the contract should be referred to arbitration, whether or not the obligations of either or both parties under the contract be subsisting at the time of such disputes and whether or not the contract had been terminated,

Held, that there was an enforceable agreement to go to arbitration upon all matters connected with the contract, including the question whether the contract be subsisting at the time of such arise. (*Bhagwati, J.*) Chimanram Motilal *v.* Brajaraj Shaha *v.* Bengal Jute Mills Co., Ltd. I.L.R. (1946) 1 Cal. 312.

——Agreement to refer to arbitration of named individual—Death of such individual before making award—Court if can appoint another arbitrator. *See* C. P. Code, Sch. II, paras. 17 and 5—Scope. (1948) 1 M.L.J. 196 (F.B.).

——*Agreement to refer—Strict construction—Agreement vague and uncertain—Validity.*

Arbitration agreements should be strictly construed. Clear language should be introduced into any contract which is to have the effect of ousting the jurisdiction of the Courts and compelling the parties to have recourse to arbitration for decision of disputes. An arbitration agreement which is vague and uncertain, is invalid. (*Sinha, J.*)

Ganapatrai Gupta *v.* Moody Brothers, Ltd. 85 C.L.J. 136.

———*Arbitrator—Functions of—If Judge of law and fact—Power of Court to sit in appeal.*

An arbitrator is a Judge of law and fact and the Court should not sit as a Court of appeal on awards of arbitrators in respect of matters of fact or law. (*Davis, C.J.*) Tirathdas Uttam Sing *v.* Motiram Uttam Singh. I.L.R. (1946) Kar. 302=A.I.R. 1947 Sind 110.

———*Arbitrators — Jurisdiction — Condition—Existence of dispute—If essential.*

There can be no doubt that the existence of a dispute is essential for a reference and is a pre-condition to the arbitrator's jurisdiction. (*Sinha, J.*) Khushiram Benarshilal *v.* Mathuradass. 52 C.W.N. 826.

———*Arbitrator — Jurisdiction — Conditions—Existence of dispute—If essential.*

The existence of a dispute is an essential condition for the jurisdiction of an arbitrator. If there is no dispute there can be no right to demand arbitration at all. A point as to which there is no dispute cannot be referred to arbitration. Failure to pay does not necessarily constitute a dispute or difference. In order to make out the jurisdiction of the tribunal of arbitration, it must be shown that the subject-matter of the reference was some dispute between the parties and that the particular dispute had arisen actually before the matter went before the arbitrators. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of right by one party and repudiation thereof by another. [I.L.R. (1939) 2 Cal. 181 and 33 Bom.L.R. 51, referred to.] (*Harries, C.J. and Chatterjee, J.*) Mathuradas Goverdhandass *v.* Khusiram Benarshilal. 53 C.W.N. 873.

———*Arbitrator—Jurisdiction—Factum or existence of contract giving rise to disputes—Broker and constituent—Instructions to close outstanding contract—Broker closing—Reference of second contract—Competency.*

It is well-established that if one of the parties to a reference disputes the factum or existence of the contract in respect of which disputes arise and which disputes the arbitrator has got to determine, then the arbitrator has no jurisdiction to decide the question whether in fact the contract was entered into or not.

Where in pursuance of or in relation to an outstanding contract between a broker and his constituent, instructions are given to the broker to close the outstanding contract, and the broker closes the same and refers the subject-matter of the contract entered into in pursuance of the instructions, the arbitrator has jurisdiction to decide the matter even though the instructions may be denied by the constituent. In such a case the existence or factum of the contract is not in dispute so as to deprive the arbitrator of jurisdiction to decide the matter. All that is necessary is that the second contract must be in performance of the first contract and must arise out of the first in order that the arbitrator could have jurisdiction to consider any dispute that might arise as to whether instructions were given or not with regard to the second contract. 34 Bom.L.R. 1097; 41 Bom.L.R. 1293; 42 Bom. L.R. 1135, dist.; 22 Bom.L.R. 711, expl.; 48 Bom.L.R. 678, ref. (*Chagla, C.J. and Coyajee, J.*) Ghelabhai Mahasukhram Roy *v.* Keshavdev Madanlal. 51 Bom.L.R. 499=A.I.R. 1949 Bom. 343.

———*Arbitrator—Jurisdiction—Factum or validity of contract or arbitration agreement—Denial of—Power of arbitrators to decide question.*

Where the factum or validity of a contract (or arbitration agreement) is disputed, it is not within the province of the arbitrators to decide upon the same and thus to assume jurisdiction in the matter of the dispute. The decision as to the factum or validity of a contract is exclusively within the jurisdiction of the Court. The arbitrators in such a case (except in cases where the transaction in dispute is a closing transaction in respect of an outstanding transaction between the parties) are divested of all jurisdiction to entertain the dispute and to enter upon a reference in connection with the same. (*See* S.C. on appeal. 51 Bom.L.R. 79.) (*Bhagwati, J.*) Vishambar Lal Ruiya *v.* Gulamally Abdul Husein. 4 D.L.R. (Bom.) 91.

———Arbitrator—Jurisdiction— Objection to—When to be raised—Waiver of objection—What amounts to—Party taking part in proceedings—When estopped. [*See* Q.D. 1941-1945, Vol. I, Col. 116.] All India Groundnut Syndicate, Ltd., *In re.* 222 I.C. 155=1946 Bom. (Rul.) 80.

———***Arbitrator—"Misconduct"—Arbitrator taking evidence behind back of parties—Award based on—Validity.***

Where an arbitrator takes evidence behind the backs of the parties without notice to them, and bases his award on that evidence, it amounts to misconduct which would afford ground for setting aside the award. 3 C.W.N. 361; 13 C.L.J. 399; 15 P.L.T. 693; 86 I.C. 773, rel. on. (*Meredith and Ramaswami, JJ.*) Ganga Prasad Modi *v.* Nagarmal Modi. 5 D.L.R. (Pat.) 18.

———*Arbitrator—Misconduct — Reference of disputes arising from will and dispositions of property made by testator—Award departing from wishes of testator—If guilty of misconduct—Provision for education, maintenance and marriage expenses of minors without fixing sum—If bad for indefiniteness.*

An arbitrator to whom parties refer disputes arising from a will and dispositions of property contained therein must be free to depart, so far as he thinks it fair and just, from the wishes of the testator. In so doing, he is not guilty of misconduct, but is within his right.

Nor would the fact that the award makes provision for the maintenance, education and marriage of the minors in the family without fixing a specific sum, make the award bad on the ground of indefiniteness. The provisions for those expenses would mean only what would be reasonable and proper, having regard to the status of the family and the nature and extent of the property. (*Davis, C.J.*) Tirathdas Uttam Sing *v.* Motiram Uttam Singh. I.L.R. (1946) Kar. 302=A.I.R. 1947 Sind 110.

———*Arbitrator—Powers of—Arbitration clause in contract—Issue as to existence of trade custom—Power to determine—Such issue, if one as to existence or validity of contract—Arbitration Act, Ss.* 31 *and* 33.

It is clear that under a clause in a contract referring to arbitration any dispute arising under the contract, it is competent to the arbitrator finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract, where such custom is not inconsistent with the terms of the contract. When an arbitrator is given power to decide all disputes arising out of a contract he must decide what the contract is and he cannot decide that without introducing the custom. A trade custom or usage, when established, becomes a part of the contract itself, unless it is expressly or by necessary implication excluded by the terms of the contract. If the contract be in writing the custom so established, provided it is not inconsistent with the written terms, is to be treated exactly as if it had been written out at length and the parties are taken to have made their bargain in reference to that custom. Therefore the issue as to whether there is a custom does not raise any question as to the existence or validity of the contract itself. (*Das, J.*) Khusiram Benarsi Lal *v.* Hanutmal Boid. 53 C.W.N. 505.

———*Arbitrator—Powers of—Custom affecting rights of parties—Existence of—Arbitrator, if competent to determine.*

Under the clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrators finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract where such custom is not inconsistent with the terms of the contract. (*Sinha, J.*) Tularam Nathmall *v.* Bilasroy & Co. 85 C.L.J. 164.

———*Arbitrators—Powers of—Production of evidence by party—Power of arbitrator to refuse opportunity.*

The arbitrator may give his reasons for shutting out a certain amount of evidence sought to be tendered by a certain party. It is not, however, open to the arbitrator to refuse to grant an opportunity to a party to produce evidence on the ground that there was no necessity to examine witnesses or hear counsel. (*Adul Rashid, C.J. and Mehrchand Mahajan, J.*) Tirath Singh *v.* Isher Singh. 49 P.L.R. 129=A.I.R. 1948 Lah. 50.

———Award—Award governed by Arbitration Act—Party wrongly applying under C. P. Code for decree thereon—If may resist objection to award as time-barred under Art. 158, Limitation Act, as amended by Arbitration Act. [*See* Q.D 1941-1945, Vol. I, Col. 118.] Nani Bala Shaha *v.* Ram Gopal Shaha. I.L.R. (1945) 1 Cal. 454.

———Award—Construction — Whether covers matters in dispute referred to aritration. *See* Ratanlal Chamaria *v.* Keshardeo Chamaria. A.I.R. 1949 P.C. 195.

———*Award—Effect of—Binding character—Basis of rights of parties.*

An award is binding between the parties in all matters which it professes to decide, and the fact that parties to the award have not carried out its terms is not in law sufficient to deprive the award of its binding effect. A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made, the submission and award furnish the only basis by which the rights of the parties can be determined, and constitute a bar to any action on the original demand. (*Davis, C.J. and Constantine, J.*) Lutufallah Khudabakhsh *v.* Mahomed Sidik. I.L.R. (1946) Kar. 207=223 I.C. 307=1946 Sind (Rul.) 149=A.I.R. 1946 Sind 117.

———Award—Effect of—If can create interest in immovable property. *See* Limitation Act, Arts. 120 and 144. 49 Bom.L.R. 731.

———*Award—Finality—Question of validity of adoption.*

The question of the validity of an adoption is a mixed question of law and fact and the arbitrator's decision is final on it. (*Abdur Rahman and Mahajan, JJ.*) Panna Lal *v.* Chaman Parkash. 225 I.C. 8=1946 Lah. (Rul.) 405=A.I.R. 1947 Lah. 54.

———Award—Grounds for challenging. *See* (i) Arbitration—Award—Setting aside; (ii) Arbitration Act, S. 30.

———*Award—Judge of Court appointed quasi-arbitrator—Procedure* extra cursum curiae—*If applicable to proceedings not pending before Court.*

A judgment of a Court pronounced *extra curcum curiae,* is in the nature of an arbiter's award, and as a general rule atleast, no appeal from it will lie. But the procedure *extra cursum curiae* is not applicable to proceedings not pending before the particular Court the Judge of which is constituted the quasi-arbitrator. (*Das, J.*). I. G. H. Ariff *v.* Bengal Silk Mills, Ltd. I.L.R. (1945) 2 Cal. 70=A.I.R. 1949 Cal. 350.

———*Award—No plea for the award being set aside—Power of Court of appeal to make a reference to arbitration again.*

Where in an appeal against an order passing a decree on an award there is no plea for the award being set aside, it is not open to the appellate Court to make a reference to arbitration again. A.I.R. 1935 Mad. 1053, rel. on. (*Rege, J.*) Bhagirath *v.* Shankerlal. 5 D.L.R. (M.B.) 10.

———*Award—Power of Court to interfere with—Error on points of law specifically referred to arbitrator—Reference to unregistered documents in the award—If and when an error of law, appearing on the face of the record—Indefiniteness of award—Test.*

Where points of law have been specifically referred to an arbitrator and his award is alleged to be vitiated by his erroneous decision in regard to them, the Court would not interfere with the award even if the Court itself would have taken a different view of the points had they been before it. (1913) 2 K.B. 32 and (1933) A.C. 592, relied on.

Where the agreed terms of reference are such that an arbitrator acting under them is dispensed from observing legal rules of evidence, and many of the ordinary rules of the conduct of a trial, a mere reference in the award to certain unregistered documents is insufficient to establish that it was wrong in law to refer to them. Unless those who attack the award could demonstrate affirmatively that the law was departed from by the arbitrator in noticing the existence of those documents, they could not succeed in establishing an error appearing on the face of the award.

It is not enough to detect a possible inconsistency in the terms of an award to enable a Court to set it aside or remit it. It must be "so indefinite as to be incapable of execution." *(Lord Radcliffe.)* DURGA PROSAD CHAMRIA *v.* SEWKISHENDAS BHATTAR. 1949 A.L.J. 490=A.I.R. 1949 P.C. 334=62 L.W. 855=54 C.W.N. 74=30 P.L.T. 444=52 Bom.L.R. 171=(1949) 2 M.L.J. 760 (P.C.).

———*Award Separate sets of contracts—Reference to arbitrators—Agreed award on one set of contracts—Reference to umpire regarding other set of contracts—Validity—Arbitration Act, S. 30—Application to set aside award—Seller and buyer of goods—Application for delivery.*

The arbitration related to five contracts between the buyer and seller of various quantities of yarn. The arbitrators agreed regarding two contracts of December, 1941, *vaida* or delivery. They disagreed with regard to three remaining contracts which were for January, 1942, *vaida*. The arbitrators made two awards, first with respect to the two contracts upon which they agreed; and secondly, respecting the three contracts upon which they disagreed. As regards the latter, they referred the matters for decision by the umpire who gave an award. One of the parties applied under S. 30 of the Arbitration Act to set aside the award. It was shown that one of the bye-laws of the association of which the parties were members and by which they were bound provided that the arbitrators or umpire shall have power to make an interim award.

Held, that the award which the arbitrators made relating to the subjects upon which they had disagreed was an interim award as contemplated by the bye-law in question and that under the circumstances it was unnecessary for the matters upon which the arbitrators had agreed to be referred to the umpire and that the award was not liable to be set aside on the ground that the umpire had not taken cognizance of the entire subject-matter of disputes between the parties.

Where a resolution of the Yarn Merchants Association provided that the seller should demand on or before the 20th of the *vaida* or delivery month and the buyer to give despatching instructions to the seller on or before the 24th of that month,

Held, that the effect of the resolution was that the buyer must give the despatching instructions by the 24th of the *vaida* month provided the seller demanded those instructions from him. The obligation was first upon the seller to make his demand and having done that, then the buyer was obliged to give the despatching instructions. If the seller fails to make his demand then the buyer is under no obligation to give despatching instructions. The first duty to be discharged is that of the seller to make the demand for the instructions. *(Gentle, C.J. and Bell, J.)* RATHAKRISHNAMURTHY *v.* CHENGALRAYA CHETTY & CO. 61 L.W. 157=1948 M.W.N. 204=A.I.R. 1948 Mad. 365=(1948) 1 M.L.J. 164.

———Award—Setting aside. *See* ARBITRATION ACT (X OF 1940), S. 30.

———*Award—Setting aside of—Assessment of damages for breach of contract—Power of Court to interfere.*

It is not open to the Court to interfere with an award on the ground that the arbitrators were mistaken in awarding damages for breach of contract on a wrong basis, where the error does not appear on the face of the award. ***(Sinha, J.)*** TULARAM NATHMALL *v.* BILASROY & CO. 85 C.L.J. 164.

———*Award—Setting aside—Award adjudicating on matter not included in submission with consent of party.*

The Court will not set aside an award on the ground that the arbitrator had exceeded his authority by adjudicating on a matter not included in the submission, when the party complaining agreed at the hearing that the arbitrator should deal with that matter. *(Gentle, J.)* ANANDI LAL PODDAR *v.* KESHAVDEO PODDAR. I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

———*Award—Setting aside—Award in contravention of findings recorded by arbitrator—Setting aside—Misconduct.*

Where an award made by an arbitrator on a reference made to him is obviously opposed to the findings arrived at and recorded by him, it is illegal on the face of it. Though the Court cannot go into the question as to whether the award is reasonable or not, it can certainly see whether the award is illegal on the face of it; and if the award is in direct contravention of the findings arrived at and definitely recorded by him, then the award must be held to be illegal on the face of it and must be set aside. An arbitrator who is authorised by the deed of reference to decide the specific points in dispute and pass orders regarding the property in accordance with his findings has no jurisdiction to record findings in favour of one party and then to order delivery of the property to some other party. He will, if he does so, be guilty of a "judicial misconduct", and such an award must be set aside. *(Lokur, J.)* MARUTI ABA BONGANE *v.* AKARAM PANDU. 49 Bom.L.R. 294=A.I.R. 1947 Bom. 400.

———*Award—Setting aside—Award not executable for want of registration—Power of Court to order its removal from file.*

Failure to register an award which requires to be registered under S. 17 (1) (*b*) of the Registration Act, is not a ground upon which it can be set aside. As execution cannot be ordered upon the unregistered award, the Court has power to order its removal from its file. [3 C. W. N. 811, referred to.] (*Gentle, J.*) ANANDI LAL PODDAR *v.* KESHAVDEO PODDAR. I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

———*Award—Setting aside—Dispute whether defendant was bound to deliver specific goods—Award ordering him to pay damages—If without jurisdiction—Bengal Chamber of Commerce Rules of the Tribunal of Arbitration, R.* 26.

When parties set out specifically what disputes have arisen and what relief is sought in consequence of the alleged default by one party they are the only matters upon which the arbitrator is required to enquire and adjudicate. Where, therefore, the dispute between the parties which is referred to arbitration is whether the defendant is bound to deliver the specific goods which he is alleged to have wilfully and wrongfully withheld, an award of the arbitrators ordering the defendant to pay damages is without jurisdiction and is liable to be set aside.

R. 26 of the Bengal Chamber of Commerce Rules of the Tribunal of Arbitration should be read with R. 30, the result of which is that under R. 26 the Tribunal could order and determine what either of the parties should do in the matter of delivering or taking delivery of the goods and things of that description. Making an order for payment of damages will not come within the language of R. 26. (*Majumdar, J.*) FATEH CHAND MURLIDHAR *v.* DEBI DUTT & CO., LTD. 52 C. W.N. 635.

———*Award—Setting aside—Error of law—General rule and exception—Reference of all outstanding matters in pending suit—Award, if can be challenged.*

In submissions to arbitration the rule is that as the parties choose their own arbitrator to be the judge in the disputes between them they cannot, when the award is good on its face, object to his decision either upon the law or the facts. In this respect the Courts do not recognize any distinction between the awards of legal and of lay arbitrators. Where, however, an error, whether of act or of law, appears on the face of the award or upon some paper accompanying and forming part of the award, the award will be set aside unless the error is immaterial to the decision. It is not usually permissible to refer to anything else to show that the award is erroneous. An exception has, however, been engrafted on this doctrine to the effect that when a specific point of law is referred to arbitration the award cannot be set aside if the arbitrator wrongly decides the point of law. This being the state of the law, in each case of an application for setting aside an award on the ground of error of law apparent on the face of the award, the Court has to decide whether the reference was one in which the question of law arose incidentally as being material to the decision of the matter which had been referred to arbitration, or it was one in which a specific question of law had been referred to the decision of the arbitrator as the sole tribunal. If the reference was of the former class the case falls within the general rule and the award may be set aside if an error is apparent on the face of it. If, on the other hand, the reference was of the latter kind it falls within the exception and the award cannot be set aside even if it is erroneous. When an order of reference is made in a pending suit after the issues arising on the pleadings have been settled, and "all outstanding matters in the suit" at that stage are referred, the parties do intend to refer those specific issues which are then the only "outstanding matters in the suit," so as to bring the reference within the exception rather than the general rule, and the award made by the arbitrator appointed in the suit under such circumstances cannot be challenged even if the decision is manifestly wrong. (*Gentle and Das, JJ.*) DURGA PRASAD CHAMARIA *v.* AMARDEVI SETHANI. I.L.R. (1947) 1 Cal. 446=230 I.C. 344=1947 Cal. (Rul.) 209=A. I. R. 1947 Cal. 75=50 C.W.N. 880.

———*Award—Setting aside—Grounds.*

There is no doubt that an award would be set aside if there was an illegality apparent on the face of it, or if on the facts found the arbitrator had relied specifically on some principle of law and had made that principle of law the basis of this award and that principle was found to be erroneous in law. An arbitrator is not bound to give any reasons for his award. The mere fact that the arbitrator has given some reasons and not all the reasons which may have influenced him in coming to a certain conclusion would not make the award of the arbitrator illegal and liable to be set aside for the only reason that from certain findings recorded by him a possible inference may be drawn that he had misunderstood the law applicable to the facts of the case before him. (*Chandra and Sapru, JJ.*) NANAK CHAND *v.* PANNA LAL DURGA PRASAD. 1948 A.L.J. 300=A.I.R. 1948 A. 444=1948 A.L.W. 243=1948 O.W.N. 248=1948 A.W.R. (H.C.) 332.

———*Award—Setting aside—Grounds for.*

Courts should not set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless they see that there has been something radically wrong and vicious in the proceedings. (*Kapur, J.*) HARPHOOL SINGH *v.* PRABHU DAYAL. A.I.R. 1950 E.P. 266=52 P.L.R. 128.

———Award—Setting aside—Grounds—Arbitrator given wide powers as to mode of enquiry—Award if can be questioned on the ground of inadequate representation of parties who were minors. [*See* Q.D. 1941—1945, Vol. I, Col. 119.] DEBI DAS *v.* KESHAVA DEO. I. L. R. (1946) All. 67.

———*Award—Validity—Additions made after signature and before pronouncement.*

Additions made in an award with the consent of all the arbitrators after it is signed by them and before it is published, will not affect the validity of the awards. Arbitrators cannot be said to be *functus officio* until the pronouncement of the award is actually made, even if they have signed the award. 49 I.C. 523: A.I.R. 1928 Lah. 153 and A.I.R. 1935 Lah. 491, referred to. (*Kapur, J.*) Harphool Singh *v.* Prabhu Dayal. A.I.R. 1950 E.P. 266=52 P.L.R. 128.

——*Award—Validity—Authorisation to arbitrators to decide dispute after making enquiries in any way they liked—Failure to examine witnesses—Award, if can be attacked on that ground.*

Where arbitrators were authorised by the agreement between the parties to the reference to decide the dispute between them after making enquiries in any way they liked, and an award is made without examining any witnesses, it is not open to the parties to challenge the award on the ground of the failure to examine the witnesses. (*Faiyaz Ali, J.M. II.*) Bashiruddin *v.* Mansoor Ullah Khan. 1949 R.D. 353.

——*Award—Validity—Arbitrator not deciding all issues framed in suit—Scrutiny of award—Power of Court.*

There is no rule of law that an arbitrator must decide all the issues framed in the suit expressly as long as the whole suit is decided by him. He is not bound by any rules of procedure or those of evidence, and it is not open to the parties to pick holes in the decisions by a tribunal of their own choice on these grounds. The Court which is called upon to register his decision is not a Court of appeal and cannot scrutinise it in the same way as appellate Court. (*Abdur Rahman, J.*) Madan Lal *v.* Nabi Bakhsh. 226 I.C. 241=1946 Lah. (Rul.) 444=48 P.L.R. 377=A.I.R. 1947 Lah. 177.

——*Award—Validity—Award for or against joint Hindu family business in its trading name.*

An award for or against a joint Hindu family business in its trading name is valid, and can be enforced by a suit or by proceedings under the Arbitration Act. (*Das, J.*) Munshilal & Sons *v.* Modi Bros. 51 C.W.N. 563.

——*Award—Validity—Award signed by all arbitrators and registered—Absence of one arbitrator at registration—If invalidates award or its registration.*

The registration of an award which is signed by all the arbitrators who made it is not invalid by reason of the fact that one of the arbitrators did not appear at the time of registration to admit his signature. Such an award cannot be held to be invalid. [53 Cal. 410; I.L.R. (1946) Mad. 840, dist. 23 Pat. 719, rel.] (*Manohar Lall and Mahabir Prasad, JJ.*) Sukhdeo Singh *v.* Radhika Singh. 28 Pat. 514=4 D.L.R. (Pat.) 185.

——*Award—Validity—Conditions provided by the agreement of reference not complied with.*

So long as the arbitrator fulfils the conditions of the agreement of reference, it is immaterial, if the award is right or wrong. But if the conditions provided by the agreement are not fulfilled, the award has no legal value.

Where it is clear from the terms of reference that the parties contemplated the examination of evidence of the parties as necessary, if the arbitrator fails to fulfil this condition, the award will not be binding on the parties. (*Sinha and Wanchoo, JJ.*) Moti Lal *v.* Sharda Devi. I.L.R. (1948) A. 210=1948 O.A. (H.C.) 42=(1948) A.W.R. (H.C.) 42=A.I.R. 1948 A. 222=1948 A.L.J. 109=1948 A.L.W. 159.

——*Award—Validity—Contract for sale of goods—Reference of all disputes to arbitration—Buyer claiming right to reject goods as inferior in quality—Award that goods should be accepted and paid for at less than contract rate—If without jurisdiction.*

Where by an agreement the parties to a contract for sale of goods refer to arbitration all their disputes in respect of that contract including the question whether the buyer is entitled to reject the goods on account of inferiority of quality, an award by the arbitrators that the goods should be accepted and paid for by the buyer at the contract rate subject to a certain allowance is not without jurisdiction. The parties by their submission must be taken to have agreed that the arbitrators should decide not only whether the goods were inferior, but, if so, what reduction should be made in the price. (*Clough, J.*) Modi Bros. *v.* Mahabir & Bros. 52 C.W.N. 168.

——*Award—Validity—Court declining to make it rule of Court.*

The fact that the Court declines to make an award a rule of Court, cannot affect the validity of the award. The refusal of an application for the filing of an award merely leaves the award to have its own ordinary legal effect and it can be relied upon as a defence in a suit relating to the subject-matter dealt with by it. (*Abdur Rahman and Mahajan, JJ.*) Panna Lal *v.* Chaman Parkash. 225 I.C. 8=1946 Lah. (Rul.) 405=A.I.R. 1947 Lah. 54.

——*Award—Validity—Erroneous decision on question of law.*

The arbitrator is a Judge of law as well as of facts and a mere erroneous decision by him on a question of law cannot be held to vitiate the award. (*Achhru Ram, J.*) Hanuman Chamber of Commerce, Ltd., Delhi *v.* Jessa Ram Hera Nand. 50 P.L.R. 181=A.I.R. 1949 E.P. 46.

——*Award—Validity—Private reference by three brothers of Dayabhaga joint family for partitioning family properties—Death of one of the brothers during pendency of proceedings—His sons and the remaining brothers continuing proceedings ignoring the widow and without reference to her—Award—Legality.*

Three brothers forming the members of a Dayabhaga joint Hindu family appointed by a registered agreement, dated 15th August, 1938, an arbitrator to effect a partition of their paternal properties consisting of lands, a residential house and certain shares in joint stock companies. The reference paper stated that none of the parties or their representatives in succession shall be competent to raise any objection to the arbitration. There was a provision authorising the arbitrator to make the award in instalments and though a period of six months was fixed within which to make the award, provision was made entitling the arbitrator to extend the time by giving to the brothers intimation or notice. The arbitrator did something in pursuance of the reference like dividing the shares, and the dividends thereon, and as the time fixed was about to expire, time was enlarged from time to time. In October, 1939, the eldest brother died leaving him surviving five sons and his widow. In the minutes book, it was noted that the eldest brother had died and that his five sons mentioned by name expressed their willingness to abide by the terms contained in the agreement of reference to arbitration executed by their father. No mention was made of the widow of the deceased though in view of the Hindu Women's Rights to Property Act, 1937, she was entitled to the same share as each of the sons of the deceased in respect of all the properties, other than agricultural land. Thereafter the arbitration proceedings continued between the two remaining brothers and their nephews who were treated as completely representing the deceased's one-third share, though as a matter of fact they only partially represented his estate and the one-sixth share belonging to the widow was an heir of the deceased. There was a notice of a further extension of time to make the award and the notice was only to the uncles and nephews. A partial award in respect of the residential house dividing it into three lots was made on 2nd October, 1940, and on 6th October, 1940, notice of further extension of time was given. The minutes book was signed on 7th October, 1940, by the five sons and their uncles and there was also the thumb impression of the widow of the deceased brother. But there was no further extension in fact as the parties were not satisfied with the partial award. The widow gave notice that the award was not binding on her as she was no party to the proceedings and had no opportunity to have her say in the matter and her sons challenged the award on the ground of misconduct. A suit was filed by the widow for a declaration that the award was void and made without jurisdiction and the two brothers filed an application to file the award and contended in defence to the widow's suit that the widow had all along known about the proceedings and that her interests were fully represented by her sons. On a question as to the validity of the award,

Held (*Patanjali Sastri, J., differing*).—The widow of the deceased brother being entitled to a specified share in the property of her husband, was a co-sharer with the sons and represented the estate of the deceased to that extent, and in the matter of partition it was necessary to make her a party to the submission by giving her notice. The arbitrator was not entitled to make the award in her absence so as to bind her. The failure to treat the widow as one of the heirs of the deceased and the failure to give her notice till after the award had been pronounced, is fatal to the award delivered. Mere knowledge of the widow of the proceedings pending before the arbitrator was not enough to lead to the conclusion that she had notice of the extensions of time granted by the arbitrator and was a party to the reference and had permitted her sons to represent her. When the eldest brother died before the arbitrator could proceed further with the reference and give a binding award, he should have given notice to all the legal representatives of the deceased and attempted to make them parties to the reference by notice, though he was not bound to follow the strict procedure of law required for substitution of parties under O. 22, C. P. Code. Courts would ordinarily be slow to set aside an award when an arbitrator has acted within the terms of his submission and has not violated any rules of natural justice. But when an arbitrator ignores the existence of an interested party and goes to the length of awarding her share to others and then corrects his error and allots to her along with others a share but without notice to her, the conduct is not such as is in accordance with the rules of natural justice. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) Tirtha Lal Dey *v.* Bhusan Moyee Sasi. 1949 F.C.R. 396=1949 F.L.J. 192=A.I.R. 1949 F.C. 195=4 D.L.R. (F.C.) 117=(1950) 1 M.L.J. 249 (F.C.).

———*Award—Validity—Provision in reference for filing of statements and examination of witnesses—One party being absent—Other side examined and award given—Award, if valid—Reference if vague.*

The parties to a suit executed a muchilika in favour of a named arbitrator in which provision was made for the filing of statements and examination of witnesses. On a day fixed of which notice had been given to the parties the arbitrator began his enquiry. One of the parties was absent and a request for an adjournment till the evening of that day was granted. But when neither that party nor any body appeared on his behalf, the arbitrator examined the other party and gave an award late that night.

Held, that the muchilika was not a mere agreement to refer the dispute to arbitration but was itself an instrument making the reference and that there was no uncertainty in the reference and that the award given was binding on the parties. (*Wadsworth and Rajamannar, JJ.*) Ponnayya Moopanar *v.* Suppammal. 226 I.C. 400=1946 Mad. (Rul.) 263=59 L.W. 255=1946 M.W.N. 231=A.I.R. 1946 Mad. 391 (2)=(1946) 1 M.L.J. 303.

———*Award—Validity—Signature of one of arbitrators—Sufficiency.*

In arbitrations without the intervention of the Court, one arbitrator can sign the award on behalf of the others. (*Bose and Mangalmurti, JJ.*) Yeshwantrao *v.* Dattatrayarao. I.L.R. (1947) Nag. 631=1948 N.L.J. 28=A.I.R. 1948 Nag. 162.

———*Award—Validity—Three named arbitrators—Conclusions communicated to parties by letter—Letter signed only by two arbitrators—Validity of award.*

Where the arbitration agreement referred the matters in dispute to three named arbitrators and one of them withdrew after a partial disposal of the business which all were called upon to carry out, and the remaining two arbitrators completed the disposal of the remaining business and then intimated their conclusion to the parties by a letter,

Held, that the letter whereby the two arbitrators intimated their conclusion did not constitute an award,

Held further, that since the letter incorporating the conclusions of the arbitrators was signed only by two out of the three arbitrators it was not a valid award. (*Gentle, C.J. and Rajamannar, J.*) Kuppuswami Chetty *v.* Anantharamier. I.L.R. (1948) Mad. 83=1947 M.W.N. 371=60 L.W. 244=A.I.R. 1948 Mad. 40=(1947) 1 M.L.J. 297.

———*Award—Validity—Statements of parties taken separately—Award given on the pleadings of parties and without taking any evidence—Validity.*

A widow's suit against her husband's reversioners for arrears of maintenance, recovery of jewels, etc., was by consent of both parties referred to a sole arbitrator for decision. The arbitrator examined and took the statements of the plaintiff and the defendant separately in which both of them stated they were willing to abide by the decision of the arbitrator on his looking into the plaint and written statement in the suit and he gave his award without taking any evidence. On a question whether by the taking of statements of the parties separately the arbitrator misconducted the proceedings.

Held, that though an arbitrator should not hear the evidence of one party behind the back of the other, it cannot, in the circumstances, be held that by merely taking the statements of the parties separately any evidence was recorded from one party behind the other and to the latter's prejudice. The arbitrator was placed by the parties themselves in a difficult position with authorisation from them both to decide the disputes by a reference to the pleadings and the records. As there was nothing whatever to show that the arbitrator did not make his award within the narrow confines of the pleadings, it cannot be said that there was any misconduct either of the arbitrator or of the arbitration proceedings. (*Govinda Menon and Mack, JJ.*) Kesanna *v.* Vengamma. 62 L.W. 276=1949 M.W.N. 224 =4 D.L.R. (Mad.) 129=A.I.R. 1950 Mad. 16=(1949) 1 M.L.J. 462.

———*Award—Validity— Unauthorised submission to arbitration on behalf of firm—Only one of the partners of the firm ratifying it—Effect of award against the firm.*

Where the submission to an arbitration on behalf of a firm is unauthorised and there has been no ratification of the submission by all the partners of the firm, any award based on such a reference cannot be enforced as a decree even as against any individual partner who may have ratified the unauthorised submission. (*Thadani, J.*) Madangopal Radheylal *v.* Sanwaldas Madhavdas. I.L.R. (1947) Kar. 206=A.I.R. 1948 Sind 79.

———*Clause in contract—Provision for reference of disputes "relating to the contract" or "in connection with the contract"—If includes dispute whether contract has been frustrated or not.*

Where an arbitration clause in a contract provides for reference of disputes "relating to the contract" or "in connection with the contract", the words used are sufficiently wide to cover a dispute as to whether the contract has been frustrated or not. (*Harries, C.J. and Mukherjea, J.*) Chunbanmull Jhaleria *v.* Clive Mills Co., Ltd. I.L.R. (1948) 2 Cal. 297.

———*Clause in contract—Provision for reference of "dispute regarding contract"—Contract for sale of oil—Dispute as to liability for sales tax—Jurisdiction of arbitrator.*

A contract for the sale of oil contained an arbitration clause in the following terms:—"Any dispute regarding this contract is to be settled by the Bengal Chamber of Commerce." A dispute arose between the parties as to who was ultimately liable for the sales tax payable under the Bengal Finance (Sales Tax) Act about which the contract was silent.

Held, that the dispute was undoubtedly a dispute regarding the contract and was in fact closely connected with the contract, and was therefore within the jurisdiction of the arbitrator. Disputes regarding a contract need not necessarily be disputes arising directly under the contract. They might be disputes connected with the contract in some way or another. (*Harries, C.J. and Chakravarti, J.*) Mohin & Co., Ltd. *v.* Atul Chandra Dutta. 85 C.L.J. 188.

———*Clause in contract—Validity—Contract containing agreement invalid.*

If a contract is invalid, the arbitration agreement which is a part of the contract is also invalid. (*Sinha, J.*) Ganapatrai Gupta *v.* Moody Brothers, Ltd. 85 C.L.J. 136.

———*Clause in contract—Validity—Contract void or voidable—Arbitration clause, if survives.*

An arbitration clause contained in a contract was in the following terms:—"All matters, questions, disputes, differences and|or claims arising out of and|or concerning and|or in connection with and|or in consequence of or relating to this contract whether or not the obligations of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated shall be referred to arbitration."

Held, that there was no limit in the scope and ambit of the arbitration clause except that it contemplated a contract. If a contract was never entered into, because, for example, the parties were not *ad idem* or the contract was void *ab initio, e.g.,* by reason of illegality or mutual mistake of fact essential to the contract, that clause would not be available, for there being no contract there could be no dispute arising out of it. But if once it was found that there was a contract, then, although the contract might have come to an end by reason of frustration or rescission or breach of condition or by being avoided for fraud or misrepresentation or coercion, the arbitration clause clearly survived. (*Das, J.*) Tolaram Nathmull *v.* Birla Jute Manufacturing Co., Ltd. I.L.R. (1948) 2 Cal. 171.

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———*Clause in contract—Validity—Parties to contract under mutual mistake of fact.*

A mutual mistake of parties to a contract as to an existing fact will render the contract void *ab initio.* In such an event, the arbitration clause contained in the contract would necessarily have no existence. On the other hand, if the mistake is as to some future event, a binding contract is entered into between the parties, although it may be avoided or rescinded at some future date if the expected event does or does not happen. In such a case the contract including the arbitration clause contained in it is not void *ab initio.* (*Harries, C. J. and Mukherjea, J.*) Chundanmull Jhaleria *v.* Clive Mills Co., Ltd. I.L.R. (1948) 2 Cal. 297.

———*Powers of arbitrator—Custom affecting rights of parties—Existence of—Arbitrator, if competent to determine.*

Under the clause in a contract referring to arbitration any dispute arising under the contract it is competent to the arbitrators finally to determine the existence of a custom affecting the rights and obligations of the parties under the contract where such custom is not inconsistent with the terms of the contract. (*Sinha, J.*) Tularam Nathmall *v.* Bilasroy & Co. 85 C.L.J. 164.

———*Powers of arbitrator—Jurisdiction of arbitrator depending on existence of custom—Power of arbitrator to decide the question.*

Where the jurisdiction of the arbitrators depends on the existence of custom, they cannot decide the question on which would be founded their jurisdiction. (*Sinha, J.*) Sohanlal Ruia v. Thomas & Co. (Jute and Gunnies), Ltd. I.L.R. (1949) 1 Cal. 350.

———*Power of Court to refer questions other than those in suit.*

A Court has no power to refer to arbitration any questions other than those in question in the suit and such a reference if made would be *ultra vires* and the proceedings would have to be set aside as invalid. (*Rege, J.*) Bhagirath *v.* Shankerlal. 5 D.L.R. (M.B.) 10.

———*Reference—Construction—Reference by 2 groups of partners of firm for decision of differences between them—Provision for reference of all differences and disputes—Arbitrator given power to determine shares of several partners, to adjudicate upon all matters of account upon which parties may be at variance and to adjust accounts finally between the parties—Decision of disputes between partners of one group* inter se*—Power of arbitrator to make.*

Where an agreement of reference between three partners of a firm on one side and two on the others, after reciting that the parties, with a view to avoid litigation have agreed that all the disputes and differences shall be referred to the sole arbitration of *X,* provides *inter alia,* that the arbitrator shall have full power to determine what the shares of the several partners were, to adjudicate upon all matters of account finally between the parties and to direct payment of such money as may be found due to or by the said *V* and *A* by or to the other parties hereto, and generally to decide every matter and contention connected with

the claim of the said *V* and *A,* against the other parties hereto in reference to the said firm and to make every order in reference to the said claim which it would be competent to a Court of law to decide and make in a suit for enforcing the said claim, it must be held that the arbitrator has jurisdiction to decide not only disputes between the two groups of the partners but also all disputes between the several partners *inter se* of each of the groups. It cannot be said that in the context the agreement contemplates only the determination of the shares of the groups alone; and on the terms of the agreement of reference and having regard to the principle of the law of partnership the arbitrator must give his award in favour of or against individual partners and not in favour of or against groups, and, therefore, the disputes between the members of each group *inter se,* are clearly included in the reference and must be decided by the arbitrator. A.I.R. 1933 Lah. 1022; A.I.R. 1936 Lah. 514; 48 M.L.J. 142; 67 M.L.J. 413, ref. (*Naik, C.J. and Ali Khan, J.*) Jagidishwarayya *v.* Tejalingam. A.I.R. 1950 Hyd. 63.

———*Reference—Modification—Rights of parties.*

It is open to the parties at any stage to modify the reference which they had originally made. (*Bose and Mangalmurti, JJ.*) Yeshwantrao *v.* Dattatrayarao. I.L.R. (1947) Nag. 631= 1948 N.L.J. 28=A.I.R. 1948 Nag. 162.

———Reference—Successful attack by minor on validity of agreement to refer—Effect as against other parties. *See* C. P. Code, O. 32, R. 7. (1946) 1 M.L.J. 339 (P.C.).

———*Reference to—Validity — Association—Agreement to refer based on general sense of meeting of members and signed by secretary—Validity.*

Where at a general combined meeting of the members of 6 Sampradayas and 3 Sampradayas the matter in dispute was decided to be referred to arbitration and two separate agreements of reference to arbitration were drawn up and signed by some representative members of the two Sampradayas including the secretaries it was held that the reference to arbitration was perfectly valid. (*Nawal Kishore, C.J. and Sukhdeonarain, J.*) Bhikamchand *v.* Chandanmal. 1947 M. L.R. 28 (Civil).

———*Reference to—Validity—Reference by one partner—Acquiescence by other partners—Partnership Act, Ss.* 18 *and* 19*—Contract Act, Ss.* 193 *and* 196.

Although the initial reference to arbitration of a dispute relating to the business of a firm is made by one of the partners of the firm without any express or implied authority from his other partners, there is nothing to prevent such partners from ratifying his act which was unauthorised at its inception. Ratification need not be by any express act or declaration and may be implied from conduct. It may be inferred from mere acquiescence or silence or inaction on the part of the party concerned. (*Achhru Ram, J.*) Hanuman Chamber of Commerce, Ltd., Delhi *v.* Seth Jessa Ram Hira Nand. 50 P.L.R. 181 =A.I.R. 1949 E.P. 46.

———Reference—Validity—Reference signed by one of three brothers who had a power of attorney from another brother who was also the certificated guardian of the third brother, a minor—Minor attaining majority before date of reference—Counsel for minor giving consent to reference—Binding nature. [*See* Q.D. 1941-1945 Vol. I, Col. 127.] MADHO PRASAD *v.* KANHAIYA LAL. 222 I.C. 375=I.L.R. (1945) All. 882 =1946 A. (Rul.) 159=A.I.R. 1946 All. 1.

———*Umpire—Agreement for arbitration by even number of arbitrators—Difference between them to be decided by named Judge of High Court—Latter, if act* extra cursum curiae *as Judge or as umpire.*

When an agreement for arbitration by an even number of arbitrators provides for any difference between them to be decided by a named person, even if the word "umpire" is not used in connection with that person, he can act only in that capacity. If such an agreement provides that the matters of difference or which were not determined by the arbitrators should be decided by a named Judge of the High Court, the latter does not act *extra cursum curiae* as a Judge when he disposes of the matters referred to arbitration but acts as an umpire in the arbitration. Parties cannot choose a Judge of a Court by whom they wish their cause to be decided and even if it has been the intention in the agreement for the matters to be decided by the Court, assuming that course could legally be adopted, any such provision in the agreement would have to be by reference to the Court and not to a named Judge of it. (*Gentle and Ormond, JJ.*) BENGAL SILK MILLS, CO., LTD. *v.* AISHA ARIFF. 231 I.C. 187=A.I.R. 1947 Cal. 106=I.L.R. (1946) 1 Cal. 611.

———*Umpire—Powers of—Difference of opinion between arbitrators.*

The umpire has authority to decide if there is a difference of opinion between the arbitrators. (*Bose and Mangalmurti, JJ.*) YESHWANTRAO *v.* DATTATRAYARAO. I.L.R. (1947) Nag. 631. 1948 N.L.J. 28=A.I.R. 1948 Nag. 162.

ARBITRATION ACT (IX OF 1899), S. 15

Construction—"On being filed"—Construction and effect of—Award when becomes decree—Execution—Limitation—Starting point—Limitation Act, Art. 182.

The words "on being filed" in S. 15, Arbitration Act, indicate the point of time from which the award is deemed to be enforceable as it were a decree. It is clear that the award only acquires the incidents of a decree when it is filed in Court, and "the date of the decree" for purposes of Art. 182, Limitation Act, is the date on which it is filed into Court and becomes a decree. (*Wadsworth and Rajamannar, JJ.*) ALBUQUERQUE *v.* CATHOLIC BANK, LTD. I.L.R. (1947) Mad. 123=59 L.W. 182=1946 M.W.N. 213= A.I.R. 1946 Mad. 352=(1946) 1 M.L.J. 244.

———**(X OF 1940)**—*Act if exhaustive—Award passed on oral submission—If can be enforced.*

The Arbitration Act is exhaustive of the law relating to arbitration in India. An award, therefore, passed on an oral submission can neither be filed and made a rule of Court under the Act, nor enforced apart from the Act. (*Viswanatha Sastri, J.*) BELLI GOWDER *v.* JOGHI GOWDER. 1950 M.W.N. 783=(1950) 2 M.L.J. 639.

———*Applicability—Revenue Courts.*

The Arbitration Act applies to proceedings in Revenue Courts also. 1944 R.D. 325 Rel. on. (*Faiyaz Ali, J.M. II.*) KUWAR SINGH *v.* MARE. 1949 R.D. 399.

———*Procedure—Application under Act—Procedure for hearing and decision—C. P. Code—Applicability of.*

There is no special procedure provided by the Arbitration Act in respect of applications filed in Court under the Act. They have got to be decided generally in accordance with the provisions of the C. P. Code. (*See* S.C. on appeal, 51 Bom.L.R. 79). (*Bhagwati, J.*) VISHAMBARLAL RUIYA *v.* GULAMALLY ABDUL HUSEIN. 4 D.L.R. (Bom.) 91.

———**S. 2 (a)**—*"Arbitration agreement"—Agreement to be bound by rules of association—One rule providing for compulsory arbitration—Effect of.*

To constitute "an arbitration agreement" within the meaning of S. 2 of the Arbitration Act, it is not necessary that there should be a formal agreement, or that the terms should all be contained in one document. All that is necessary is that the parties should agree in writing to submit present or future differences to arbitration. Where two members of an association (Bombay Bullion Exchange) has applied, though at different times, to be enrolled as members of the association, agreeing by the very terms of their applications signed by them, to be bound by the current rules and regulations of the association, which include a rule that all disputes between them, present or future, would be submitted to arbitration, there is an agreement to submit present or future differences to arbitration, which constitutes an arbitration agreement falling within S. 2. (*Bhagwati, J.*) MOHANLAL CHHAGANLAL SHAH *v.* BISSESARLAL. 48 Bom. L.R. 686=A.I.R. 1947 Bom. 268.

———**S. 2 (a)**—*Arbitration agreement—Clause in contract—When amounts to—Use of words "arbitration", "arbitrator", etc.—If necessary—Reference of disputes to person who is an employee of one of the parties—Effect.*

In order that a clause in an agreement may constitute an arbitration agreement within the meaning of S. 2 of the Arbitration Act, it is not necessary that the words "arbitration", "arbitrator" or "arbitration agreement" should appear in the clause, so long as the parties can be found to have agreed to allow the matter to be decided by a person of their own selection whose decision was to be final, conclusive and binding on them. If the matters in dispute between them are left to be decided by a person of their choice whose decision is to be final and conclusive, the person so chosen or appointed cannot but be regarded as an arbitrator despite the fact that he is an employee of one of the parties. (*Abdul Rashid, Ag. C.J. and Abdur Rahman, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* SIMLA BANK-

ING AND INDUSTRIAL CO., LTD. 226 I.C. 444=1946 Lah. (Rul.) 450=A.I.R. 1947 Lah. 215.

——**S. 2 (a)**—*Arbitration agreement—Contract notes signed by member of East India Cotton Association and sent to another not a member—Contract embodying bye-law of Association providing for compulsory arbitration—If Arbitration agreement.*

Where contract notes containing a bye-law of the East India Cotton Association which provides for compulsory arbitration are sent by one party to the contract to the other, and they are accepted by the other party either by signing the confirmation notes or by his conduct, it would be a sufficient arbitration agreement within the meaning of the definition in S. 2 of the Arbitration Act. It is absolutely necessary that it should be a confirmation note signed by the party receiving the contract notes in favour of the other. It is sufficient if the Court, on the materials before it, is satisfied that there was acceptance by conduct. The party so accepting the note would be bound by the agreement even when he is not a member of the Association, when the other is a member of that Association. (*Bhagwati, J.*) L. W. FERNANDEZ *v.* JIVATLAL PARTOPSHI. I.L.R. (1946) Bom. 777=229 I.C. 568=48 Bom.L.R. 678=1947 Bom. (Rul.) 212=A.I.R. 1947 Bom. 65.

——**S. 2 (a)**—*Arbitration agreement—Signatures of both parties—If essential.*

When S. 2 (*a*) of the Arbitration Act which defines an arbitration agreement speaks of an agreement in writing, all that it means is that the terms of the agreement should be expressed in writing and that the agreement should be such that it binds both the parties and that the actual signatures of both the parties on the agreement are not essential. The agreement may be in the form of a signed document by both the parties containing all the terms or a signed document by one party containing the terms and a plain acceptance, signed or orally accepted by the other party, or it may be an unsigned document containing the terms of a submission to arbitration agreed to orally by both the parties. It is sufficient if one party signs the submission and the other accepts it. The acceptance may be by word of mouth or may be by conduct. (*Mehr Chand Mahajan and Falshaw, JJ.*) MANGAL CHAND BANWARI LAL *v.* PAYARE LAL RAM SARUP. 50 P.L.R. 253=A.I.R. 1949 E.P. 199=4 D.L.R. (Simla) 162.

——**S. 2 (a)**—*Arbitration agreement—What constitutes.*

Where a trading member of a company maintaining an Exchange for the business of buying and selling commodities wrote to the company when he applied for membership in the company that "we undertake that all disputes arising out of dealings effected by us in accordance with and subject to the Bye-laws of the Exchange shall constitute a reference under the Arbitration Act".

Held: There was an arbitration agreement in view of the terms of the letter. (*Raghubar Dayal and Akbar Hussain, JJ.*) UPPER INDIA SUGAR EXCHANGE, LTD. *v.* HAJI HABIB HAJI PIR MOHD. I.L.R. (1948) All. 443.

——**S. 2 (a)**—*Reference—Validity—No application—Statement in Court by Counsel—Court recording it upon a rubkar signed by the parties.*

The language of S. 2 (*a*) of the Arbitration Act does not even mention an application. It only requires an agreement in writing. So where on a statement in Court by counsel recorded upon a Court rubkar signed by the parties in the presence of the Court a reference is made, it is a valid reference to arbitration. 22 A.L.J. 67, applied. (*Dayal and Agarwala, JJ.*) MAHOMED YAKUB KHAN *v.* SIRAJUL HAQ. (1949) A.L.J. 288=A.I.R. 1949 A. 771=1949 A.W.R. 342.

——**S. 2 (c)**—*"Civil Court"—If includes—Insolvency Court—Power to refer dispute to arbitration.*

The Insolvency Court is a Special Court and not a Civil Court within the meaning of S. 2 (*c*) of the Arbitration Act and it has therefore no jurisdiction to make a reference of the disputes involved in an insolvency proceeding to arbitration. After the commencement of the insolvency proceedings the person proceeded against has no right to agree to a reference to arbitration. (*Padhye, J.*) MANGILAL FATERAM *v.* DEVICHARAN MANGAL LAL. I.L.R. (1948) Nag. 535=A.I.R. 1949 Nag. 110=1948 N.L.J. 309.

——**Ss. 2 (c) and 31**—*"Civil Court" if includes revenue Court—Jurisdiction to pass decree in terms of award—Test—Reference in respect of zamindari and house property—Award only in respect of the former—Competency of the Civil Court to pass a decree in terms of the award.*

The expression "Civil Court" as used in S. 2 (*c*) of the Arbitration Act does not include the Revenue Court.

Having regard to the definition of the word "Court" in S. 2 (*c*) and the terms of S. 31 of the Act, the jurisdiction of a Court for passing a decree in terms of an award would depend upon the questions which form the subject-matter of reference to the arbitration and not on the terms of the award. Hence, where the reference is in respect of both zamindari and house property but the award is only in respect of the zamindari property by virtue of sub-Ss. (2) and (3) of S. 31, the Civil Court has the exclusive jurisdiction to entertain an application for passing a decree in terms of the award and ordering it. (*Malik and Prasad, JJ.*) BITHAL DAS KHANNA *v.* SHRI NATH DAS KHANNA. I.L.R. (1948) A. 10=A.I.R. 1949 A. 360=1947 A.L.J. 594.

——**Ss. 2 (c), 21 and 41**—*'Court"—If includes appellate Court—Power of appellate Court to refer disputes to arbitration.*

"Court" as defined in S. 2 (*c*) of the Arbitration Act does not include an appellate Court, and there is nothing in that Act which enables an appellate Court to refer to arbitration the matters in dispute between the parties. (*Mukherjea and Sharpe, JJ.*) ABANI BHUSHAN CHAKRABORTY *v.* HEM CHANDRA CHAKRABORTY. I.L.R. (1946) 2 Cal. 492=227 I.C. 168=50 C.W.N. 838=81 C.L.J. 289=1946 Cal. (Rul.) 428=A.I.R. 1947 Cal. 93.

———S. 3—*Appointment of two arbitrators in absence of provision in arbitration agreement—Validity—Arbitrators appointing umpire beyond time mentioned in Cl. (2) of First Schedule—Jurisdiction of such umpire—Acquiescence or consent of parties—Effect of.*

Under S. 3 of the Arbitration Act, unless there is an express provision in the arbitration agreement itself to the contrary, the reference must be to a single arbitrator. Where the parties who did not realise the legal implications of their arbitration agreement which did not contain any provision as to how many arbitrators should be appointed, appointed two arbitrators, one nominated by each, and the two arbitrators appointed an umpire beyond the time mentioned in Cl. (2) of the First Schedule, the appointment of the umpire is invalid even assuming that the appointment of the two arbitrators was valid. It is a fundamental rule that a judgment of Court or of an arbitrator or of an umpire without jurisdiction is a nullity. Here, there is an inherent incompetency in the umpire to deal with the matter as an umpire and no consent of parties would confer upon him any jurisdiction to make an award. By reason of the limitation imposed by statute the so called umpire has no jurisdiction to determine the disputes between the parties and neither acquiescence nor express consent of the parties can confer jurisdiction upon him. Moreover, estoppel cannot be invoked against the mandatory provisions prescribed by a statute. *(Chatterjee, J.)* Harack Chand Damani *v* Ramsarup Lakkar. 85 C.L.J. 232.

———S. 5—*Application for leave to revoke authority of arbitrator—Material consideration for Court.*

A material consideration for the Court as to the order it will make on an application for leave to revoke the authority of an appointed arbitrator is the time when the application is made. If it is made at an early stage of the arbitration proceedings, the Court will more readily grant leave to revoke, assuming always that a good case for revocation is shown. Where however the application is not made at an early stage, and the applicant knowing about the defect in the arbitrator's qualification or in the proceeding before him submits his case to him, the Court will not be disposed to grant leave to revoke the authority of the arbitrator. *(Banerjee, J.)* Kanoria Brothers *v.* Hindusthan General Produce Co., Ltd. 86 C.L.J. 140.

———Ss. 8 and 9—*Applicability—Arbitration agreement providing for reference to appointed arbitrators.*

If in an arbitration agreement provision is made for reference to appointed arbitrators, the procedure to be followed in a case where the appointed arbitrator refuses to act or is incapable of acting or dies, is laid down in S. 8 of the Arbitration Act. The procedure laid down by S. 9 of the Act has no application to an arbitration agreement which provides for a reference to *appointed* arbitrators as distinguished from arbitrators *to be appointed*. 56 C. 848, ref. to. *(O'Sullivan and Thadani, JJ.)* Hariram Khiaram *v.* Gobindram Rattan Chand. A.I.R. 1949 Sind 24.

———Ss. 8 and 9—*Scope—Failure of arbitrator to signify his acceptance of his appointment within one month of request by one of the parties—Effect—Arbitrator purporting to act afterwards and giving award—Legality.*

Where an arbitrator nominated by the parties fails to signify his acceptance of the office within one month of a request from one of the parties it amounts to a refusal to act as arbitrator. It may be open to such an arbitrator to change his mind after he had expressed his refusal so to act but his change of mind must be at a time when he is at liberty and in a position to do so (that is within one month of the request by the party). He cannot purport to act as adjudicator after the expiry of the one month and any award passed by him will be invalid and of no effect. *(Gentle, C.J. and Tyagarajan, J.)* Venkatanaranayya *v.* Lakshmidevamma. (1947) 2 M.L.J. 520.

———S. 8 (2)—*Appointment of umpire—Jurisdiction of Court—Notice under sub-S.* (1) (c)—*If condition precedent.*

Under S. 8 (2) of the Arbitration Act the Court is not competent to appoint an umpire in the absence of any notice on the arbitrators as required by S. 8 (1) *(c)*. To give jurisdiction to the Court to act under the said section it is essential that as a condition precedent a notice should be given. *(Majumdar, J.)* Governor-General in Council *v.* Bilash Singh. 52 C.W.N. 54.

———S. 9—*Appointment of arbitrator by party—When complete.*

The appointment of an arbitrator by a party is not considered complete until it has been notified to the other side. *(Banerjee, J.)* Dominion of India *v.* Kalyan Kumar. 53 C.W.N. 180.

———S. 9—*Formal appointment of sole arbitrator—Necessity for.*

Under S. 9 of the Arbitration Act unless there is a formal appointment in the words of Cl. **(*b*)** of that section the arbitrator appointed by one party cannot arrogate to himself the functions of a sole arbitrator on the refusal of the other party to appoint an arbitrator. *(Teja Singh and Achhru Ram, JJ.)* Harichand *v.* Lachhman Das. 50 P.L.R. 57=A.I.R. 1948 E. P. 11=2 D.L.R. 956.

———S. 9 (b)—*Appointment of sole arbitrator—Condition pre-requisite.*

The power to a party to appoint a sole arbitrator has been conferred by S. 9 *(b)* of the Arbitration Act and the pre-requisite condition for exercise of that power is that the other party fails to appoint an arbitrator for fifteen clear days after the service of a notice in writing to make the appointment. The appointment of a sole arbitrator before this time is bad, and an award by him is invalid. 9 I.C. 178, relied on. *(Banerjee, J.)* Dominion of India *v.* Kalyan Kumar. 53 C.W.N. 180.

———Ss. 10 (2), 14 and 17—*Award signed by fourteen out of fifteen arbitrators—Validity—Application to set aside award barred by time—Right to resist filing of award.*

According to the provisions of S. 10 (2) of the Arbitration Act a reference must be regarded as one expressly containing a provision that the award of the majority shall prevail when there is no provision to the contrary in the reference. In the absence of such a provision, when all the fifteen arbitrators were present and took part in the deliberations preceding the making of the award but only fourteen signed the award it cannot be said the failure of one of the arbitrators to sign the award is fatal to its validity by reason of S. 14 of the Act.

A party barred by limitation from making an application to set aside an award cannot either resist the filing of the award or show grounds upon which the award can be set aside. (*Clark, J.*) PAUL *v.* JOSEPH. 61 L.W. 394=1948 M.W.N. 476=A.I.R. 1948 Mad. 512=(1948) 1 M.L.J. 376.

———**S. 14**—*Application for filing award—If can be thrown out by Court* suo motu *as collusive when no such plea is raised by the parties.*

Where an application is made under S. 14 of the Arbitration Act for filing an award in Court the Court cannot in the absence of a plea or issue *suo motu* hold that the reference and the award as well as the proceedings before the Court were all collusive. The Court cannot raise such a plea which is one of fact *suo motu*. It may be that the award and the proceedings are collusive; but if they are they will have to be found by a Court in subsequent proceedings on a plea raised by third parties and on evidence which may be led in that litigation. (*Abdur Rahman, J.*) SOBHA DEVI *v.* FAQIR CHAND. 1946 Lah. (Rul.) 418=225 I.C. 166=A.I.R. 1947 Lah. 24.

———**S. 14**—*Award filed into Court by arbitrators—Persons not parties either to the agreement of reference or to the award—Power of Court to add them as necessary parties under O. 1, R. 10, Civil Procedure Code.*

The Court's powers of interference regarding the awards passed by arbitrators is limited in scope. The Court is not competent to go into the merits or otherwise of the decision but entitled only to correct any obvious error or patent mistake or any other error which would appear on the face of the award. The Court will not be competent to adjudicate upon any matters which are contained in the decision even as between the parties to the reference and *a fortiori* it cannot go into matters not covered by the reference which may be raised by third parties to the reference. Therefore, though it cannot be laid down as a formal proposition of law that O. 1, R. 10, Civil Procedure Code, could not be absolutely inapplicable to a proceeding before the Court under the Arbitration Act, the Court has no power in a petition filed by the arbitrators under S. 14 of the Act, for filing an award, to add as necessary parties under O. 1, R. 10 of the Code, persons who were *eo nomine* not parties either to the agreement of reference or to the award. (*Krishnaswami Nayudu, J.*) SUBRAMANIAN *v.* VASUDEVAN CHETTIAR. 63 L.W. 174=A.I.R. 1950 Mad. 488=(1950) 1 M.L.J. 237.

———**S. 14**—*Notice as contemplated by—When to be given.*

Where a notice is given by the arbitrators before the award was signed it is obviously not a valid notice for according to S. 14 (1) of the Arbitration Act, the arbitrators must sign their award and then give notice in writing to the parties of the making and signing thereof. (*Davies.*) RAM SWAROOP *v.* PHOOL CHAND. 1946 A.M.L.J. 41.

———**S. 14**—*Scope—Compliance—Notice of filing of award—Service on advocate—If valid and proper service.*

Under S. 14 of the Arbitration Act it is the statutory right of a party to be personally served with notice of the filing of the award and service except personal service is not a proper service. Knowledge of the filing of the award acquired otherwise than in the way prescribed by S. 14 cannot be deemed to be proper service of a notice of the award. Service of notice on the advocate cannot be regarded as valid service under S. 14. (*Thadani, J.*) HOLARAM VERHOMAL *v.* GOVERNOR-GENERAL IN COUNCIL. I.L.R. (1946) Kar. 459=A.I.R. 1947 Sind 145.

———**S. 14**—Scrutiny of award—Power of Court. *See* ARBITRATION—AWARD—VALIDITY. 48 P.L.R. 377.

———**S. 14 (2)**—*Applicability and scope—Jurisdiction to direct award to be filed in Court—Basis of—Agreement in writing—Necessity.*

Under the Arbitration Act, 1940, the only procedure prescribed for filing an award is that contained in S. 14 (2) of the Act. "Arbitration agreement" as defined in S. 2 (*a*) does not include a parole or oral agreement to refer to five panchas. There is no provision in the Act which expressly applies to an agreement to refer a dispute to more than three arbitrators. Chapter II of the Act will apply only when there is an agreement in writing. The existence of an agreement in writing is therefore the foundation of the jurisdiction of the Court to direct the arbitrators under S. 14 (2) to cause an award to be filed in Court. (*Agarwala, C.J. and Meredith, J.*) GAURI SINGH *v.* RAMLOCHAN SINGH. 29 P.L.T. 105=A.I.R. 1948 Pat. 430=3 D.L.R. (Pat.) 26.

———**S. 14 (2)**—*Application to file award by one of arbitrators—If maintainable.*

Under S. 14 (2) of the Arbitration Act, it is not necessary that an application to file the award should be made by all the arbitrators. Any one of them on behalf of himself and the others can file the award. [I.L.R. (1945) Nag. 323, 5 R. 171 and 1914 Sind 90, rel. on. 23 P. 719, referred to.] (*Sarwate, J.*) R. K. MISHRA *v.* KUNDAN LAL. I.L.R. (1949) Nag. 272=A.I.R. 1949 Nag. 349=1949 N.L.J. 408.

———**Ss. 14 (2) and 38**—*Arbitrators' fees—Power of Court to compel party to pay before filing of award—Special contract between parties for each to pay his proportionate share—Effect of—Remedies open to party paying his share.*

Whether S. 14 (2) or S. 38 of the Arbitration Act applies to a case, a party to an arbitration cannot have the award filed unless he pays off the balance of the fees due to the arbitrators. The

Act does not provide that if any of the parties does not pay his share of the arbitrators' fees, the Court has power to compel him to do so by means of an interim order at the instance of another party who has paid his share and wants to have the award filed.

A provision in a special contract between the parties that each will pay his proportionate share of the arbitrators' fees and if any party fails to pay or no party pays, the costs will come out of the estate, means no more than that the parties will not be personally responsible for the costs which will come out of the estate. In any event, the provision only means that there will be a direction for the cost to come out of the estate in the ultimate decree and it does not and cannot mean that during the progress of the suit or the progress of the arbitration proceedings, the Court will have power to make interim order directing, as it were, specific performance of the contract between the parties.

The Act provides for two remedies and two remedies only. One is that the party who wishes the award to be filed can have his wish fulfilled by paying the costs himself. The recovery of the costs from the remaining parties must form the subject-matter of the separate proceeding or may perhaps be adjusted at the time of passing the final decree. The other remedy is that if it is found that the arbitration is being brought to nothing by the recalcitrance of one of the parties who is refusing to pay his share of the arbitrators' fees, the person aggrieved may well make that a ground for an application for superseding the reference. (*Harries, C.J. and Chakravartti, J.*) SHIB KRISHNA TARAFDAR *v.* SUNIL KUMAR. I.L.R. (1949) 1 Cal. 482=A.I.R. 1949 Cal. 189.

———**S. 14 (2)**—*Compliance with—Necessity Court passing decree on award before expiry of time for filing an application to set aside award—Decree passed without jurisdiction.*

If a decree is passed by a Court on the award of an arbitrator before the expiry of the time for making an application to set aside the award, then such a decree should be deemed as passed without jurisdiction.

In a suit a reference was made for arbitration and when the award was received by the Court the pleaders of both parties were present while the defendant alone was absent and the Court forthwith passed a decree confirming the award, though the defendant's pleader asked for an adjournment.

Held, that the period of thirty days for filing objections not having expired the Court was not justified in passing the decree and therefore the matter should be remanded to the lower Court for adhering to the procedure under S. 14 (2) of the Act. (*Horwill, J.*) APPA RAO *v.* MOHAMMAD HANEEF. 61 L.W. 561=4 D.L.R. (Mad.) 45=A.I.R. 1949 Mad. 256=1948 M.W.N. 652 =(1948) 2 M.L.J. 236.

———**S. 14 (2)**—*Non-service of notice of award—New plea in revision—Permissibility.*

A point as to non-service of notice of the filing of an award under S. 14 (2) of the Arbitration Act, cannot be raised for the first time in revision. (*Thadani, C.J. and Ram Labhaya, J.*) MAFIZUDDIN BHUYAN *v.* ALIMUDDIN BHUYAN. A.I.R. 1950 Assam 191.

———**S. 14 (2)**—*Parties present at time of filing of award—Notice, if may be dispensed with.*

Under S. 14 (2) of the Arbitration Act, the Court must give notice to the parties of the filing of the award. The notice, of course, need not necessarily be in writing but may be given orally if the parties are present in Court at the time of the filing of the award. But such verbal notice must be given explicitly and cannot be implied from the order recording the filing of the award in the presence of the parties. (*Teja Singh and Achhru Ram, JJ.*) HARI CHAND *v.* LACHHMAN DAS. 50 P.L.R. 57=A.I.R. 1948 E.P. 11=2 D.L.R. 956.

———**S. 14 (2)**—*Pencil or pen notes of evidence—If necessary to be filed.*

Pencil or pen notes of evidence when there is a formal minute of the evidence and proceedings before the arbitrator, do not require to be filed having regard to the language used in S. 14 (2) of the Arbitration Act. 1 Luck. 139, Dist. (*Mukharji, J.*) HAJI EBRAHIM KASSAM COCHINWALLA *v.* NORTHERN INDIAN OIL INDUSTRIES, LTD. 85 C.L.J. 176.

———**S. 16**—*Award leaving undetermined matter referred to arbitration—Duty of Court.*

It is well-settled that the award of an arbitrator must be a final decision on all matters requiring his determination and that it is the duty of the arbitrator to decide all the matters referred to him. If he does not decide all the disputes, he commits a breach of duty. If the award has left undetermined any of the matters referred to arbitration, it is the duty of the Court in a proper case to remit the award or the matters so left undetermined to the arbitrator for reconsideration. (*Bachawat, J.*) BARINDRA KRISHNA DEB *v.* BANI SANKAR SARKAR. 54 C.W.N. 796.

———**Ss. 16 and 30**—Remitting award and setting it aside—Grounds. *See* ARBITRATION ACT (X OF 1940), S. 37 (1) AND (3). (1948) 2 M.L.J. 601.

———**S. 16**—Revision—Order remitting award for reconsideration—Revision—If open. *See* C. P. CODE, S. 115. I.L.R. (1946) Kar. 21.

———**S. 16 (1)**—*Remittal of award on grounds other than those in statute—If justified—Plea, if can be taken in appeal.*

In a suit for partition referred to arbitration the Court remitted the award on the ground that it was not clear whether every individual sale in respect of the items in suit were considered by the arbitrator. As the plaintiff did not turn up the arbitrator returned the award to Court, which after examining the arbitrator and the plaintiff upheld the award. On appeal it was held that the award became void under S. 16 (3) of the Act. In revision,

Held, (i) the Court could not remit an award on any ground not contemplated by S. 16 (1) of the Act. (ii) It was open to the parties to plead in appeal the irregularity of the trial Court in so remitting the award. (*Raghava Rao, J.*) VENGU AYYAR *v.* YEGYAM AYYAR. 1950 M.W.N. 785=(1950) 2 M.L.J. 642.

———**S. 16 (1) (c)**—Power of Court to remit award—Non-registration of award—If ground for remitting. [*See* Q.D. 1941—1945, Vol. I, Col. 135.] NANIBALA SHAHA *v.* RAM GOPAL SHAHA. I.L.R. (1945) 1 Cal. 454.

———**S. 17**—*Applicability and scope—Application for judgment on award—Plea that award cannot be filed—If open when period for setting aside has expired.*

When a party has debarred himself from applying to set an award aside within the time limited by Art. 154, Limitation Act, he cannot come to the Court and point out to the Court the grounds on which the Court should set aside the award itself under the powers reserved in the earlier part of S. 17, Arbitration Act, in defence to an application by the other party to the Court for a judgment in terms of the award. (*Blagden, J.*) UMADUTT NEMANI *v.* CHANDRAO. 230 I.C. 252=1947 Bom. (Rul.) 243=A.I.R. 1947 Bom. 94=48 Bom.L.R. 675.

———**Ss. 17 and 39**—*Appealability—Dismissal of objections to filing of award and passing of decree in terms of award.*

On an application for the filing of an award, objections raised thereto that there was no valid reference at all were dismissed and a decree in terms of the award was passed. On the question whether an appeal lay against this under S. 17 or S. 39 of the Arbitration Act.

Held: An appeal could not lie under S. 17 because, it was not on the ground that the decree was in excess of the award but only on the ground that there was no valid reference. But an appeal preferred can be deemed to be one under S. 39 of the Act as one from an order refusing to set aside an award. I.L.R. 47 All. 743; I.L.R. (1940) 2 Cal. 551; I.L.R. 9 Luck. 73, rel. on. (*Mushtaq Ahmed and Desai, JJ.*) RAM ALAM LAL *v.* DUKHAN. 1950 A.W.R. 304=A.I.R. 1950 A. 427=1950 A.L.J. 249.

———**S. 17**—*Award against joint Hindu family business in its trading name—Judgment, whether can be passed against members individually or against their* karta.

An award for or against a joint Hindu family business in its trading name is a perfectly good award, and judgment may be passed upon such an award under the Arbitration Act. If, upon an award in favour of or against a joint Hindu family business in its trading name being filed in Court, notice is issued and served on the individual members of the joint Hindu family or on the *karta* as such the Court can under S. 17 of the Act proceed to pronounce judgment for or against the members or the *karta* as the case may be. The trading name of a joint Hindu family business is the compendious mode of describing the members and an award in the trading name is in reality an award in the name of all the members. Therefore a judgment in the names of all the members is quite in accordance with the award. The *karta* under the Hindu law represents and stands for all the members and therefore a judgment for or against the *karta* is in reality a judgment for or against the whole family and as such is in accordance with the award. (*Das, J.*) MUNSHILAL & SONS *v.* MODI BROS. 51 C.W.N. 563.

———**S. 17**—*Decree not in excess of award—Revision—Validity of award—If can be challenged—C. P. Code, S.* 115.

When the decree is not in excess of the award, objections to the validity of the award cannot, be urged in revision against the decree. [29 C. 157 (P.C.), 14 L. 165, 1935 Pat. 16, 7 Luck. 642, 1933 Oudh 327 and 1943 Oudh 304, rel. on.] (*Sarwate, J.*) R. K. MISHRA *v.* KUNDANLAL. I.L.R. (1949) Nag. 272=A.I.R. 1949 Nag. 349=1949 N.L.J. 408.

———**S. 17 and C. P. Code, S. 115**—*Passing of decree on award before period allowed for filing objections thereto had expired—Illegal exercise of jurisdiction—Proper remedy of aggrieved party.*

Where a decree was passed on an award before the expiry of the period of 30 days from the date of the service of the filing of the award allowed for filing objections thereto, on a question as to the proper remedy of the aggrieved party,

Held: The order passed was one without jurisdiction and in such a case an appeal does not lie and the only remedy of the aggrieved party is an application under S. 115, C. P. Code. (*Satyanarayana Rao, J.*) KRISHNAMMA *v.* CHENNAYYA. 1948 M.W.N. 607=A.I.R. 1949 Mad. 276=4 D.L.R. (Mad.) 60=61 L.W. 571=(1948) 2 M.L.J. 365.

———**Ss. 19 and 20**—*Award made upon reference under S.* 20 (4) *set aside—Reference not expressly superseded—Arbitration agreement—If remains in force.*

By the operation of S. 20 (5) of the Arbitration Act, the provisions of S. 19 of the Act are applicable to a case falling under S. 20, where there is no pending suit, but the agreement to refer has been filed in Court. Under S. 19 the Court has power, when it sets aside an award made upon reference under S. 20 (4), to supersede the reference and thus avoid the arbitration agreement. It follows that where a Court, while making an order under S. 19 does not expressly supersede the reference and direct that the arbitration agreement shall cease to have effect, it must be deemed to have declined to exercise the power, and consequently that the arbitration agreement notwithstanding that it has been filed in Court, still remains of full force according to its tenor, not only with respect to the difference which was referred to arbitration, but also with reference to all disputes between the parties which properly fall within the agreement. (*Cornelius, J.*) ABDUL HAKIM KHAN *v.* CHAIRMAN, LAHORE IMPROVEMENT TRUST. Pak.L.R. (1949) Lah. 789=A.I.R. 1950 Lah. 32.

———**S. 20**—Agreement lost or destroyed—If can be ordered to be filed. [*See* Q.D. 1941—1945, Vol. I, Col. 137.] DUNI CHAND RAM PARKASH *v.* PREM CHAND MAYA DASS. 221 I.C. 485=1946 Lah. (Rul.) 105.

———**S. 20**—*Applicability—Contract—Arbitration clause—Frustration by Government Notification—When effected—Procedure—Reference to arbitration—Right to apply for—Question of frustration—Jurisdiction to decide—Duty of Court.*

The respondent entered into an agreement with the appellant Firm for supply of certain bales of cloth of specified description on certain future date. The contract was settled on 6th February, 1943, and delivery was to be made in the months of February to June, 1943. There was a clause in the agreement by which all disputes in respect or with regard to the contract were to be settled by arbitration. On 26th May, 1943, a notification, No. 417, C. S., was issued by the U. P. Government dealing with piece goods falling under the U. P. Cotton Piece Goods Futures and Options Prohibition Order, by which it was declared that no cotton piece goods shall be delivered no margin shall be paid or received under any contract relating to such piece goods unless at the time when such delivery or payment fell due both the parties thereto agreed to such delivery or payment.

Disputes having arisen between the parties regarding the carrying out of the contract, the respondent on 31st May, 1946, filed an application under S. 20 of the Arbitration Act, praying that the agreement be filed in Court and a reference be made to arbitration; on the same date the respondent also filed an application under S. 33 of the Arbitration Act pleading that the matter should not be referred to arbitration and for an order that the agreement had become unlawful and stood rescinded in view of the frustration ot the contract by reason of the Government Notification, dated 26th May, 1943,

Held, (1) that the Notification in question did not declare all contracts of the nature to be unlawful and unenforcible but the only effect of the notification was that either party could resile from the agreement and if either party did resile from the agreement the contract was then to come to an end, but the contract could only remain in force and be operative only with the consent of both parties; (2) the question whether the contract had come to an end or not depended upon proof of the fact whether either party had decided to resile from it; (3) that the contract had not therefore been frustrated, and there was no immediate termination of the contract as to all matters and disputes which had not already arisen; and (4) that therefore the arbitration clause remained binding and operative and did not come to an end.

Held, further, that the contract not having become void or impossible of performance, the agreement could be filed in Court and the matter had to be referred to arbitration as provided by the arbitration clause in the agreement.

The question, however, whether at the time when the delivery fell due both the parties had agreed to such delivery, was one of fact which should not be decided by the Court, but should be properly left to the arbitrators to decide. Where there were matters of fact which had to be gone into before it can be said that the contract had come to an end, the arbitration clause was operative and binding. Only when, on the admitted facts in the pleadings of the parties, the Court could come to the conclusion that the performance of the contract had become impossible or unlawful and that therefore the contract had become void under S. 56, Contract Act, would the arbitration clause also become void along with the contract and not otherwise. [1948 Cal. 257, ref.] (*Wanchoo and Bhargava, JJ.*) LACHMI NARAIN ANAND SWAROOP *v.* RAJARAM RAMESH CHAND. I.L.R. (1950) A. 215=4 D. L. R. (All.) 203=1949 A.W.R. 509.

———**Ss. 20 and 34**—*Applicability—Matter required under statutory provision to be submitted to arbitration of specified person, arising in pending suit—Power of Court to refer it to such person.*

An Electric company instituted a suit against a Municipal Committee claiming among other items the cost of the service lines furnished by it for the purpose of street lighting. On the company raising the plea that by virtue of Cl. 6 (3) of the Schedule to the Electricity Act the cost of the service lines was a matter which could only be determined by the Electric Inspector, the Court directed that the dispute so far as it related to the cost of the service lines should be referred to the Electric Inspector. It was contended on behalf of the committee that since the matter had arisen in the course of a pending suit, the Court had no authority to act as it had done, as the sole provision in the Arbitration Act covering a case of this kind was that contained in S. 34 under which all that the Court could do was to stay the proceedings to enable the parties to make the reference. Overruling that contention,

Held, (1) that S. 34 of the Arbitration Act applied only in a case where the Court itself had jurisdiction to decide the matter, but allowed it to go to an arbitrator on account of an existing arbitration agreement, and in view of the other circumstances of the case. This section obviously had no application where the Court had no jurisdiction to deal with the matter before it, by reason of a statutory provision that such matter should be submitted to the arbitration of a specified person and should be decided by him.

(*ii*) That the case fell clearly under S. 20 of the Arbitration Act, all the necessary conditions for its application being present. The parties had not, *qua* Cl. 6 (3) of the Schedule to the Electricity Act, entered into any arbitration agreement, but by virtue of S. 46, the provision in Cl. 6 (3) was to be deemed to be an arbitration agreement and to be applied as such. This provision existed prior to the institution of the suit, and a dispute had clearly arisen between the parties to which it applied. The application by one party that the Court should apply this provision was, in the circumstances, equivalent to an application under sub-S. (1). Sub-Ss. (2) and (3) contained procedural provisions, which might be deemed to be satisfied in a case where such an arbitration agreement was invoked by either party to a pending suit, for the application need not in that case be numbered and registered as a suit, nor was it necessary that separate notice of it should be given to the parties who were already before the Court. Sub-S. (4) which was the operative part of the section also applied in the case, for the statute could not be defeated by showing cause, and the arbitrator was a person specified in the enactment, *viz.*, Cl. 6 (3). The only ground upon which doubt might be entertained regarding the applicability of S. 20 of the Arbitration Act to a case like the present was that that section was preceded by a cross heading which ran as follows:—"Arbitration with intervention of a Court where there is no suit pending". But these words were not to be construed as words of limitation upon the operation of the section. The provisions of the section are of exclusive application to a case like the present, and in those circumstances it was unnecessary to refer to the cross-heading for the purpose either of understanding the section or of applying it.

(*iii*) That the provision in S. 36 (3) of the Electricity Act providing for an appeal from the decision of the Electric Inspector to the Provincial Government could not cause any difficulty in the way of the Court assimilating the final decision upon the reference in its decree in the suit, which included oother reliefs besides the relief in relation to the cost of the service lines. (*Cornelius, J.*) MUNICIPAL COMMITTEE, FAZILKA *v.* FAZILKA ELECTRIC SUPPLY CO., LTD. A.I.R. 1947 Lah. 309.

——**S. 20 (4)**—*Refusal of arbitrator named in agreement to act—Effect of—If makes agreement ineffectual.*

Under S. 20 (4), Arbitration Act, the authority of the Court has been considerably widened. Previously the Court was not entitled to fill up the place of an arbitrator who had refused to act, but now if the arbitrator named in the agreement declined to act, the Court could ask the parties to agree to another person as arbitrator, and if the parties still could not come to an agreement, the Court could appoint another arbitrator. In other words, the omission or failure on the part of the arbitrator first appointed by the parties would not make the agreement wholly ineffectual, but the agreement could still be kept alive by the parties by agreement, and failing that, by the Court itself. (*Mahomed Sharif, J.*) YAR MAHOMED *v.* GHULAM SARWAR. Pak.L.R. (1950) Lah. 285=A.I.R. 1950 Lah. 145.

——**Ss. 21 to 25**—Applicability—Oral reference by parties to suit to arbitration by Judge—Judge—if becomes arbitrator—Decision—If award—Appealability. [*See* Q.D. 1941-1945, Vol. I, Col. 138.] K. P. DALAL *v.* R. S. JAMADAR. I.R.R. (1945) Bom. 744.

——**S. 21**—*Applicability—Execution proceedings—Power of Court to refer dispute in execution to arbitration.*

The Arbitration Act is not inapplicable to proceedings in execution, and a civil Court executing a decree has therefore jurisdiction to refer a dispute arising in execution to arbitration. The award can be recorded as an adjustment of the decree under O. 21, R. 2, C. P. Code or as a compromise under O. 23, R. 1, C. P. Code. (*Malik, C.J. and Bind Basni Prasad, J.*) MUNNI LAL *v.* KISHUN PRASAD. I.L.R. (1948) A. 629 =1948 A.L.J. 556=3 D.L.R. (All.) 46=A. I.R. 1948 A. 443.

——**S. 21**—*Applicability—Proceedings under S. 12, U. P. Agriculturists' Relief Act—Reference to arbitration—Permissibility.*

Proceedings under S. 12, U. P. Agriculturists' Relief Act are proceedings in a suit before a Civil Court to which the Arbitration Act applies; and hence a reference to arbitration of the dispute between the parties to such proceedings is competent and lawful. (*Malik, C.J. and Bind Basni Prasad, J.*) BALRAM SINGH *v.* DUDH NATH. I.L.R. (1948) A. 363=A.I.R. 1949 A. 100=3 D.L.R. (All.) 12=1948 A.L. J. 296=1948 A.L.W. 239=1948 O.W.N. 244 =1948 A.W.R. (H.C.) 328.

——**S. 21**—*Award deciding dispute forming subject-matter of suit without order of reference—Whether can be given effect to—C. P. C., O. 23, R. 3.*

An award made under a written arbitration agreement deciding the disputes forming the subject-matter of several pending suits without an order of reference by Court cannot be given effect to or acted upon either under O. 23, R. 3, C. P. C., or under the Arbitration Act. (*Das, J.*) I. G. H. ARIFF *v.* BENGAL SILK MILLS, LTD. I.L.R. (1945) 2 Cal. 70=A.I.R. 1949 Cal. 350.

——**S. 21**—*"Interested" party—Meaning of.*

The words "parties interested" in S. 21, Arbitration Act are not confined to parties who are claiming something in their favour and do not cover a case where a party is pleading against his own interest. Although the action of a party to a suit would be detrimental to his own interest, he is nonetheless "interested" in the decision of the matter in difference, arising between the parties to the suit. (*Ghulam Hasan, J.*) RAM HARAKH SINGH *v.* MUMTAZ HUSAIN. 4 D.L. R. (All.) 70=A.I.R. 1949 A. 679.

——**S. 21**—Jurisdiction of Court to refer matrimonial dispute for the decision of arbitrators. [*See* Q.D. 1941-1945, Vol. I, Col. 136.] RAMUDAMMA *v.* KASI NAIDU. I.L.R. (1946) Mad. 134.

——**S. 21**—*Reference to arbitration—Agreement of all parties—If necessary—Parties "interested"—Meaning of.*

S. 21 of the Arbitration Act does not lay down that all the parties to a suit must refer the matter to arbitration; it only provides that any matter in difference shall be referred to arbitration by all the parties interested in a suit. The question whether a party is interested in the suit is one of fact and of substance and not of form. It is not an invariable rule that every necessary party is necessarily an interested party in all matters of difference between those actively litigating. There may be cases where a person may be a necessary party and yet not an interested party in regard to any matter in difference between them. A man may be *ex parte* and yet interested within the meaning of the section. (*Abdur Rahman, J.*) MADAN LAL *v.* NABI BAKHSH. 226 I.C. 241=1946 Lah. (Rul.) 444 =48 P.L.R. 377=A.I.R. 1947 Lah. 177.

——**Ss. 21 and 41**—Reference to arbitration—Power of appellate Court. *See* ARBITRATION ACT Ss. 2 (*c*) 21 AND 41. 50 C.W.N. 838.

———**S. 21**—*Scope—Reference—All parties interested not joining—Effect on award—Subsequent ratification by party not joining—If validates reference and award.*

Where all the parties interested do not join in the reference to arbitration, the award given in such arbitration is invalid, and the mere fact that the party not joining in the reference has remained *ex parte* would not render the award valid. Subsequent ratification by such party would not validate the reference which is void at its inception and the award thereon. The consent of all the parties is the foundation of the Court's jurisdiction to make an order of reference. [1926 All. 238; 1925 Mad. 621; 1933 Oudh 384; 1938 Oudh 154, rel. on.] (*Ghulam Hasan, J.*) Ram Harakh Singh *v.* Mumtaz Husain. 4 D.L.R. (All.) 70=A.I.R. 1949 A. 679.

———**S. 21**—Scope—Suit for declaration of plaintiff's right as gadisar of property—Property not alleged or proved to be public trust—Reference to arbitration—If prohibited or illegal. *See* C. P. Code, S. 92. 227 I.C. 61.

———**S. 21**—*Separate orders of reference in separate suits—Single consolidated award—Validity.*

Where there are separate suits, separate arbitration agreements and separate orders of reference by Court, it is irregular for the umpire to make one single consolidated award. (*Das, J.*) I. G. H. Ariff *v.* Bengal Silk Mills, Ltd. I.L.R. (1945) 2 Cal. 70=A.I.R. 1949 Cal. 350.

———**S. 23**—*Reference to arbitration—Competency of appellate Court.*

An appellate Court has no power to refer a matter to arbitration. Under S. 21 only parties to the suit are competent to apply for a reference to arbitration and as parties to an appeal are not authorised, the appellate Court would not be able to act under S. 23. (*Mootham and Mathur, JJ.*) Shukrullah *v.* Rahmat Bibi. I.L.R. (1947) A. 227=1947 A.L.J. 445=A.I.R. 1947 A. 304.

———**S. 23**—Reference to arbitration in pending suit—When Court ceases to have jurisdiction to deal with suit. [*See* Q.D. 1941-45, Vol. I, Col. 139.] Narayanaswami Nattar *v.* Manicka Nattar. 224 I.C. 124=1946 Mad. (Rul.) 151=A.I.R. 1946 Mad. 86.

———**S. 23 (1)**—*Matters not in difference in suit—Reference to arbitration—Jurisdiction of Court.*

Under S. 23 (1) of the Arbitration Act, the Court has no jurisdiction to refer to arbitration matters which are not in difference in the suit. Matters in difference in a suit are ascertained from the pleadings which have been filed in the suit before an agreement and an order of reference is made, and therefore, those differences must exist at the time of the agreement and do not include differences which thereafter arise. (*Gentle, J.*) Prabodh Kumar Goswami *v.* Eichholx Trading Co. I.L.R. (1947) 1 Cal. 572.

———**Ss. 23 (2), 25, 30 and 32**—*Reference made to arbitration—If can be abandoned by consent of parties—Subsequent compromise by parties—Court, if can give effect to—Compromise alleged by one party and disputed by other—Power of Court to enquire into factum of compromise.*

Per *Chakravarti, J.*:—(1) After a reference to arbitration has been made in a suit through the Court, the parties cannot be allowed, by mere consent, to abandon the arbitration and go on with the suit or ask for a fresh reference. (2) But if a concluded compromise in undisputed terms be placed before the Court by all the parties, whether before an award has been made or after the Court may grant leave to revoke the submission under S. 5 of the Arbitration Act and, on superseding the arbitration agreement thereafter under S. 12 (1) (*b*), pass a decree in terms of the compromise. But the compromise, before it is accepted, must be considered on its own account as to whether it is valid, and cannot be accepted as a matter of course. (3) Where, however, a compromise is only alleged by one party but disputed by the other, the existence of such a disputed compromise cannot be good ground for granting leave to revoke the submission and the Court has no power to entertain the question of such a compromise or to embark upon an enquiry as to its factum. (4) In no case can a compromise be given effect to by the Court without first superseding the reference.

Per *Akram, J.*:—Once the dispute goes to arbitration the authority of the Court to proceed with the suit is suspended and it cannot deal with the subject-matter of the reference so long as the reference stands; it is only when the arbitration is superseded that the suit, as it were, revives and the matters in dispute can be dealt with by the Court. Where a compromise is alleged by one party but disputed by the other, the Court cannot embark upon an inquiry and determine whether in fact there has been a compromise. Such an inquiry will necessitate dealing with the subject-matter of the reference and that would be contrary to S. 23 (2) and S. 25, proviso of the Arbitration Act. (*Akram and Chakravarti, JJ.*) Prafulla Chandra *v.* Panchanan. I.L.R. (1946) 1 Cal. 398=222 I.C. 597=50 C.W.N. 287=1946 Cal. (Rul.) 137=81 C.L.J. 1=A.I.R. 1946 Cal. 427.

———**S. 24**—*Applicability—Interest of party not joining in reference not separable from that of parties to reference.*

Where the interest of a party not joining in the reference to arbitration, is inseparable from that of the other parties who are parties to the reference, S. 24 of the Arbitration Act will not apply and cannot be availed of. [1934 All. 658, dist.] (*Ghulam Hasan, J.*) Ram Harakh Singh *v.* Mumtaz Husain. 4 D.L.R. (All.) 70=A.I.R. 1949 A. 679.

———**S. 26**—*Construction of—Arbitrations not governed by Act—If governed by Chapter V of the Act.*

All that S. 26 of the Arbitration Act provides is that the provisions of Chapter V of the Act shall apply to all arbitrations which are governed by the Act; the section does not mean that the

Act applies to parole agreements to refer disputes to arbitration or that it applies to arbitrations not governed by the Act as well. (*Agarwala, C.J. and Meredith, J.*) Gauri Singh *v.* Ramlochan Singh. 29 P.L.T. 105=A.I.R. 1948 Pat. 430=3 D.L.R. (Pat.) 26.

———S. 28—*Power of Court to extend time fixed for making award.*

Under S. 28 of the Arbitration Act the Court could extend time, if it thought fit, even after the time fixed for making the award had expired. The section gives unrestricted powers to Court to enlarge the time for making the award. The omission to apply for an extension is only an irregularity. (*Wanchoo and Bhargava, JJ.*) Amar Nath *v.* Uggar Sen. 1949 A.W.R. 30 =A.I.R. 1949 A. 399=4 D.L.R. (A.) 57= I.L.R. (1949) A. 720.

———S. 28—*Provision in arbitration agreement empowering arbitrator to extend time of making award—Validity.*

A provision in an arbitration agreement that the arbitrator is to be at liberty to extend the time of making his award by endorsement on the back of the agreement, cannot be given effect to in view of the provisions of S. 28 of the Arbitration Act. (*Bachawat, J.*) Barindra Krishna Deb *v.* Bani Sankar Sarkar. 54 C.W.N. 796.

———S. 30—*Application to set aside award—Competency—Notice of filing of award not received.*

An application to set aside an award cannot be made in the absence of an award being filed in Court; but directly the award is filed, irrespective whether or not notice has been received of its filing, such application is competent. (*Gentle and Ormond, JJ.*) Bengal Silk Mills Co., Ltd. *v.* Aisha Ariff. I.L.R. (1946) 1 Cal. 611=231 I.C. 187=A.I.R. 1947 Cal. 106.

———S. 30—*Appraisement of evidence by arbitrator—Interference by Court.*

Appraisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The parties have selected their own forum and the deciding forum must be conceded the power of appraisement of evidence. Where there is no question of any violation of natural principles of justice in refusing to give a hearing to any party or in refusing to have the evidence of a particular party, the arbitrator is the only judge of the quality or the quantity of evidence and it is not for the Court to take upon itself the task of being a judge of the evidence before the arbitrator. It may be possible that on the same evidence the Court might have arrived at a different conclusion from the arbitrator but that by itself is no ground of setting aside an award of an arbitrator. (*Mukharji, J.*) Haji Ebrahim Kassam Cochinwalla *v.* Northern Indian Oil Industries, Ltd. 85 C.L.J. 176.

———S. 30—*Award filed after time specified by Court—Validity.*

While the arbitrator is *functus officio* if he allows the time specified by the Court to expire before *making* his award, that doctrine is inapplicable so far as filing of the award in Court is concerned. Filing of an award by an arbitrator is a ministerial act and not judicial or *quasi* judicial act of the arbitrator. It has nothing to do with the validity of the award excepting so far as Art. 178 of the Limitation Act affects the question. A.I.R. 1949 Cal. 549, foll. (*Mukharji, J.*) Haji Ebrahim Kassam Cochinwalla *v.* Northern Indian Oil Industries, Ltd. 85 C.L.J. 176.

———S. 30—*Award—Setting aside—Basis and quantum of damages awarded not justified by law—Finding by arbitrators—Power of Court to review.*

An award of damages by arbitrators on the basis of rates exceeding the maximum rates fixed by the Control Order while such order is in force, is clearly illegal. To allow the arbitrators to award such damages would be to legalise an act which has been declared to be an offence under the relevant statute and cannot possibly be permitted by a Court of law. It is impossible for the Court in such a case to accept the contention that at the most the arbitrators are guilty of an error and as the error is not apparent on the face of the award, it is not open to the Court to set aside the award. An award can be set aside on the ground of error of law when it is manifest on the face of the award. It is, however, open to the Court to look into the relevant statements filed before the arbitration tribunal. If the Court is satisfied that the arbitrators were guilty of misconduct then the Court should set aside their award. The expression "legal misconduct" is an ambiguous term. It means and includes some honest though erroneous breach of duty causing a miscarriage of justice. If there has been a mishandling of the arbitration proceedings or serious neglect of duties on the part of persons vested with judicial authority to determine the rights and liabilities of parties which is likely to lead to substantial miscarriage of justice, then the Court is justified in setting aside the award.

It is legal misconduct to decide that there was an extension of the due dates under the contract when there was absolutely no evidence in support of it, and to award damages on the basis of such extension according to the market rate prevailing after the Control Order ceased to be operative. Ordinarily the Court will not review the arbitrators' conclusions or findings provided they act within the authority and according to the principles of justice and behave fairly to both the parties. But the discretionary power of the arbitrators in the conduct of proceedings is never absolute and their decision would have to be reviewed by the Court and their award set aside if it appears that in the course which they have pursued they have acted in a manner in which no person vested with judicial authority could possibly act. (*Harries, C.J. and Chatterjee, J.*) Chhogmal Rawatmal *v.* Sankal Chand. 53 C.W.N. 828.

———S. 30—*Award—Setting aside—Discretion of Court—If can be controlled by agreement between parties.*

An agreement between the parties that whatever award the arbitrators might give would be acceptable to them in every way without objection, cannot shut out an objection on the ground of misconduct on the part of the arbitrators. The discretion of the Court to set aside an award on any valid ground cannot be controlled by an agreement between the parties. 1915 Lah. 80, Not Foll. *(Rahman, J.)* Abdul Majid *v.* Bahawal Bakhsh. Pak.L.R. (1950) Lah. 323=A.I.R. 1950 Lah. 174.

———S. 30—*Award—Setting aside—Ground for —Error of law appearing on face of award in reference to some documents.*

Before a Court can set aside an award on the ground that an error of law appears on the face of it in the reference to some documents, it must be demonstrated affirmatively that the law was departed from by the arbitrator in noticing the existence or contents of those documents, and mere reference to certain documents in the award is insufficient to establish that it was wrong in law to refer to them. A mere mention in the award that certain papers and the contract were carefully considered by the arbitrator cannot be construed to mean that either the contract or the papers were incorporated in the award. 54 C.W.N. 74 (P.C.), applied. *(Mukharji, J.)* Haji Ebrahim Kassam Cochinwalla *v.* Northern Indian Oil Industries, Ltd. 85 C.L.J. 176.

———S. 30—*Award—Setting aside—Ground for Failure of arbitrator to disclose his interest in parties or subject-matter of arbitration—Proof of such interest—Failure of arbitrator to reply to query.*

It is settled law that where the interest is known to the parties at or before the time of the appointment of the arbitrator, no complaint can be made by a party who has agreed to appoint such an arbitrator with full knowledge of the arbitrator's interest either in the parties or in the subject-matter of the arbitration. It is equally well-settled law that if the arbitrator has undisclosed or concealed personal interest either in the parties or in the subject-matter of the arbitration then that is a sufficient ground for setting aside the award. But the fact of the arbitrator having such interest or bias must be established and satisfactorily proved before the Court and if so established and proved the Court will set aside his award. It is however no part of the arbitrator's duty to answer a query whether he has or not any personal interest in the subject-matter or parties. Failure to reply to a query of this description does not mean that the arbitrator's interest or bias is *ipso facto* proved by reason of such failure to reply. *(Mukharji, J.)* Haji Ebrahim Kassam Cochinwalla *v.* Northern Indian Oil Industries, Ltd. 85 C.L.J. 176.

———Ss. 30 and 13—*Award—Setting aside—Misconduct—Refusal of adjournment for enabling party to apply in Court for statement of special case.*

While under English law Courts are empowered to direct an arbitrator to state a question of law, there are no such powers in the Courts in India under the Arbitration Act. Therefore, the refusal of the arbitrators to grant an adjournment to enable the parties to apply in Court for the statement of a special case, does not amount to misconduct under the Arbitration Act. *(Mukharji, J.)* Haji Ebrahim Kassam Cochinwalla *v.* Northern Indian Oil Industries, Ltd. 85 C.L.J. 176.

———S. 30—*Award—Setting aside—"Misconduct—Otherwise invalid—Arbitrator acting beyond powers conferred by Court and exercising powers given by parties—Award of sum to party* ex gratia*—Legality—Validity of award.*

When the Court makes an order of reference under S. 23, Arbitration Act, it substitutes a domestic power in its own place. But it does not give up its supervision over the conduct of reference by making the order of reference. The arbitrator has to make an award which is in obedience to the order of reference. It is not open to the parties by agreement to extend the powers given to the arbitrator or to give him additional powers; nor is it competent to the arbitrator to assume such powers by consent of the parties or in the exercise of such power to award to a party a sum of money *ex gratia.* To do so would be illegal and without jurisdiction. No Court or judicial tribunal can award any sum to any party *ex gratia.* The fact that the arbitrator acts in the best interest of the parties will not, however, make the award valid when he has acted beyond jurisdiction or in an extra-judicial manner. It is legal misconduct for an arbitrator to act without jurisdiction or to assume powers which he does not possess, and if he does so, the award is bad and has to be set aside. *(Chagla, Ag.C.J. and Bhagwati, J.)* Sher Banubai Jafferbhoy *v.* Hossein Bhoy. 50 Bom.L.R. 89=A.I.R. 1948 Bom. 292.

———S. 30—*Award—Setting aside—Power of Court—"Misconduct"—Meaning of—Failure of arbitrators to hear oral evidence—Bengal Chamber of Commerce Arbitration Rules, R.* 15.

If the arbitrators do not appreciate the points involved in the case and do not apply their minds to them, or if they decide in a way in which no reasonable man occupying a judicial or a *quasi* judicial position would decide, it is open to the Court to interfere with the award in the interest of justice.

"Misconduct" is an ambiguous word and includes any mishandling of the arbitration proceedings or any neglect of duty on the part of the arbitrators which is likely to lead to substantial miscarriage of justice. A gross mistake may be evidence of misconduct. It does not mean personal turpitude such as corruption and bribery.

R. 15 of the Rules of arbitration of the Bengal Chamber of Commerce gives power to the arbitrators if they think fit, to hear oral evidence. If the arbitrators do not exercise this power in a judicial manner, the Court may interfere on the ground of misconduct. *(Sinha, J.)* Khushiram Benarshilal *v.* Mathuradass. 52 C. W. N. 826.

———S. 30—*Dismissal of application for setting aside award—Reservation of liberty to reagitate one of objections—Power of Court.*

It may well be doubted whether a Court has power while dismissing an application for setting aside an award, to give liberty to the unsuccessful party to reagitate an objection which might have been and should have been raised against such dismissal, as it may give rise to an anomalous or awkward position. (*Das, J.*) MUNSHILAL & SONS *v.* MODI BROS. 51 C.W.N. 563.

——**S. 30**—If controls powers of Chief Judge of Court of Small Causes when hearing appeal under S. 29 of the Madras Town Planning Act. *See* MADRAS TOWN PLANNING ACT, S. 29 AND ARBITRATION ACT, S. 30. · (1946) 1 M.L.J. 255.

——**Ss. 30 and 33**—*Party participating in arbitration proceedings—If can subsequently object to jurisdiction of arbitrator.*

A party who never objected to the jurisdiction of the arbitrator, participated in the arbitration proceedings and took the chance of a decision in his favour, cannot, after the award is given against him, be allowed to turn round and assume an inconsistent position. (*Sinha, J.*) HAJI EBRAHIM KASSIM COCHINWALLA *v.* PANNALAL JOHURMULL. I.L.R. (1949) 1 Cal. 245.

——**Ss. 30 and 32**—Reference made to arbitration—If can be abandoned by consent of parties—Subsequent compromise by parties—Court, if can give effect to—Compromise alleged by one party and disputed by other—Power of Court to enquire into factum of compromise. *See* ARBITRATION ACT, Ss. 23 (2), 25, 30 AND 32. 50 C. W.N. 287.

——**S. 30**—*Setting aside award—Discretion of Court—If can be controlled by agreement between parties.*

An agreement between the parties that whatever award the arbitrators might give would be acceptable to them in every way without objection, cannot shut out an objection on the ground of misconduct on the part of the arbitrators. The discretion of the Court to set aside an award on any valid ground cannot be controlled by an agreement between the parties. A.I.R. 1915 Lah. 80, Not Foll. (*Rahman, J.*) ABDUL MAJID *v.* BAHAWAL BAKHSH. Pak.L.R. (1950) Lah. 323= A.I.R. 1950 Lah. 174.

——**S. 30 (c)**—*Scope of—Subject-matter of reference not capable of being referred to arbitration—Award, if can be challenged.*

S. 30 (*c*), Arbitration Act, is wide enough to cover an award which is sought to be challenged on the ground that the subject-matter of the reference was not capable of being referred to arbitration. (*Thadani, C.J., and Ram Labhaya, J.*) MUSAFIR ALI *v.* MD. ROYSUL HAQ. A.I.R. 1950 Assam 114.

——**Ss. 31 and 33**—Arbitration clause in contract—Issue as to existence of trade custom—If one as to existence or validity of contract—Power of arbitrator to determine such issue. *See* ARBITRATION—POWERS OF ARBITRATOR. 53 C. W. N. 505.

——**S. 31**—Jurisdiction to entertain application to pass decree in terms of award—Test. *See* ARBITRATION ACT (X OF 1940), Ss. 2 (*c*) AND 31. 1947 A.L.J. 594.

——**Ss. 31, 32 and 33**—*Scope and Effect—Denial by party of factum of arbitration agreement—Proper remedy—Suit or application.*

The intention of the framers of the Arbitration Act was that the rights and liabilities of the parties in respect of an arbitration agreement or an award such as are mentioned in Ss. 31 and 32 of the Act should be litigated only in the Court having jurisdiction under S. 31 and on an application made under S. 33 of the Act and not by way of suit. The intention of the Legislature must be taken to be to take away the remedy by way of suit which the parties to an arbitration agreement or an award had before the passing of the Act and to relegate them to the remedies as provided in that Act.

The words "any party to the arbitration agreement" in S. 33 of the Act should be read in a sense other than in its strict and literal sense. It should be construed to mean a party who is alleged to be a party to the arbitration agreement but who challenged the existence thereof. The word "existence" should not be read in a restricted sense but in its ordinary and natural meaning, namely, existence either in fact or in law. An application by a party who denies the factum of the arbitration agreement is, therefore, maintainable under S. 33 of the Act. [1945 Bom. 494, appl. 52 C.W.N. 224 and I.L.R. (1946) M. 840, ref. to.] (*Sinha, J.*) CHATURBHUJ MOHANLAL *v.* BHICAM CHAND. 53 C.W.N. 410.

——**Ss. 31 and 32**—*Scope—Award—Enforcement—Remedy—Suit — Maintainability — Bar under S. 32—If overridden by Specific Relief Act, S. 30.*

Under the Arbitration Act, 1940, a party to an award is not entitled to enforce it by way of suit. Such a suit is expressly barred by S. 32 of the Act. S. 30 of the Specific Relief Act obviously cannot override S. 32 of the Arbitration Act; it is subordinate to S. 32 of that Act. (*Leach, C.J. and Lakshmana Rao, J.*) MOOLCHAND JOTHAJEE *v.* RASHID JAMSHED SONS & CO. I.L.R. (1946) Mad. 840=59 L.W. 143=1946 M.W.N. 136= A.I.R. 1946 Mad. 346=(1946) 1 M.L.J. 185.

——**Ss. 31 (1) and (2) (c)**—*Petition under S. 14 (2) for receiving the award and passing a decree in terms of the award—Forum—Test of jurisdiction—Execution of agreement or residence of parties within jurisdiction—If sufficient—All the arbitrators residents within jurisdiction—If intention to submit to jurisdiction must be presumed.*

The respondent a limited company with its office at Madras (and also a subsidiary office at Bangalore where the payments were made) carried out various works in Bangalore for the Public Works Department of the Government of India. The appellant, a resident of Bangalore was a sub-contractor supplying at the outset labour and subsequently various materials for the work which the respondent was executing in Bangalore. The appellant claimed that in respect of his dealings with the respondent he was entitled to be paid a sum of about Rs. 36,000. The respondent however asserted that if the accounts between the parties were looked into it would be found that far from their owing any money to the appellant, he would be found liable to pay them large sums of money. The disputes were referred to arbitration by an agreement apparently executed at Madras and the arbitrators were all residents of Madras. The arbitrators gave an award whereunder they directed the appellant to pay the respondent the sum of Rs. 22,346. The arbitrators then filed a petition under S. 14 (2) of the Arbitration Act on the Original Side of the Madras High Court praying that the award be received, that notice of the filing of the award be sent to the parties and that a decree in terms of the award be passed.

Held:—The Court in Madras has no jurisdiction to receive the award and only the Court in Bangalore has jurisdiction.

In order to determine which is the Court having jurisdiction in the matter, you should first of all ascertain what the questions are, which form the subject-matter of the reference to arbitration. You then proceed to ask: supposing these questions had arisen in a suit which is the Court which would have jurisdiction to entertain the suit? That Court would be the Court having jurisdiction under the Arbitration Act also. The Court which would have jurisdiction would be not the Court at the place in which the agreement was entered into or where the defendant resides, but the Court which would have jurisdiction in respect of the questions forming the subject-matter of the reference.

The question of residence would become relevant only should it arise out of or in connection with the subject-matter of the dispute and the reference. A.I.R. 1937 All. 208, relied on. A.I.R. 1943 Bom. 32, considered and obiter *not followed*.

Merely because the three arbitrators happen to be residents of Madras, one is not bound to presume an intention to submit to the jurisdiction of the Court in Madras.

Per *Horwill, J.*—If we have regard to S. 31 (1) to ascertain in which Court, as the word is defined in S. 2 (1) the award has to be filed, we find that it is the Court that has jurisdiction over the subject-matter of the award, the omission of any reference to residence being presumably for the reason that in filing an award there is no plaintiff and no defendant. (*Horwill and Balakrishna Ayyar, JJ.*) Venkatasamiappa *v.* Srinidhi, Ltd. 63 L.W. 468=5 D.L.R. (Mad.) 268=1950 M.W.N. 320=(1950) 1 M.L.J. 709.

———**S. 31 (2)**—*Application raising question with regard to validity or existence of arbitration agreement—Maintainability before filing of award—Award filed before disposal of application—Defect, if cured.*

An application raising a question as to the validity, effect or existence of an arbitration agreement is maintainable in the Court where the award may be filed even though the award has not been actually filed at the date of the application. Further, the defect, if any, due to the non-filing of the award at the date of the application can be cured by the filing thereof before the disposal of the application, and the Court may direct that the award be filed *nunc pro tunc.* (*Das, J.*) I.G.H. Ariff *v.* Bengal Silk Mills, Ltd. I.L.R. (1945) 2 Cal. 70= A.I.R. 1949 Cal. 350.

———**S. 31 (4)**—*Application to Court competent to entertain it—Effect of, on jurisdiction of other courts—Court in which award can be filed.*

Where in any reference an application under the Arbitration Act is made in a Court competent to entertain it, the taking of such a step would operate under S. 31 (4) of the Act to deprive any Court of jurisdiction over the arbitration proceedings other than the Court in which the application is made. The fact that the arbitrator had no notice of the making of the application makes no difference. The award can be filed only in that Court and all other proceedings consequent thereon can be entertained by that Court alone. (*Khundkar, J.*) *Re* Charu Chandra Das. 50 C.W.N. 547.

———**S. 31 (4)**—*Jurisdiction to hear objections and to pass decree—Competent Court.*

The Court which makes the reference and to which an award is submitted is alone authorised to hear the objections on the award and to pass a decree in terms of that award. (*Mootham and Mathur, JJ.*) Shukrullah *v.* Rahmat Bibi. I.L.R. (1947) A. 227=1947 A.L.J. 445=A.I.R. 1947 A. 304.

———**S. 32**—*Inhibition under—If extends to defence—Award not filed into Court—Decree and judgment not passed thereon—Award fully performed—Subsequent claim on same matter—Reliance on award by way of defence—Permissibility.*

The inhibition in S. 32 of the Arbitration Act is confined merely to a plaint by which a decision upon the existence, effect or validity of an award is sought. Its provisions do not extend to a defence as opposed to the filing of a suit. Consequently a defendant is not precluded from putting forward an award which has been fully performed by him but which was not filed under S. 14 and according to which judgment was not pronounced or a decree given under S. 17 of the Act, in answer to the plaintiff's claim which was the subject-matter of the reference and the award. (*Happell and Govindarajachari, JJ.*) Suryanarayana Reddi *v.* Venkata Reddi. I. L. R. (1949) Mad. 111=1948 M.W.N. 268=61 L.W. 289=A.I.R. 1948 Mad. 436=3 D. L. R. (Mad.) 23=(1948) 1 M.L.J. 317.

———**Ss. 32 and 33**—*Scope, applicability and effect of—'Existence'—Meaning of.*

S. 32 of the Arbitration Act must be read with S. 33 and the two sections read together mean that where a person admits having entered into an arbitration agreement but contends that it is not operative, S. 32 applies and bars any suit by such a person to challenge the existence, validity or effect of the arbitration agreement and his only remedy is to apply under S. 33. The word "existence" in both the sections means legal existence as opposed to a merely factual or apparent existence. Where, however, the arbitration agreement is denied in the sense that the person never entered into it, there is in fact and in law no arbitration agreement in existence at any time and a suit by such a person is not hit by

S. 32. (*Das, J.*) MANICKLAL *v.* SHIVA JUTE BAILING, LTD. 52 C.W.N. 389.

——Ss. 32, 33 and 34—*Scope of—Award not filed into Court—Bar to subsequent suit.*

The object of the Legislature in enacting S. 32 of the Arbitration Act is that no suit should be allowed to be instituted for a decision upon the existence, effect or validity of an award and no party to an award shall be allowed to have it set aside, amended or modified or in any way affected otherwise than as provided in that Act. Section 33 provides that the validity of an award can only be contested by an application to the Court and not by means of an independent suit. That section is mandatory, because it says that any party desiring to challenge the validity of an award shall apply to the Court and the Court shall decide the question on affidavits, subject of course to the provision in the proviso for other evidence for the taking of which the Court may pass appropriate orders.

The fact that the defendant did not put forward the award in the earlier litigation does not preclude him from making a point of the fact of that award as outstanding and as a bar to the present action of the plaintiff, and no question of constructive *res judicata* arises.

It is well settled law that an alienation by a widow is voidable at the instance of the reversioners, and if one of two reversioners has chosen to attack the alienation and succeeded in establishing the ground for an attack, then it is only to the extent of his share of the property that he can succeed. (1948) 1 M.L.J. 317: I.L.R. (1949) Mad. 111, followed. (*Raghava Rao, J.*) SURAYYA *v.* ANANDAYYA. 63 L.W. 777=(1950) 2 M.L.J. 313.

——S. 32—*Scope and effect—Defendant in a suit relying on an award as bar to the suit—Defendant not taking steps to file the award and make it a decree—Effect.*

Where the defendant who is relying upon an award as a bar to the plaintiff's suit did not take steps to have it filed and dealt with under the appropriate provisions of the Arbitration Act, it is not competent to him to rely upon it in answer to the action. That, he might be entitled to do if the award happened to be acted upon by the parties and if the part of it which had to be performed by the defendant was actually performed. (1945) 2 M.L.J. 98 and (1948) 1 M.L.J. 317; I.L.R. (1949) Mad. 111, ref. to. (*Raghava Rao, J.*) VENKATASUBBAYYA *v.* BAPADU. (1950) 2 M.L.J. 672.

——S. 32—*Scope and effect of—If controlled or overridden by S. 30, Specific Relief Act—Suit on basis of award on private arbitration—Question as to existence or validity of reference and award involved—Jurisdiction of Court to try suit.*

S. 30 of the Specific Relief Act cannot override S. 32, Arbitration Act, 1940. S. 32 is the governing section in respect of matters which involve questions as to the existence and validity of an arbitration agreement or award. The Act of 1940, was intended to and did alter the law, one of the main objects of the Act being to provide for claims to set aside awards and to challenge agreements of reference being made by application to Court and decided on affidavits or other evidence and not by means of a suit. Where the question at issue clearly relates to the existence or validity of an award made in a private arbitration, a suit is clearly barred and cannot be maintained in a Civil Court. [50 Cal. 1 (P.C.); 30 C.W.N. 529, dist. and expl. I.L.R. (1942) Bom. 452; 45 C.W.N. 887; 1946 Mad. 346, rel. on.] (*Imam and Ramaswami, JJ.*) RAMCHANDER SINGH *v.* MUNSHI MIAN. 28 Pat. 569=4 D.L.R. (Pat.) 199.

——Ss. 32 and 33—*Scope and effect—If takes away the right of suit of a person who denies the fact of arbitration agreement.*

Every person has a right to file any suit of a civil nature unless this right is taken away expressly or by necessary implication and reading S. 32 and S. 33 of the Arbitration Act together, as they must be read, the right to file a suit of a person who denies altogether the fact of the arbitration agreement has not been taken away by those sections. (*Clough, J.*) BAIJNATH NARSERIA *v.* CHHOTULAL SETHIA. 52 C.W.N. 397.

——Ss. 32 and 33—*Scope and effect—Suit to enforce award—If barred.*

Ss. 32 and 33 of the Arbitration Act only bar suits contesting or challenging the existence or validity of an arbitration agreement or award. These sections do not bar suits which are filed on the footing of the existence and validity of the arbitration agreement and the award and only seek to enforce the award. (*Das, J.*) MUNSHILAL & SONS *v.* MODI BROS. I.L.R. (1948) 1 Cal. 81=51 C.W.N. 563.

——S. 32—*Scope—If abrogates Ss. 17 and 49, Registration Act—Award in arbitration without intervention of Court—Admissibility in evidence without registration.*

S. 32 of the Arbitration Act does not abrogate the provisions of Ss. 17 and 49 of the Registration Act. It merely provides that no Court can entertain any independent suit for a declaration that a certain award exists or is valid, or to set aside, amend or modify or affect the award in any way otherwise than as provided in the Arbitration Act. Where an award, in an arbitration without the intervention of the Court purports to create, declare, assign, limit and extinguish in present the right, title or interest to immovable property over the value of Rs. 100, it *prima facie* requires registration; and if unregistered, it cannot be received in evidence to prove any transaction affecting the property, and hence it cannot be enforced by the Court. (*Manohar Lall and Mukharji, JJ.*) DEWARAM *v.* HARINARAIN. 26 Pat. 437=A.I.R. 1948 Pat. 320.

——S. 32—*Scope—Petition for declaration of existence of subsisting contract and arbitration agreement—Competency—Availability of remedy by suit—If a bar.*

S. 32 of the Arbitration Act is concluded in very general terms and deals with all sorts of applications, including applications not only under S. 33 of the Act, by way of challenging the existence or validity of an agreement of arbitration or an award, but also applications which may be made by a party to have an arbitration agreement confirmed or declared as subsisting between the parties. It is therefore open to a party who is thwarted in his attempt to have the disputes settled by the process of arbitration, if there is an arbitration agreement between the parties, to come to the Court and have the question of the existence, effect or validity of the arbitration agreement adjudicated upon by the Court, so that on such adjudication had by him from the Court he can proceed further with the arbitration proceedings as contemplated by the arbitration agreement. He is entitled to apply to the Court for a declaration that there is subsisting contract between the parties and that the respondent is bound to have all the disputes in connection with it decided by arbitrators as contemplated in the arbitration agreement, which is disputed by the respondent.

The mere fact that it is open to the applicant to file a substantive suit on the original cause of action, would not deprive him of his right to have the question of the existence or validity of the arbitration agreement decided upon by the Court by taking proceedings under S. 32 of the Arbitration Act. He is not bound to pursue his remedy by suit, merely because the other party denies the existence or disputes the validity of the arbitration agreement. (*See* S. C. on appeal, 51 Bom.L.R. 79.) (*Bhagwati, J.*) Vishambarlal Ruiya *v.* Gulamally Abdul Husein. 4 D.L.R. (Bom.) 91.

———**Ss. 32 and 33**—*Scope—Petition to Court seeking declaration of existence of valid arbitration clause—Maintainability.*

It is not open to a party to a contract with an arbitration clause to file a declaratory suit that there is in existence an arbitration agreement. But it does not entail the result that a petition to the Court seeking to affirm the existence of an arbitration agreement is not maintainable. Merely because S. 33 of the Act mentions a particular kind of application, *viz.*, for challenging an arbitration agreement, it does not follow that an application for affirming the existence of an arbitration agreement is not maintainable. It is open to a party to make any application with regard to which a suit is barred in S. 32, S. 33 is merely one instance of such an application and is not exhaustive of all applications which may be made under the Act. Therefore a petition by a party for a declaration that there is a valid and subsisting arbitration agreement between the parties is maintainable, though not under S. 33 of the Act. (*Chagla, C.J. and Tendolkar, J.*) Gulamali Abdulhussein & Co. *v.* Vishwambharlal Ruiya. 51 Bom.L.R. 79=A.I.R. 1949 Bom. 158.

———**Ss. 32 and 33**—*Suit challenging validity of arbitration agreement—Maintainability.*

A suit to challenge the existence or validity of an arbitration clause in a contract or for determining the effect of an arbitration agreement or award is not maintainable by reason of S. 33 of the Arbitration Act which provides that such a challenge must be made by means of an application and not by means of a suit. I.L.R. (1941) 2 Cal. 123, foll. A.I.R. 1949 E. P. 165, diss. from. (*Chatterjee, J.*) Bajrang Lal Laduram *v.* Agarwal Bros. A.I.R. 1950 Cal. 267.

———**S. 32**—*Scope—Suit contesting validity of contract containing arbitration agreement—Maintainability.*

S. 32 of the Arbitration Act becomes applicable only where a suit is brought for a declaration about the existence or non-existence, or validity or invalidity, or the determination of the effect of, or for cancellation, either of the arbitration agreement or the award said to have been made in pursuance of such an agreement, or for any amendment or modification being effected in such award. The section does not apply to a case where no relief is sought in respect of an agreement of reference to arbitration or award. If in a suit the plaintiff challenges either the existence or the validity of the contract one of the terms whereof is that any dispute between the parties relating to the execution of that contract must be decided by reference to arbitration, the suit cannot be said to offend against the provisions of this section. In such a suit if the contract itself is held to be either proved to exist, in a case where its existence is impugned, or to be valid, in a case where its validity is challenged, the arbitration agreement automatically becomes operative. If, on the other hand, the contract is found to be non-existent or to be invalid, the alleged arbitration agreement goes with the contract itself. The Court is at no stage called upon to give any decision as to the existence or validity or effect of the arbitration agreement independently of the contract itself with which the arbitration agreement stands or falls. The Arbitration Act has been enacted merely with the object of consolidating the law relating to arbitrations, and the question of the existence or validity of the contract containing an arbitration agreement being not a matter falling within the purview of the Act, it cannot be said, with any show of reason, that S. 32 takes away the jurisdiction of the Courts to give appropriate relief in suit brought either to contest or establish, the existence or validity of the contract. I. L. R. (1947) Mad. 99 and I.L.R. 1942 Bom. 452, Dist. I.L.R. (1941) 2 Cal. 123, comm. on. (*Ram Lal, C.J. and Achhru Ram, J.*) Banwari Lal *v.* Board of Trustees, Hindu College, Delhi. A.I.R. 1949 E. P. 165.

———**S. 32**—*Suit to enforce award—Defendant denying existence and validity of award—Suit, if barred.*

A suit to enforce an award in which the defendant denies the existence and validity of the award, is barred by S. 32, Arbitration Act. (*Imam and Ramaswami, JJ.*) Ramchander Singh *v.* Munshi Mian. A.I.R. 1950 Pat. 48.

———**S. 33**—*"Any party"—Construction.*

The expression "any party to an arbitration agreement" in S. 33 of the Arbitration Act should be construed so as to cover a person who is claimed to be a party to an agreement of arbitration although he does not admit its execution or the authority of the person executing it. (*Abdur Rahman and Mehrchand Mahajan,* *JJ.*) Lalchand *v.* Basanta Mal Devi Dayal. 49 P.L.R. 246.

———**Ss. 33 and 34**—*Application challenging validity or existence of arbitration agreement—Whether can be stayed.*

When the subject-matter of an application under S. 33, Arbitration Act, only relates to questions regarding the validity, effect or existence of the arbitration agreement, S. 34 of the Act cannot, of necessity, be invoked, unless there be a fresh arbitration agreement to refer those very disputes regarding the validity, effect or existence of the previous arbitration agreement. If there be such a new arbitration agreement, about the validity, effect or existence of which there is no dispute, and yet a party commences proceedings challenging the validity, effect or existence of the old arbitration agreement, S. 34 may be invoked to stay those proceedings, so that the disputes as to the existence, validity and effect of the old arbitration agreement may be referred to arbitration in terms of the fresh arbitration-agreement. In the absence of such a fresh arbitration-agreement, it is not possible to invoke S. 34 for staying a proceeding under S. 33, where the only dispute is as to the validity, effect or existence of the old arbitration-agreement. (*Das, J.*) Balabux Agarwalla *v.* Luchminarain Jute Mafg. Co., Ltd. I.L.R. (1948) 1 Cal. 265.

———**S. 33**—*Application for an order about the validity of an award—When could be made.*

An application under S. 33 of the Arbitration Act should be made only after the award has been filed. Any such application before the filing of the award would be premature and may be incompetent. Even if it be not absolutely incompetent it is essential that it should be made either after an application under S. 14 (2) of the Act for the order directing the arbitrator to file an award has been made or it should be accompanied by such an application. (*Dayal and Mushtaq Ahmed, JJ.*) Bishun Prasad *v.* Gopal Das. I.L.R. (1950) All. 50.

———**S. 33**—*Application for declaration that there was no valid award—Filing of award—Necessity.*

When an application is presented to the Court under S. 33 of the Arbitration Act, which challenges the existence of an award, no award need, or can, be filed in such an application. (*Gentle, C.J. and Rajamannar, J.*) Kuppuswami Chetty *v.* Anantharamier. I.L.R. (1948) Mad. 83=A.I.R. 1948 Mad. 40=1947 M.W.N. 371=60 L.W. 244=(1947) 1 M.L.J. 297.

———**S. 33**—*Application made before award is filed in Court—Maintainability—Award filed subsequent to application—Effect on application.*

An application under S. 33, Arbitration Act, to have the validity of an award determined by the Court is liable to be thrown out as not maintainable when there is no award in Court. But once the award is produced in Court, though it may not have been filed before the application was made, it will be deemed to have been made as an application to set aside the award. I.L.R. (1942) Bom. 452; I.L.R. (1943) 2 Cal. 392, not foll.; I.L.R. (1945) 2 Cal. 70, rel. (*Sinha and Rai, JJ.*) Damari Rai *v.* Rampirit Ahir. A.I.R. 1950 Pat. 376.

———**S. 33**—*Application to affirm existence of arbitration agreement—Maintainability.*

S. 33, Arbitration Act, provides a remedy not to the person who affirms the existence or validity of an arbitration agreement but to the person who challenges the same. A person who affirms the existence of an arbitration agreement cannot apply to the Court under S. 33 or any other section of the Act for an adjudication by the Court that such an agreement exists and is binding on the parties. The word "effect" in S. 33 does not mean the existence of an arbitration agreement. It connotes in this context the purport, drift or tenor of the agreement. 51 Bom. L.R. 79, diss. from. (*Chatterjee, J.*) Bajrang Lal Laduram *v.* Agarwal Bros. A.I.R. 1950 Cal. 267.

———**S. 33**—Application under—Power of Court to decide on affidavits or on evidence. [*See* Q.D. 1941-1945, Vol. I, Col. 140.] Liladhar *v.* Firm Radhakrishan Ramshakaya. A.I.R. 1946 Nag. 5.

———**S. 33**—*Award—Objection by defendant—Whether an application to set aside award—Irregularity if to be condoned.*

In a dispute an award was filed, and on that date the Court posted the suit to another date for objections and the defendants filed objections but the plaintiff remained quiet. On the next date of hearing, the Court felt that the defendants should have filed an application to set aside the award under S. 33 of the Arbitration Act instead of merely setting out the objections with the aim of setting aside the award and so dismissed the objections and passed a decree in terms of the award.

Held, that on a perusal of the defendants' objections they disclosed the defendants' intentions to have the award set aside and they were not only in substance an application to set aside the award, but it was almost so in form and the mistake made by the defendants was to a large extent due to the order passed by the lower Court when posting the case to a later date. It was only an irregularity that should have been overlooked. (*Horwill and Bell, JJ.*) Bangarayya *v.* Ramabhadriraju. I.L.R. (1948) Mad. 123=60 L.W. 133=1947 M.W.N. 133=A.I.R. 1947 Mad. 315=(1947) 1 M.L.J. 155.

———**S. 33**—*Pleadings—Petition to Court to declare existence of arbitration agreement—Contents—Submission clause contained in contract—Averment that contract was accepted—Necessity.*

It is not necessary under the Arbitration Act that there should be a written submission in order to sustain a petition to Court seeking to affirm the existence of an arbitration agreement. The law does not require that a submission to arbitration must be signed by both the parties. The only requisite of the law is that there must be a submission in writing. If there is a submission clause in a contract, it is not necessary that the contract must be signed by the other party before the other party can be bound by the submission clause; the party may accept the contract orally or in writing. If the applicant is in a position to establish that a particular contract, which contains a submission clause, was accepted by the respondent, then there would be a written submission to arbitration within the meaning of the Act. When a contract note is delivered and retained by the other party, it depends upon the circumstances of each case whether such delivery and retention of the contract note by the other party does amount to acceptance or not. It is a pure question of fact. The applicant must aver in his application that there was an acceptance of the contract by the respondent. The mere averment that the contract was delivered to and retained by the other side is not *per se* tantamount to an averment that the contract was accepted by the other side. 41 Bom.L.R. 1293, Ref. (*Chagla, C.J. and Tendolkar, J.*) Gulamali Abdulhussein & Co. *v.* Vishwambharlal Ruiya. 51 Bom.L.R. 79=A.I.R. 1949 Bom. 158.

———**S.** 33—Proceedings under—Nature of—Procedure to be followed. [*See* Q.D. 1941-1945, Vol. I, Col. 140.] Balwant Singh *v.* Ramcharan Singh. 18 R.A. 91.

———**S.** 33—*Procedure — Application under S. 14 (2)—Issues of fraud, forgery, etc., raised—Denial of arbitration—Disposal on affidavits—Propriety of.*

Where in an application under S. 14 (2), Arbitration Act, the pleadings involve serious allegations of fraud, forgery, etc., and of denial of the arbitration, the issues raised are not such as could properly be decided on affidavit. (*Reuben and Mukharji, JJ.*) Jagdish *v.* Sunder. 27 Pat. 86=A.I.R. 1949 Pat. 393.

———**S.** 33—Scope of. *See* Arbitration Act (X of 1940), Ss. 34 and 33. (1949) 2 M.L.J. 239.

———**S.** 33—*Scope—Power of Court to take evidence in cases not falling under S. 33.*

S. 33, Arbitration Act, is only an indication of what the Court would be entitled to do in a fit and proper case. The section does not take away the powers of the Court to take evidence in ordinary cases, apart from petitions strictly falling under that section. It would be open to the Court to make such orders, as are contemplated in S. 33, even in the case of other petitions which may be filed under the Act, if the Court thinks it just and expedient to do so. (*See* S.C. on appeal, 51 Bom.L.R. 79). *Bhagwati, J.*) Vishambarlal Ruiya *v.* Gulamally Abdul Husein. 4 D.L.R. (Bom.) 91.

———**S.** 33—*Suit to declare award invalid for want of valid reference—Maintainability—Limitation.*

Even if an application for setting aside an award under S. 30 of the Arbitration Act is barred by limitation, an application for a declaration that the award is invalid and illegal as there was no valid reference is maintainable under S. 33 of the Act, and there is no period of limitation prescribed for the making of such an application. 73 I.A. 52, referred to. (*Sinha, J.*) Haji Ebrahim Kassim Cochinwalla *v.* Pannalal Johurmull. I.L.R. (1949) 1 Cal. 245.

———**S.** 34—*Applicability—Agreement to refer dispute to person interested in one of the parties—Contract between private person and Governor-General—Agreement to refer dispute to head of department—Validity—Stay of suit.*

It cannot be laid down as a matter of law that a clause in an agreement or contract providing for a reference to arbitration is not a proper reference for arbitration because the person to whom the dispute has to be referred for decision is the head of the very department which in effect though not in form, is a party to the dispute and therefore that the arbitration clause is invalid and void. A reference to arbitration of the Director-General of Posts and Telegraphs in any matter arising out of a contract between the Posts and Telegraph department and a private party is not invalid but would be a valid reference, having been entered into by the parties with their eyes open. The agreement is between the Governor-General and a private party and the reference to the Director of Posts and Telegraphs constitutes a valid reference. Such a reference falls within Exception I to S. 28, Contract Act. The agreement is not one by which any party is restrained absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings before the ordinary tribunals and in any case Exception I to S. 28, Contract Act would save such an agreement. [1918 Sind 41, dist. 11 Cal. 232; 8 Luck. 98, foll.] (*Rajadhyaksha and Chainani, JJ.*) Central Government of India *v.* Chhotalal Chhaganlal. I.L.R. (1949) Bom. 449=51 Bom.L.R. 615=A.I.R. 1949 Bom. 359 =4 D.L.R. (Bom.) 147.

———**S.** 34—*Applicability and scope—Lease—Contract of—Arbitration clause—Dispute falling outside—Suit based not on contract but independently of it—Jurisdiction of Court to stay.*

Where a lease of a sugar factory provided *inter alia* that in default of payment of the lease money by the lessee or in the event of a breach of any of the terms and conditions embodied in the lease, "the lessor shall be entitled to terminate the lease and to re-enter upon the premises demised, and also provided that all disputes between the lessor and the lessee shall be decided by *A*......etc., and the decision of the Arbitrator shall be final and binding on both parties," and on default of payment of the lease money by the lessee, the lessor sued for ejectment of the lessee as a mere trespasser and not for breach of any of the terms of the lease, and the lessee applied under S. 34 of the Arbitration Act for stay of the suit,

Held, that the suit was not based on any contract, far less on the lease contract, but was independent of contract and was in substance an action in ejectment on a declaration that the defendant was a mere trespasser. Such a dispute, not being one between the lessor and the lessee, could not come within the ambit of the arbitration clause, and the Court had no authority to force a party to go to arbitration in respect of a matter which did not come within the arbitration agreement; that would be going against the direct provisions of the law as enacted in S. 34 of the Arbitration Act. A.I.R. 1948 Cal. 230, dist.;

52 Cal. 137, ref.; A.I.R. 1945 Bom. 494; 52 C.W.N. 389; 52 C.W.N. 397; 52 C.W.N. 450; 21 Pat. 544, rel. on. (*Sinha and Das, JJ.*) N. K. JAIN *v.* SUGAR MILLS, LTD. 27 Pat. 930.

———**Ss. 34 and 20**—Applicability—Matter requiring under statutory provision to be submitted to arbitration of specified person, arising in pending suit—Power of Court to refer it to such person. *See* ARBITRATION ACT, Ss. 20 AND 34. A.I.R. 1947 Lah. 309.

———**S. 34**—*Applicability—Stay of proceedings—Right to apply—Delay—Effect of.*

If there is an arbitration agreement between the parties, it is a *prima facie* right of a party to apply for stay of proceedings in Court and it is for the party who opposes that application for stay to point out that there are sufficient reasons why the matter should not be referred in accordance with the arbitration agreement. Mere delay in making the application for stay, *e.g.*, when the party believes that the dispute would be settled by a domestic tribunal of an association of which both parties are members, will not deprive the party of the benefit of the provisions of S. 34 of the Arbitration Act. (*Bhagwati, J.*) CHIMANRAM MOTILAL *v.* VANDRAVANDAS GORDHANDAS. 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

———**Ss. 34, 39 and 41**—Application for stay —Duty of Court—Acting with material irregularity in exercise of powers under S. 34—Revision Ss. 39 and 41 if deprive power of High Court. [*See* Q.D. 1941—1945, Vol. I, Col. 140.] CHARAM DAS *v.* GUR SARAN DAS. 222 I.C. 64=1946 All. (Rul.) 121.

———**S. 34**—*Application for stay—Issue as to existence of arbitration agreement—Jurisdiction of Court to decide.*

Under S. 34 of the Arbitration Act, the Court has power in the exercise of its discretion to decide in the very application for stay an issue as to the formation existence, or the validity of the arbitration agreement even though it may involve a decision on the issue as to the formation, existence or the validity of the principal contract to which it is attached. [51 C.W.N. 863 and 1945 Bom. 494, rel. on.] (*Das, J.*) KHUSIRAM BENARSI LAL *v.* HANUTMAL BOID. 53 C.W.N. 505.

———**S. 34**—*Application for stay of suit—Onus of proof—Discretionary power of Court—Existence of circumstances calculated to bias minds of arbitrators.*

Under S. 34, Arbitration Act, the primary onus is on the applicant for stay of suit to satisfy the Court that the preliminary conditions prescribed by the section have been complied with. If that onus is discharged then the onus shifts on to the party opposing the stay to satisfy the Court that there is sufficient reason why the matter should not be referred to arbitration. If the preliminary conditions are satisfied the Court will generally lean in favour of a stay. The Court will however refuse to stay the suit in exercise of its discretionary powers under the section in a case where circumstances exist which are calculated to bias the minds of the arbitrators and where the plaintiff may legitimately ask the Court to release him from his bargain to go to arbitration. (*Das, J.*) TOLARAM NATHMULL *v.* BIRLA JUTE MANUFACTURING CO., LTD. I.L.R. (1948) 2 Cal. 171.

———**Ss. 34 and 33**—*Application for stay of suit alleging existence of arbitration agreement—Other party pleading agreement to be unenforceable by reason of fraud, undue influence and coercion—Duty of Court to try that question in that proceeding itself—Other side, if bound to apply under S. 33 of the Act—Relative scope of Ss. 33 and 34.*

Where an application under S. 34 of the Arbitration Act is made alleging that there is an arbitration agreement the existence of which bars the trial of the suit and the respondent to such a petition raises the contention that the alleged agreement is unenforceable by reason of fraud, undue influence or collusion or even misrepresentation, it is incumbent upon the Court to try that question in that very proceeding. It cannot be said that it is obligatory on the part of the person raising such a defence to make an independent application under S. 33 of the Act. The very foundation of the jurisdiction of the Court to stay the trial of a suit under S. 34 is the existence of an arbitration agreement and when the truth of such an agreement itself is disputed or while admitting its truth it is pleaded that it is invalid by reason of other vitiating circumstances, there is no reason why in such an event when the question is raised and the validity of the jurisdiction of the Court depends upon the result of its decision on that question, the Court should not try that issue. The scope and the jurisdiction of the Court acting under S. 34 does not depend upon the nature of the defence raised. S. 33 of the Act gives an independent right to a person who wishes to challenge the existence or validity of an arbitration agreement or award and to anticipate the other side and to initiate proceedings to have those questions determined beforehand. It does not prohibit the Court acting under S. 34 of the Act from deciding a question which is raised before it for its decision and the decision on which alone would depend the exercise of its jurisdiction. [1946 Bom. 494, foll.] (*Satyanarayana Rao, J.*) MATHU KUTTY *v.* VAREE KUTTY. 62 L.W. 576=1949 M.W.N. 593=A.I.R. 1950 Mad. 64=5 D.L.R. (Mad.) 88=(1949) 2 M.L.J. 239.

———**Ss. 34 and 35**—Construction and scope—"Legal proceedings". [*See* Q.D. 1941—1945, Vol. I, Col. 142.] ALL-INDIA GROUNDNUT SYNDICATE, LTD., *In re.* 222 I.C. 155=1946 Bom. (Rul.) 80.

———**S. 34**—*Discretion of Court—Interference in appeal.*

Under S. 34, Arbitration Act, the making of an order staying the proceedings is a matter largely in the discretion of the Court, though the discretion has to be judicially exercised. Where the trial Court has not acted arbitrarily or capriciously, the discretion exercised by him cannot be interfered with in appeal. (*Harnam Singh, J.*) GIANCHAND WALAITI RAM *v.* KISHAN CHAND. 52 P.L.R. 384.

——S. 34—*Discretion of Court—Interference in appeal—Practice.*

Under S. 34, Arbitration Act, a Court has a discretion to grant or refuse a stay of the suit, and where such discretion has been exercised in a most judicial manner, the appellate Court will refuse to interfere. *(Harries, C.J. and Mukherjea, J.)* Chundanmull Jhaleria *v.* Clive Mills Co., Ltd. I.L.R. (1948) 2 Cal. 297.

——S. 34—*Discretion of Court—Interference —Jurisdiction of Court of appeal or revision.*

Under S. 34, Arbitration Act, an order staying proceedings is no doubt a matter largely in the discretion of the Court, but when a strong case is made not only has the Court of appeal or the Court sitting in revision jurisdiction to interfere but ought to do so. *(Mookerjee and Chunder, JJ.)* Ghewarchand Rampuria *v.* Shiva Jute Bailing, Ltd. 5 D.L.R. (Cal.) 105=A.I.R. 1950 Cal. 568.

——S. 34—*Discretion of Court—Refusal of stay—Grounds—Complicated questions of law arising—Decision of arbitrators likely to conflict with decision of Court—Rule.*

Arbitrators are competent to determine points of law as well as questions on the construction of the agreement, and, merely because questions of law might arise in the course of arbitration, it cannot be said that the Court should refuse to make an order staying the proceedings under S. 34 of the Arbitration Act. The Court has a discretion, and if it feels that the questions of law which would all to be determined by the arbitrators are such as would rather not be left to be determined by them, it has the discretion not to make an order staying the proceedings. So also when there is a likelihood of conflicting decisions being given by the Court and the arbitrators, the Court will refuse stay. *(Bhagwati, J.)* Chimanram Motilal *v.* Vandravandas Gordhandas. 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

——S. 34—*Discretion of Court—Stay of suit —Members of association of commercial men selected as arbitrators—Commercial crisis leading to litigation between association and party to arbitration agreement.*

Under S. 34, Arbitration Act, the Court has always a discretion and should proceed on the facts of each particular case in the matter of granting or refusing a stay of suit. The strict principle of sanctity of an arbitration agreement is subject to the discretion of the Court, for there must be read in every such agreement an implied term or condition that it will be enforceable only if the Court, having due regard to all surrounding circumstances, thinks it fit, in its discretion, to enforce.

A party to an arbitration agreement may be released from his bargain if he can show that the selected arbitrator has not kept an open mind but has made up his mind against the party by any act or conduct which is more than a mere passing expression of opinion or that there is a probability that he would in fact be biassed or that there is sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct.

The circumstance that the members of a Committee of an association of commercial men, who are arbitrators, are both buyers and sellers of a particular commodity, will not ordinarily and by itself disqualify any member from acting as arbitrator in an ordinary dispute between a particular buyer and a particular seller of that commodity. But a commercial crisis may overtake an association of commercial men giving rise to such serious conflicts in interest between buyers in general and sellers in general as may make it improper for the committee, which may be packed with an overwhelming majority of buyers or sellers as the case may be, to adjudicate upon a dispute between a buyer and a seller.

Where a commercial crisis takes such a turn as to necessitate a litigation between one of the parties to the arbitration agreement and the committee, and the subject-matter of that litigation is closely and inextricably connected with the disputes in the suit between the parties to the arbitration agreement, the Court should in the exercise of its discretion refuse to stay the suit and the fact that the suit against the arbitrator, which is a *bona fide* one, is filed after the application for stay is made is wholly immaterial. *(Das, J.)* Dwarkadas Co. *v.* Keshardeo Bubna. I.L.R. (1948) 1 Cal. 190.

——S. 34—*Discretion of trial Judge—Interference in L. P. Appeal.*

The jurisdiction conferred by S. 34 of the Arbitration Act is of a discretionary nature, and in a Letters Patent Appeal interference with the exercise of the discretion should not be made unless it is capricious or arbitrary. *(Abdul Rashid, C. J. and Mehrchand Mahajan, J.)* Hanuman Chamber of Commerce, Ltd., Delhi *v.* Jassa Ram Hira Nand. 49 P.L.R. 230=A.I.R. 1948 Lah. 64.

——S. 34—*Jurisdiction of Court—Stay of suit—Plea that contract containing arbitration clause is void.*

For the purpose of an application under S. 34 of the Arbitration Act, the Court can only consider the case as pleaded and framed. Even if the Court is of opinion that the case made is of doubtful value or has been ingeniously framed with a view to avoid a possible claim under the contract itself, it cannot stay the suit, unless the disputes raised are within the ambit of the arbitration clause.

The essential question seems to be (*a*) whether the plea taken, whether it is mistake, fraud, misrepresentation or coercion, make the contract containing the arbitration clause void *ab initio* so that the challenge is as to the formation of the contract or (*b*) whether the plea raises grounds for avoiding a contract validly entered into. If the latter, arbitration clause survives the avoidance or termination of the agreement. If the former, the arbitration clause cannot operate.

Ordinarily a dispute as to whether a contract was induced by fraud or misrepresentation and is void *ab initio* is one which the arbitrators cannot decide. The jurisdiction of the arbitrators depends on the existence of the contract and the submission. The arbitrators cannot ordinarily decide a dispute as to whether they have jurisdiction to decide a particular issue. The parties may, however, agree that any dispute between the parties including a dispute whether a contract was vitiated or avoided by reason of fraud or mistake should be decided by the arbitrators themselves. The Court would, however, require clear and unambiguous words in the arbitration clause in order to be able to come to the conclusion that a dispute on the decision of which the jurisdiction of the arbitrators depended, was intended by the parties to be referred to arbitration. The ousting of the jurisdiction of the ordinary Court of law can only be done by clear and definite words and ordinarily the Court would lean against a construction conferring on the arbitrators jurisdiction to decide a dispute as to the existence or non-existence of their jurisdiction. (*Sinha, J.*) Bilasrai & Co. *v.* Tolaram Nathmull. 52 C.W.N. 858.

——**S. 34**—*Order dismissing certain objections —Appeal—New objections, if may be raised.*

An appeal from an order of the lower Court disallowing objections taken to the validity of an award must ordinarily be confined to such objections as had been taken in that Court and to no other. An objection as to the invalidity of reference should not be allowed to be advanced for the first time in the appeal. (*Abdur Rahman, J.*) Madan Lal *v.* Nabi Bakhsh. 226 I.C. 241=1946 Lah. (Rul.) 444=48 P.L.R. 377=A.I.R. 1947 Lah. 177.

——**Ss. 34 and 40**—*Scope and effect—Suit pending in Small Cause Court—Jurisdiction of that Court to pass stay order.*

Where a suit is pending before a Small Cause Court, the Small Cause Court is the authority to whom an application for stay under S. 34 of the Arbitration Act has to be made, and such authority may pass an order staying the suit. The Small Cause Court is not deprived of its jurisdiction to pass the stay order by the provisions of S. 40 of the Act. Strictly interpreted, S. 40 only means that the Small Cause Court shall have no jurisdiction over the proceedings of the arbitration which have started nor will it have any jurisdiction for any application which may arise out of these proceedings. The stage at which the application for stay is made and the stay order is passed is not any part of the arbitration proceedings. Exercising jurisdiction to pass stay order is not exercising jurisdiction over arbitration proceedings. (*Das Gupta, J.*) Basanti Cotton Mills, Ltd. *v.* Dhingra Bros. A.I.R. 1949 Cal. 684.

——**S. 34**—*Stay of proceedings—Discretion of Court—Interference in appeal.*

No doubt, an appellate Court is generally unwilling to interfere with an order passed by a Court either staying proceedings or refusing to stay proceedings on an application being made to it under S. 34 of the Arbitration Act. But if it finds that the discretion which is given to the Court under that section in regard to the exercise of its powers under it has not been judicially exercised, it is its duty to interfere. (*Harish Chandra and Sapru, JJ.*) Bhudhu Lal *v.* Jagan Nath. I.L.R. (1948) All. 401=A.I.R. 1949 All. 70=1949 A.L.J. 559.

——**S. 34**—*Stay of suit—Discretion—Interference by appellate Court.*

The right to have a suit stayed under S. 34 of the Arbitration Act is a discretionary one. In England the appellate Court will not interfere where a trial Judge has exercised his discretion in favour of one of the parties in a proper and judicial manner in granting or refusing a stay. There is no reason for taking a different view in India under S. 34 of the Arbitration Act. (*Harries, C.J. and Mukherjea, J.*) Chandanmull Jhaleria *v.* Clive Mills, Ltd. 52 C.W.N. 521=A.I.R. 1948 Cal. 257.

——**S. 34**—*Stay of suit—Discretion of Court —Interference by the Appellate Court.*

Under S. 34 of the Arbitration Act the Court has a discretion to stay the suit or not to stay it and the Court has to see not whether the case be referred to arbitration but has to see whether it should not be referred to arbitration. The discretion exercised by the trial Court is not to be ordinarily interfered with by the appellate Court. The appellate Court can and will interfere when the discretion is illegally or improperly exercised or has been exercised without due consideration of the relevant factors. A refusal to stay the suit would be justified if the determination of the dispute involved the decision of a pure question of law. But because one of the parties was to be the final Judge in the dispute between parties would not be a ground to refuse stay. (*Raghubar Dayal and Akbar Hussain, JJ.*) Upper India Sugar Exchange, Ltd. *v.* Haji Habib Haj Pir Mahd. I.L.R. (1948) All. 443.

——**S. 34**—*Stay of suit—Discretionary power —Partnership agreement providing for reference to a named arbitrator—Named person being a shareholder of the concern—Court if bound to stay.*

S. 34 of the Arbitration Act gives a discretion to the Court either to stay a suit or not to stay it. Normally a Court will give effect to the terms of any agreement between the parties as to arbitration and will stay a suit. But where in a partnership agreement provision is made for reference of disputes to a named arbitrator, but the named arbitrator is himself a shareholder of the concern, the Court would be justified in not staying a suit for accounts of the dissolved partnership. (*Wanchoo and Agarwala, JJ.*) Abdul Latif *v.* Dost Mahomed & Co., Ltd. I.L.R. (1949) A. 647=1949 A.L.W. 12=A.I.R. 1949 All. 304=4 D.L.R. (All.) 114=1949 A. L. J. 375=1949 A.W.R. 435.

——**S. 34**—*Stay of suit—Ground for refusal —Named arbitrator not available—Dispute not raised before suit.*

Where a contract provides for reference of the disputes arising out of it to the arbitration of "the officer sanctioning the contract", the fact that that particular officer has left British India and is not available does not *ipso facto* provide a ground for refusing a stay of the suit brought in contravention of the arbitration agreement, when there is nothing in the arbitration clause suggesting that the parties agreed that any vacancy in the office of the arbitrator should not be filled up. In the absence of any such agreement the vacancy can be easily supplied and there is no reason to think that the arbitration will be infructuous at all. If the particular officer sanctioning the contract refuses to act or is incapable of doing so by reason of his absence or otherwise there are provisions in the Arbitration Act for the appointment of another arbitrator in his place and the arbitrator so appointed will be quite competent to proceed with the arbitration.

A mere omission to raise dispute before suit, without more, is not by itself a ground for refusing a stay although it may be taken into consideration along with other facts in exercising the discretion of the Court in the matter of a stay of the suit. *(Das, J.)* GOVERNOR-GENERAL IN COUNCIL *v.* ASSOCIATED LIVE STOCK FARM (INDIA), LTD. I.L.R. (1948) 1 Cal. 161=52 C. W.N. 288=A.I.R. 1948 Cal. 230.

——**S. 34**—*Stay of suit—Ground for refusal—Party asking for appointment of receiver as only relief.*

There is nothing in the Arbitration Act to show that an arbitrator has no power to grant relief by way of appointment of receiver. Therefore the Court cannot refuse to stay a suit under S. 34 of the Arbitration Act on the mere ground that the only relief asked for in the suit is one for the appointment of a receiver. 55 C. 249, distinguished. *(Harish Chandra and Sapru, JJ.)* BUDHU LAL *v.* JAGAN NATH. I.L.R. (1948) All. 401=A.I.R. 1949 All. 70=1949 A. L. J. 559.

——**S. 34**—*Stay of suit—Ground for refusal—Party asking for interim relief.*

The Court cannot refuse to stay a suit under S. 34 of the Arbitration Act on the ground that one of the parties asks for the grant of an interim relief by way of appointment of a receiver or the issue of an order of injunction, as under S. 41 *(b)* of the Act and para. 4 of Sch. II to that Act the Court has power to grant interim injunctions or to appoint a receiver even if the suit is stayed. *(Harish Chandra and Sapru, JJ.)* BUDHU LAL *v.* JAGAN NATH. I. L. R. (1948) All. 401=A.I.R. 1949 All. 70=1949 A. L.J. 559.

——**S. 34**—*Stay of suit—Ground for refusal—Plea of fraud against party—Proof required.*

Unless a *prima facie* case of fraud is made out, the proceedings should when an arbitration agreement exists, be stayed under S. 34 of the Arbitration Act. If the plaintiff objects to the case being referred to a domestic tribunal in accordance with an arbitration agreement between the parties he must make out a substantial and *bona fide* case of fraud. [1924 Cal. 796, ref. to.] *(Harish Chandra and Sapru, JJ.)* BUDHU LAL *v.* JAGAN NATH. I.L.R. (1948) All. 401=A. I.R. 1949 All. 70=1949 A.L.J. 559.

——**S. 34**—*Stay of suit—Jurisdiction and discretion of Court—Suit for dissolution of partnership, appointment of receiver and injunction—Charges of fraud against defendant—Clause in partnership deed providing for arbitration of disputes "arising out of or in connection with the deed."*

A suit was filed for dissolution of a partnership, accounts, distribution of the partnership assets and the appointment of a receiver, and for an injunction restraining the defendant from carrying on the partnership business or from using partnership assets until the affairs of the firm had been completely wound up. The plaintiff charged the defendant with breach of duty expressly imposed by the partnership agreement and breach of his duty generally as a partner, and with abuse of his position as a partner who in terms of the partnership deed had the control and management of the partnership business, for the purpose of defrauding the plaintiff and depriving him of his share of partnership profits. The partnership deed which was for a definite term contained a clause providing for reference to arbitration of any dispute between the parties "arising out of or in connection with the deed or the construction thereof". On an application by the defendant for stay of the suit under S. 34 of the Arbitration Act,

Held, (i) that the disputes between the parties whether they related to breaches of the terms of the partnership deed or to the defendant's manoeuvres to deprive the plaintiff of his share of the partnership assets or to other matters, were disputes which arose "out of or in connection with the deed", and that, therefore, there was jurisdiction in the Court to make an order staying the proceedings which had been instituted;

(ii) that under the arbitration clause in question the arbitrators had power to decide whether or not the partnership should be dissolved, and to award dissolution, notwithstanding the fact that the partnership agreed upon was for a definite term of years;

(iii) that the prayer in the plaint for a receiver and for an injunction, whether it was intended to be for protection pending suit or for permanent relief, was not a matter which required the Court to exercise its discretion against a stay;

(iv) that a charge of fraud to be a ground for refusing stay must be a specific charge clearly made and supported by particulars and that a mere general allegation was not enough. Though a Court would grant a stay when a charge of fraud was distinctly made, and the party charged claimed that the investigation be held by a Court and not by arbitrators, the position was different if it was the party charged who was applying for stay. As the party charged in the suit desired that the disputes which had arisen, including those which carried such general charges of misconduct as had been made, should be decided by the domestic forum which the parties had chosen, and as the disputes themselves had no special characteristic which made it desirable that they should be tried by a Court, there was no reason for refusing a stay. 53 B. 271 and I.L.R. (1942) 2 Cal. 539, referred to. *(Clough, J.)* BALLAVDAS ACHARJYA SHYAM SUNDER *v.* HALWASIYA. I.L.R. (1946) 1 Cal. 203.

——**S. 34**—*Stay of suit—Jurisdiction of Court—Dispute as to existence of arbitration agreement.*

In order to succeed in an application for stay under S. 34 of the Arbitration Act, the petitioner must prove that the respondents are parties to an arbitration agreement and the suit has been filed in respect of a matter agreed to be referred. The Court must be satisfied, before making an order for stay, that there is an arbitration agreement between the parties. If there is any dispute as to the existence of the arbitration agreement, the Court has no jurisdiction to order a stay unless the Court decides on the application that there is an arbitration agreement. If various questions of fact and of law will have to be decided for the determination of the issue as to the existence of an arbitration agreement between the parties, that issue can more conveniently be decided in the suit and the Court will not, therefore, make an order for stay of the suit. (*Sinha, J.*) SOHANLAL RUIA *v.* THOMAS & CO. (JUTE AND GUNNIES), LTD. I.L.R. (1949) 1 Cal. 350.

———**S. 34**—*Stay of suit—Jurisdiction of Court—Suit for damages for wrongful conversion of goods delivered under contract—Arbitration clause providing for reference of dispute arising out of contract.*

The defendant had entered into a contract with the plaintiff for the purchase of a certain quantity of jute. Against the said contract the plaintiff had delivered some quantity out of which the defendant had rejected a portion. The plaintiff repeatedly attempted to obtain delivery of the rejected bales of jute but the defendant did not deliver them. The plaintiff filed a suit for damages for wrongful conversion of the goods. The arbitration clause contained in the contract provided for reference to arbitration any dispute arising out of or in any way relating to the contract.

Held, that the cause of action in the suit was based wholly upon tort and tort alone which had got no connection direct or indirect with the contract itself and that the arbitration clause was not attracted on the pleadings in the suit and that, therefore, the Court had no jurisdiction to stay the suit under S. 34 of the Arbitration Act. (*Mookerjee and Chunder, JJ.*) GHEWARCHAND RAMPURIA *v.* SHIVA JUTE BAILING, LTD. 5 D.L.R. (Cal.) 105=A.I.R. 1950 Cal. 568.

———**S. 34**—*Stay of suit—Power of Court—Suit as framed independent of contract.*

Under S. 34 of Arbitration Act, the Court must consider the suit as it is pleaded and framed. If it comes to a conclusion that such a suit as pleaded is a suit on the contract or arising out of the contract containing an arbitration clause, then the suit should be stayed. But on the other hand if the suit as pleaded is a suit independent of the contract then the Court has no power to stay the suit though it is satisfied that the frame of the suit is merely a means of avoiding the consequences of alleging the true nature of the claim. (*Harries, C.J. and Mukherjea, J.*) JOHURMULL PARASRAM *v.* LOUIS DREYFUS & CO., LTD. 52 C.W.N. 137=A.I.R. 1949 Cal. 179.

———**S. 34**—*Stay—Question whether particular rule of Association is* ultra vires*—Competency of arbitrators to decide—Stay in case involving such question.*

The question whether a particular rule of the Rules of Business of an Association, such as the

Bombay Bullion Exchange, is *ultra vires,* is a difficult question of law and unsuited for decision of laymen. A panel of arbitrators named by the Association, even though it consists of the most important merchants and is advised by lawyers in particular cases, would not be a satisfactory tribunal to determine such a question. In such a case the Court would exercise its discretion by refusing stay. (*Bhagwati, J.*) CHIMANRAM MOTILAL *v.* VANDRAVANDAS GORDHANDAS. 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

———**S. 34**—*Stay of suit—Right to apply—Co-plaintiff not party to agreement to refer—If bar to application for stay.*

The fact that one of the plaintiffs in the suit was not a party to the agreement to refer to arbitration is no bar to the defendant applying for and obtaining stay of the suit when that plaintiff is not interested in the subject-matter of reference and when all that he is entitled to is only a right to receive such money as was due to the other plaintiff or plaintiffs. (*Abdul Rashid, Ag.C.J. and Abdur Rahman, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* SIMLA BANKING AND INDUSTRIAL CO., LTD. 226 I.C. 444=1946 Lah. (Rul.) 460=A.I.R. 1947 Lah. 215.

———**S. 34**—*"Steps in the proceedings"—Application for time to file written statement.*

The filing of an application for time is taking other steps in the proceedings as provided in S. 34 of the Arbitration Act. Therefore a person who has applied for time to file a written statement is not entitled at a later date to apply for stay of proceedings under that section. (*Lodge and Amin Ahmad, JJ.*) SADAN KUMAR BHATTACHERJEE *v.* SUNIL KUMAR BHATTACHERJEE. A.I.R. 1948 Cal. 59.

———**S. 34**—*"Step in the proceedings"—Application for time to file written statement.*

An application for time to file a written statement would amount to a "step in the proceedings" within the meaning of S. 34 of the Arbitration Act. [1945 A.L.J. 38, Rel. on; 1941 Lah. 64, Distd.] (*Malik, C.J. and Mushtaq Ahmad, J.*) U. P. GOVERNMENT *v.* HARNATH. I.L.R. (1950) A. 244=1949 A.L.J. 170=A.I.R. 1949 All. 611=1949 A.W.R. 261.

———**S. 34**—*"Steps in the proceedings"—Meaning of—Defendant filing unconditional appearance in Court in suit—If barred from applying for stay—High Court Rules (O.S.), R. 117.*

The true test for determining whether an act is a "step in the proceedings" within the meaning of S. 34, Arbitration Act, is not so much the question as to whether it is an application—although that would be a satisfactory test in many cases but not the only test, but whether act displays an unequivocal intention to proceed with the suit and to give up the right to have the matter disposed by arbitration. The filing of an unconditional appearance in Court in a suit is not a "step in the proceedings" which will debar him from applying for stay, under S. 34. It is not an application of any kind but is an act which it is incumbent upon the defendant to do by virtue of R. 117 of the High Court Rules to prevent the suit from being set down as being undefended, before he can apply for stay. It is not necessary for the defendant to file an appearance "under protest" according to a practice which has grown up in the High Court, but which is of doubtful import and utility. That practice need not be followed and an unconditional appearance may be filed. 45 Bom.L.R. 432; 49 Bom.L.R. 431, cons.; A.I.R. 1943 Cal. 484, ref. (*Tendolkar, J.*) NURUDDIN ABDULHUSEIN *v.* ABU AHMED. 51 Bom.L.R. 1020=A.I.R. 1950 Bom. 127.

———**S. 34**—*"Step in the proceedings"—Party seeking postponement of suit and sending consent praecipe to the party—Latter signing same—If takes "step in the proceedings"—Right to apply for stay.*

There is no doubt that under S. 34 of the Arbitration Act, the application for stay of proceedings has got to be made by a party before filing a written statement or taking any other step in the proceedings. The mere fact that the party unconditionally signs the consent praecipe sent by the other party's solicitor for postponement of the suit, on the ground that the writ of summons had not been served, would not amount to taking a step by the party signing the praecipe, and would not thereby debar that party from making the application for stay of the suit. (*Bhagwati, J.*) CHIMANRAM MOTILAL *v.* VANDRAVANDAS GORDHANDAS. 49 Bom.L.R. 431=A.I.R. 1948 Bom. 55.

———**S. 34**—*"Steps in the proceedings"—What would amount to.*

If something is done by the party applying under S. 34 of the Arbitration Act which is in the nature of an application to the Court, it will necessarily come under the category of a "step in the proceedings" within the meaning of that section so as to disentitle that party from applying for stay under that section.

A partnership contract provided for the settlement by arbitration of any disputes between the partners. One of the partners filed on 27th February, 1947, a suit for dissolution of the partnership and for accounts. On the next day he filed an interlocutory application for an interim injunction restraining the defendant from drawing certain amounts, for the appointment of a commissioner to take an inventory, etc. An *ex parte* order granting interim injunction was made and the notice in respect of it was made returnable on 3rd March, 1947. On that date the defendant appeared by his advocate and asked for 10 days' time for filing a counter which was granted and by consent of parties the interim injunction order was also modified. On the adjourned date the defendant's advocate mentioned for the first time that he intended filing an application for referring the dispute to arbitration and that therefore he did not file a counter. The interim order was directed to continue. On an application under S. 34 of the Arbitration Act by that defendant,

Held, that in the circumstances the applicant did take a step in the proceedings within the meaning of S. 34 on both the dates when the interlocutory application of the plaintiff came on for hearing and further, by his conduct in that application he was precluded from applying for stay of proceedings and for reference of the disputes between the parties to arbitration.

The fact that on the second hearing the defendant's advocate mentioned that he was going to apply under S. 34 of the Act will not affect the position so far as S. 34 was concerned. (*Kunhi Raman, J.*) GANNU RAO *v.* THIAGARAJA RAO. 61 L.W. 829=A.I.R. 1949 Mad. 582=(1948) 2 M.L.J. 606.

———**S. 34**—*Time for applying for stay—Notice of suit—If binds party served with notice with obligation to ask other party to refer matter to arbitration and to refrain from going to Court.*

It is only when a suit or a proceeding has been commenced against a party that he can make up his mind as to whether he would apply for stay or not. He is not bound to remind the other party who has commenced the suit or proceeding, before such commencement, of his duty not to start the suit under the agreement between them. A notice of suit imposes no obligation on the party served with notice to say that the dispute shall be decided by their own tribunal and not by a Court of law. He can apply for stay at any time before filing a written statement or taking any other step in the proceedings, but not thereafter. (*Abdul Rashid, Ag.C.J. and Abdur Rahman, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* SIMLA BANKING AND INDUSTRIAL CO., LTD. 226 I.C. 444=1946 Lah. (Rul.) 460=A.I.R. 1947 Lah. 215.

———**S. 37 (1) and (3)**—*Commencement of arbitration — Date — Arbitration bye-laws of Madras Yarn Merchants' Association incorporated in the arbitration clause in contract between members—Bye-law providing for invocation of arbitration by application accompanied by plaint and documents along with fee of Rs. 25—Computation of limitation for claim—If date of application or service of notice on defendant—Award—When liable to be set aside as invalid—Arbitration Act (X of* 1940), *Ss.* 16 *and* 30.

Where the arbitration bye-laws of the Madras Yarn Merchants' Association are incorporated in an arbitration clause providing for the settlement of disputes between its members and a bye-law provided for invocation of arbitration by an application accompanied by a plaint and documents, etc., along with a fee of Rs. 25 the arbitration must be "deemed to have commenced" within the meaning of S. 37 (3) of the Arbitration Act on that date which constitutes the material date for limitation. If the claim for damages for breach of contract is within 3 years from the date of such commencement the claim is not barred by limitation.

A mere error on a point of law whether specifically referred to the arbitrators or not will not by itself justify the Court setting aside the award. No hard and fast rule can be laid down as to the type of cases in which an award may be remitted under S. 16 (*c*) or set aside under S. 30 (*c*) of the Arbitration Act. All objections to the legality of the award that are on the ground of any error in law apparent on the face of the award are governed by S. 16 (*c*) and not by S. 30 (*c*). Even to justify a remission of the award on the ground of an illegality apparent on its face, it must be one of such a nature as to permit of no argument, and to be patent on its face and if permitted to pass unrectified would do substantial injustice in both law and enquity to the parties concerned. (*Rajamannar, C.J. and Mack, J.*) Rathakrisknamurthy *v.* Balasubramania & Co. A.I.R. 1949 Mad. 559=(1948) 2 M.L.J. 601.

——**S. 37 (5)**—*Applicability—Application to implead legal representatives under O. 22, R. 4, C. P. C.—Exclusion of time taken in arbitration.*

S. 37 (5) of the Arbitration Act applies not only to suits but also to applications. In computing the period of limitation for bringing the legal representatives under O. 22, R. 4, C.P.C., therefore, the period between the commencement of the arbitration and the date of the order of the Court superseding the order of reference should be excluded under S. 37 (5) of the Arbitration Act. (*Thadani, J.*) Milawaram Popatram *v.* Tolaram Ayaram. I.L.R. (1946) Kar. 326=A.I.R. 1947 Sind 113.

——**S. 38**—Arbitrators' fees—Power of Court to compel party to pay before filing of award—Special contract between parties for each to pay his proportionate share—Effect of—Remedies open to party paying his share. *See* Arbitration Act, Ss. 14 (2) and 38. A.I.R. 1949 Cal. 189.

——**S. 39** — *Appealability—Application for filing objections to award—Rejection as being out of time—Appeal.*

An order refusing to set aside an award on the ground that the application for filing objections to the validity of the award was out of time is an appealable order within the meaning of S. 39, Arbitration Act. (*Thadani, J.*) Holaram Verhomal *v.* Governor-General in Council. I.L.R. (1946) Kar. 459=A.I.R. 1947 Sind 145.

——**S. 39**—Appealability—Dismissal of objections to filing of award and passing of decree in terms of award. *See* Arbitration Act (X of 1940, Ss. 17 and 39. 1950 A.L.J. 249.

——**S. 39 and U. P. Ten. Act (XVII of 1939), Ss. 263-272**—*Arbitration Act, if applies to proceedings under the U. P. Ten. Act—Appeal against decrees or orders passed as a result of a reference to arbitration—Provision of law applicable—Order reviving arbitration—Appealability.*

The Arbitration Act applies to Revenue Courts and as the U. P. Ten. Act makes no special provision for appeal against decees or orders passed as a result of a reference to arbitration such appeals must be governed by the Arbitration Act and not by the provisions of Ss. 263 to 272 of the U. P. Ten. Act. S. 39 of the Arbitration Act will govern such appeals. But an order reviving an arbitration being one not mentioned in S. 39 of the Arbitration Act will not be an appealable one. [1944 R.D. 325; 1945 R.D. 315, foll.] (*Sultan Ahmad, M. and Lal, J.M. II.*) Ram Khilawan *v.* Basmti. 1949 R.D. 89.

——**Ss. 39 and 41**—*Orders of appellate Court—Revision by High Court—C. P. Code, S.* 115.

There is nothing in S. 39 or S. 41 of the Arbitration Act which in any way takes away the powers that the High Court possesses of entertaining petitions for revision under S. 115, C. P. Code. The proceedings before an appellate Court under that Act are undoubtedly judicial proceedings and the Judge exercising powers is a judicial officer. In these circumstances, there must be some express provision in that Act taking away the powers of the High Court under S. 115, C. P. Code, before it can be held that no petition for revision is competent from the orders of such Court. (*Abdul Rashid, C.J. and Mehr Chand Mahajan, J.*) Tirath Singh *v.* Isher Singh. 49 P.L.R. 129=A.I.R. 1948 Lah. 50.

——**S. 39**—*Scope—Order dismissing objections to award as filed beyond time—Appeal.*

Whether objections to an award are dismissed on the merits or they are dismissed on the ground that they are filed beyond time, the Court by dismissing them in effect refuses to set aside the award, and an order refusing to set aside an award is clearly appealable under S. 39 of the Arbitration Act. A.I.R. 1950 Cal. 53 and I.L.R. (1946) Kar. 459, ref. to. (*Thadani, C.J. and Ram Labhaya, J.*) Mafizuddin Bhuyan *v.* Alimuddin Bhuyan. A.I.R. 1950 Assam 191.

——**S. 39**—*Scope—Order overruling objections to the filing of award and directing decree to be drawn up in terms of award—Appeal.*

An order overruling objections to the filing of the award preferred by a party is one open to appeal under S. 39 (1) (*b*) of the Arbitration Act; and that right of appeal is not taken away merely because the same order also directs the drawing up of a decree in terms of the award. The order overruling objections does not cease to be appealable because it also passes a decree in terms of the award. 18 C.W.N. 381; 44 C.W.N. 1034; A.I.R. 1948 Pat. 207, rel. on. (*G. N. Das, J.*) Bholanath Chatterjee *v.* Chandra Shekar Bhattacharya. A.I.R. 1950 Cal. 53=5 D.L.R. (Cal.) 9.

——**S. 39 (1) and (2)**—*Applicability—Letters Patent appeal.*

The appeal provided for in sub-S. (1) of S. 39 of the Arbitration Act is an appeal from one Court to another, the latter being a Court authorised by law to hear appeals from the original decrees of the former, and therefore necessarily a Court superior to it. A Letters Patent appeal which is an appeal from one Bench to another Bench of the same Court cannot be said to fall within the purview of this provision.

It follows as a necessary corollary that the "second appeal" mentioned in sub-S. (2) of S. 39 of the Act must also be an appeal from an inferior to a superior appellate Court. A Letters Patent appeal not being an appeal of this description cannot be taken to fall within the purview of the sub-section and to be hit by the prohibition contained therein. (*Ram Lal, C.J. and Achhru Ram, J.*) Banwari Lal *v.* Board

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of Trustees, Hindu College, Delhi. A.I.R. 1949 E.P. 165.

——**S. 39 (1)**—*Order refusing to set aside award—Second appeal—If competent.*

A second appeal is not competent against an order setting aside or refusing to set aside an award. (*Thadani, C.J. and Ram Labhaya, J.*) Musafir Ali *v.* Md. Roysul Haq. A.I.R. 1950 Assam 114.

——**S. 39 (i) and (vi)**—*Scope—Application under S. 14 (2)—Dismissal on ground of no arbitration and no award—Appeal.*

Where an application under S. 14 (2) of the Arbitration Act is dismissed by the Court on the ground that the award alleged to have been made was not true and that there was no arbitration as alleged, the order is an order setting aside the award, as one refusing to act on the award, or as one refusing the relief sought by the applicant, and hence an appeal lies against such order, under S. 39 (1) or (vi) of the Arbitration Act. (*Reuben and Mukharji, JJ.*) Jagdish *v.* Sunder. 27 Pat. 86=A.I.R. 1949 Pat. 393.

——**S. 39 (2)**—*Scope of—Letters Patent appeal—If barred.*

S. 39 (2) of the Arbitration Act only prohibits a second appeal and has reference to appeals that are made to the High Court under S. 100, C. P. Code. It does not take away the right of appeal that has been conferred on a litigant under Cl. (10) of the Letters Patent (Lahore). (*Abdul Rashid, C.J. and Mehr Chand Mahajan, J.*) Hanuman Chamber of Commerce, Ltd., Delhi *v.* Jassa Ram Hira Nand. 49 P.L.R. 230=A.I.R. 1948 Lah. 64.

——**S. 39**—*Scope and effect—Order under S. 33—Whether appealable under Cl. 15, Letters Patent.*

An order under S. 33 of the Arbitration Act which is not appealable under S. 39 of that Act is also not appealable under Cl. 15 of the Letters Patent. The general right of appeal given in Cl. 15 is curtailed by the special provisions of S. 39 of the Arbitration Act, which restricts the right of appeal only to the cases specified in the section itself. This section is sufficiently explicit to include an appeal under Cl. 15 of the Letters Patent as well and as the provisions of Cl. 15 have to be taken under Cl. 44 of the Letters Patent subject to the legislative powers of the Governor-General in Council it must be held that to that extent the right of appeal has been curtailed and modified. (*Harries, C.J. and Mukherjea, J.*) Wright and Partners, Ltd. *v.* Governor-General in Council. I.L.R. (1948) 2 Cal. 265=52 C.W.N. 224.

——**S. 39 (2)**—*Scope—Second appeal—Objections to award overruled and decree passed in terms—Appeal allowed and award declared invalid—Second appeal against appellate order—If lies.*

S. 39 of the Arbitration Act is a specific provision which provides for an appeal against certain orders of the Court, including an order setting aside an award, and Cl. (2) provides that no second appeal lies from an order passed in appeal under this section. There is a clear distinction between an appeal from an order as mentioned in S. 39, and an appeal against a decree as mentioned in S. 17 of the Act. Where the first Court found that the award was not invalid and pronounced judgment in terms of the award, but on appeal the award was held invalid, no second appeal would lie against such an appellate order. (*Agarwala, A.C.J. and Imam, J.*) Sheocharan *v.* Sanichar. 26 Pat. 115=A.I.R. 1948 Pat. 207.

——**Ss. 40 and 34**—Scope and effect—Suit pending in Small Cause Court—Jurisdiction of that Court to pass stay order. *See* Arbitration Act, Ss. 34 and 40. A.I.R. 1949 Cal. 684.

——**Ss. 41 and 30**—Dispute adjusted by parties after award—Right of parties to ask Court to set aside award—C. P. Code, O. 23, Rr. 1 and 3. [*See* Q.D. 1941—1945, Vol. I, Col. 147.] Attar Singh *v.* Bishan Singh. 221 I.C. 537=1946 Pesh. (Rul.) 7.

——**S. 41**—*Powers of Court—Order for interim injunction—Arbitration proceeding not pending.*

Under S. 41 of the Arbitration Act, the Court can make an order for interim injunction although an arbitration proceeding is not actually pending. Under this section read with the fourth item in the Second Schedule, this power is conferred on the Court "for the purpose of or in relation to arbitration proceedings". It is not in terms limited to "pending arbitration proceedings".

Further where an application for injunction has been made in a suit which is pending and which has not yet been stayed, the Court has power, apart from S. 41 of the Arbitration Act, to make an order for interim injunction in a pending suit under the C. P. C. as well as in exercise of its inherent powers. Even if the Court thinks fit to exercise its discretion by granting a stay of proceedings that fact does not oust the jurisdiction of the Court to give auxiliary relief, *e.g.*, by the appointment of a receiver or by granting an injunction. The Court can, in its discretion, grant such relief and then stay the action as regards all other matters. (*Das, J.*) Chedilal Hariniwas *v.* Brit-Over, Ltd. 52 C.W.N. 45.

——**S. 41 (b)**—Scope and effect—Receiver—Appointment of—Power of Court to appoint before notice of application under S. 20 is given. [*See* Q.D. 1941—1945, Vol. I, Col. 147.] Nagarchand *v.* Surendranath. 12 B. R. 436=223 I.C. 571=1946 Pat. (Rul.) 241=A. I. R. 1946 Pat. 70.

——**S. 46 and First Schedule, Cl. 3**—*Applicability of Arbitration Act to proceedings before the arbitrator appointed under the Madras Town Planning Act—Computation of four months' time under Cl. 3 of the 1st schedule of the Arbitration Act.*

The exception contained in S. 46 of the Arbitration Act takes away the Madras Town Planning Act out of its purview. Even if R. 3 of the 1st schedule of the Arbitration Act is assumed to apply to arbitration under Ch. V of the Madras Town Planning Act the only rational way of applying it would be to consider the four months' period as commencing from the date on which the arbitrator entered upon the hearing of a particular claim. (***Leach, C. J., and Lakshmana Rao, J.***)

ARBITRATION ACT (1940), S. 47.

Ranganathan *v* Krishnayya. I.L.R. (1947) Mad. 113=227 I.C. 14=59 L.W. 211=1946 M.W.N. 218=A.I.R. 1946 Mad. 504=(1946) 1 M.L.J. 255.

——**S. 47, Proviso**—*Scope—"Award otherwise obtained"—Reference in pending suit without intervention of suit—Award on—Validity and enforceability—If* "ipso facto" *adjustment of suit—C. P. Code, O. 23, R. 3.*

An award obtained on an agreement for reference to arbitration between the parties, during the pendency of a suit and without any order from the Court, cannot be treated as an adjustment of the suit under O. 23, R. 3, C. P. Code, *ipso facto*, and without a fresh consent between the parties given after the award. An award in a pending suit is not a plea in bar and cannot operate to oust the jurisdiction of the Court to continue the proceedings in the suit, and it cannot operate by itself as an accord and satisfaction of the claim in the suit.

A reference to arbitration of the subject-matter of a pending action without an order of Court is not included within "Arbitration without the intervention of the Court" under the Arbitration Act. Such an award is one which forms into a category by itself and is within the contemplation of the proviso to S. 47 of the Act. It is no doubt open to the parties to abandon the suit and then file the award for its enforcement and the Court may then be bound to inquire into the validity thereof. But without such consent of the parties it is unenforceable even under the general law of contract. A reference in a pending suit without an order of the Court involves ouster, or, at any rate, suspension for the time being, of the Court's jurisdiction to proceed with the trial of the suit, and, as such, it is opposed to public policy and, therefore, not enforceable even as a contract. I.L.R. (1946) Mad. 39, diss. A.I.R. 1934 Cal. 643; 16 Pat. 699, foll.; 47 All. 637 (F.B.); 51 Bom. 908 (F.B.); 51 Mad. 800 (F.B.), not foll.; 12 I.A. 67; I.L.R. (1946) Mad. 840; I.L.R. (1949) Mad. 111; 51 C.W.N. 563, ref. (*Ray, C.J. and Das, J.*) Indramoni Mohapatra *v.* Nilamoni Moharana. A.I.R. 1950 Orissa 169.

——**S. 47, Proviso**—Scope—If affects discretion of Court under O. 23, R. 3, C. P. Code—Award in private arbitration—If can be made decree of Court as being compromise. [*See* Q.D. 1941—1945, Vol. I, Col. 148.] Arumuga Mudaliar *v.* Balasubramania Mudaliar. I.L.R. (1946) Mad. 39.

——**Sch. I, para. 3**—*Provision, if mandatory.*

The provision in paragraph 3 of the first Schedule to the Arbitration Act that unless a contrary intention is expressed in an arbitration agreement, the arbitrators should make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement, is expressed in mandatory terms, and its contravention involves avoidance of the award. (*Cornelius, J.*) Abdul Hakim Khan *v.* Chairman, Lahore Improvement Trust. Pak.L.R. (1949) Lah. 789=A.I.R. 1950 Lah. 32.

ARMS ACT (1878), S. 13.

——**Sch. I, R. 5**—*"Entering on reference"—Meaning of.*

An umpire enters on the reference when he enters upon the matter of the reference, (*i.e.*), when the parties are before him or under some peremptory order he is compelled to conclude the hearing *ex parte*. He cannot be deemed to have entered on the reference on the day when he merely directed that no further notice need be sent to one of the parties without beginning an enquiry into the case. 44 A. 432, referred to. (*Rahman, J.*) Abdul Majid *v.* Bahawal Bakhsh. Pak.L.R. (1950) Lah. 323=A.I.R. 1950 Lah. 174.

ARMS ACT (XI OF 1878), S. 4—*"Ammunition"—Old, rusty and dirty cartridges and bullets—Possession without licence—Offence.*

"Ammunition" as defined in S. 4 of the Arms Act includes not only serviceable loaded cartridges but also all parts of ammunition. Old, dirty, and in parts rusty, loaded cartridges and bullets, are therefore "ammunition" within the meaning of the Act, and possession of such articles contrary to the Act (without a licence) would therefore be an offence. (*Lobo and Tyabji, JJ.*) Emperor *v.* Nirmaldas Alumal. I.L.R. (1947) Kar. 49.

——**Ss. 13 and 19 (e)**—*"Going armed"—Meaning of—Essence of offence—Accused found outside his room and sitting on* otla *with* dharias *at time of riots—Offence—Intention to use weapon.*

The expression "going armed" in S. 13 and S. 19 (*e*) of the Arms Act does not necessarily imply motion on the part of the person going armed or his leaving his own premises. The essence of the offence of "going armed" under S. 13, which is punishable under S. 19 (*e*), is, first, the carrying of the weapons in question on the person of the accused, and, secondly, the intention on the part of the accused of using the arms as weapons when necessary or opportune. Such an intention is a necessary ingredient of the offence under S. 19 (*e*). The Court has to look to the circumstances of each case to see whether such an intention can be found or not.

Where the accused at a time when riots were going on came out of his living rooms with two *dharias,* and was found sitting on his *otla* at a distance of about 8 to 10 paces from his door, the *otla* abutting on the road, where the police found several people running away the accused must be held to be guilty of the offence of "going armed" in contravention of the provisions of S. 13 within the meaning of S. 19 of the Arms Act. (*Sen and Gajendragadkar, JJ.*) Emperor *v.* Abdul Hafiz Hassan. 49 Bom.L.R. 807=A. I. R. 1948 Bom. 173=49 Cr.L.J. 208.

——**S. 13**—*Offence under—No intention of using a pistol, which is carried in a locked handbag.*

Unless a man carries unlicensed arms with the intention of using them, he is not guilty under S. 13 of the Arms Act. When a person carries a hand-bag in which he had kept an unlicensed pistol, he cannot be said to have gone armed as he had no present intention of using the pistol.

(*Desai, J.*) RAMCHANDER *v.* REX. 1950 A.L.J. 811=A.I.R. 1950 All. 386=4 A.I.Cr.D. 401=5 D.L.R. (A.) 202=51 Cr.L.J. 1064.

———**Ss. 14, 19 (f), 21 and 29**—*Possession of more gun powder than that mentioned in the licence—Offence, committed—Sanction under S. 29—Necessity—"Extent" in S. 14 includes quantity of ammunition permitted by the licence.*

The word "extent" in S. 14 of the Arms Act is not confined to territorial extent but also includes the quantity of ammunition permitted by the licence. Possession or control of any quantity in excess of it must be deemed apart from its not being covered by the licence, an offence under S. 14 read with S. 19 (*f*), because it is not according to the extent permitted by the licence. S. 21 will come into play only where in violation of a condition subject to which the licence has been granted an act has been done which is not punishable under S. 19. The prosecution of a licensee who is found in possession of ammunition beyond the extent permitted by the licence would not be maintainable under S. 29 of the Act without the requisite sanction of the District Magistrate. (*Yahya Ali, J.*) AHMAD NAINA MARACAIR, *In re.* 1945 M.W.N. 485=48 Cr.L.J. 880=60 L.W. 429=2 D.L.R. 47=A.I.R. 1947 Mad. 451=(1947) 2 M.L.J. 102.

———**Ss. 14 and 4**—*Possession of gun powder for reloading cartridges by a licensee for a breach-loading gun—If illegal.*

A person who has licence for a breach-loading gun and is authorized to keep cartridges is not debarred from possessing gun powder for the purposes of reloading the cartridges. Taking the definition of ammunition in S. 4 along with S. 14 of the Arms Act, the licensee is entitled to keep powder, wads and shots for loading cartridges provided he does not exceed the number of cartridges allowed to him under the licence. (*Thomas, C.J.*) RAM SAROMAN SINGH *v.* EMPEROR. 21 Luck. 301=222 I.C. 547=1946 A.L.W. (C. C.) 55=47 Cr.L.J. 310=1946 A. Cr. C. 10=1946 Oudh (Rul.) 116=1946 A.W.R. (C.C.) 54=1946 O.W.N. 55=1946 O.A. (C.C.) 54=A.I.R. 1946 Oudh 124.

———**S. 15**—*If applies to Mirzapur.*

S. 15 of the Arms Act applies to the City of Mirzapur. (*Agarwala and Bhargava, JJ.*) AMIR KHAN *v.* STATE. 1950 A.W.R. 328=A.I.R. 1950 A. 423=51 Cr.L.J. 1144=1950 A. L. J. 407.

———**S. 18 (a)**—*Power to suspend licence granted by District Magistrate—If vests in a City Magistrate.*

The City Magistrate has no power under S. 18 (*a*) of the Arms Act to suspend a gun licence granted by the District Magistrate. (*Sinha and Bennett, JJ.*) HAKIM NAWAB ALI *v.* EMPEROR. I.L.R. (1946) A. 689=1946 A.L.J. 199=224 I.C. 456=1946 A.L.W. 209=1946 O. W. N. (H.C.) 201=1946 A.W.R. (H.C.) 381=1946 A. (Rul.) 406=47 Cr.L.J. 638=1946 A.Cr.C. 43=A.I.R. 1946 All. 484.

———**Ss. 19 (c) and 20**—*Applicability—Person holding licence to possess arms in an Indian State bringing cartridges into British India from Ceylon—Intention to hide the arms—Offence punishable.*

The doing of an act mentioned in Cls. (*a*) (*c*). (*d*) or (*f*) of S. 19 of the Arms Act with an intention indicating that the act should not be known to a public servant is sufficient to make it an offence. Where a person holding a licence to possess arms within an Indian State brought live cartridges by sea from Ceylon into British India and tried to hide them, but his act was detected,

Held, the bringing into British India of arms was an act contemplated under S. 19 (*c*) even if it was not an offence under the same section and as there was an intention on the part of the accused to hide his act from the observation of the Customs Authorities or public servants, he was guilty of an offence under S. 20 of the Act. (*Govinda Menon, J.*) THE PUBLIC PROSECUTOR *v.* K. M. IBRAHIM SAHIB. 61 L. W. 635=1948 M.W.N. 665=A.I.R. 1949 Mad. 166=50 Cr. L.J. 213=(1948) 2 M.L.J. 273.

———**S. 19 (f)**—*Applicability—Possession or control—Arms found in room of house—Head of family owning house—Liability to conviction—Conditions of—Proof required.*

To render a person liable to conviction under S. 19 (*f*) of the Arms Act, arms should be recovered from his possession or control. Merely because arms are found in a house belonging to a family, it cannot be said that the head of the family, who is in possession of the house must also be in possession of the arms in the room in the house and is therefore liable. It has to be proved by evidence that the room in which the arms or offending articles are found or are recovered was indeed in possession of that person or was under his control. It has to be proved that some particular person or individual was in possession or control of the room or that portion of the house from which the arms were recovered in order to justify a conviction under S. 19 (*f*). 1932 A.L.J. 1072, foll. (*Sankar Saran, J.*) ALGOO MISIR *v.* REX. 4 D.L.R. (All.) 264=3 A.I.Cr.D. 657.

———**S. 19 (f)**—*Arms found concealed in the house belonging to two own brothers—No proof as to who concealed them—Conviction of either—Legality.*

Where arms (for which there is no licence) is found concealed in the house of two own brothers, as it cannot be known which of the two concealed them, none of them can be said to be "in possession" of them and neither of them could be convicted under S. 19 (*f*) of the Arms Act. (*Agarwala, J.*) SATDEO *v.* REX. 1950 A.L.J. 19=51 Cr.L.J. 800=A.I.R. 1950 A. 284=1950 A. W.R. 79.

———**S. 19 (f)**—*Ingredients of offence*—Mens rea—*Arms found in house of joint family—Manager—If in "possession" and liable to conviction—Possession or control.*

Mens rea is an essential ingredient of the offence under S. 19 (*f*), Arms Act, and before a person can be convicted under the section, it had to be proved that he was either in possession of the arms or had them under his control in contravention of the Act. The mere fact that the accused is the head and manager of a family is not sufficient for a finding that he must have been in possession or control of the arms found in a place in the family house; and the managing member cannot be convicted under S. 19 (*f*), on the mere basis of the finding of arms, without anything further to show that he was in actual possession of the articles found. (1932) A. L. J. 1072; (1933) A.L.J. 1338; (1936) A.L.J. 508; 1944 Lah. 339; 1948 Pat. 222; 48 Cr.L.J. 17; 48 Cr.L.J. 53, foll.; 1932 A.L.J. 570; 1936 Pat. 512; 1937 Pesh. 73, not foll.; 15 All. 129; 20 All. 598; 1947 A.L.J. 501; (1939) Cr.L.J. 428; 1944 Lah. 64; 1941 Nag. 296, ref. and discussed. (*Raghubar Dayal and Agarwala, JJ.*) SUGHAR SINGH *v.* REX. I.L.R. (1950) A. 174=A.I.R. 1950 A. 277=51 Cr.L.J. 776=3 A.I.Cr.D. 619=4 D.L.R. (All.) 254.

———S. 19 (f)—*Offence under—Person without a licence taking the gun of another and firing a shot—Possession only for a very short time—Sufficiency for conviction.*

Where a person who has no licence seizes the gun of another and fires a shot though his possession is only for a short time, nevertheless an offence is committed under S. 19 (*f*) of the Arms Act. (*Verma and Bind Basni Prasad, JJ.*) EMPEROR *v.* JAGMOHAN THUKRAL. I.L.R. (1947) A. 240=48 Cr.L.J. 829=1946 A. L. J. 502=1946 A.W.R. (H.C.) 631=1947 A.L.W. 119=A.I.R. 1947 A. 99.

———S. 19 (f)—*Offence under—Recovery from place in exclusive possession of accused—Necessity.*

To sustain a conviction for an offence under S. 19 (*f*) of the Arms Act it must be proved that the recovery of the unlicensed arms or ammunition was from a place which was in the exclusive possession of the accused. (*Atma Charan, J.C.*) AMBA LAL *v.* THE STATE. A. I.R. 1950 Ajmer 30 (1)=51 Cr.L.J. 1108.

———Ss. 19 (f) and 29—*Offence under S. 19 (f) in the Dt. of Hardoi—Sanction of District Magistrate for prosecution—Necessity.*

According to the provisions of S. 29 of the Arms Act when an offence under S. 19 (*f*) of the Act has been committed in a District like Hardoi, the prosecution of the offender cannot be started without the previous sanction of the District Magistrate. (*Kaul and Walford, JJ.*) PUKHAI *v.* EMPEROR. 23 Luck. 53=49 Cr.L.J. 295=(1947) O.A. (C.C.) 359=A. I. R. 1948 Oudh 187=1947 O.W.N. 534=1947 A.W. R. (C.C.) 359.

———S. 19 (f)—*"Possession"—Accused having key of box containing arms kept in his house—Liability of.*

Possession of a key of a box containing arms in the house of the accused, must be held to be "possession" of arms for purposes of S. 19 (*f*) of the Arms Act, as the possession of the key of the box by the accused tends to show that the accused must have knowledge of the presence of the arms in the box. (*Thadani, J.*) MAHTABALI SHAH HUSSAIN SHAH *v.* EMPEROR. 230 I. C. 158=1947 Sind (Rul.) 96=A.I.R. 1947 Sind 192=48 Cr.L.J. 556.

———S. 19 (f)—*Possession or control—Arms found in room of house—Head of family owning house—Liability to conviction—Conditions of—Proof required.*

To render a person liable to conviction under S. 19 (*f*) of the Arms Act, arms should be recovered from his possession or control. Merely because arms are found in a house belonging to a family, it cannot be said that the head of the family, who is in possession of the house must also be in possession of the arms in the room in the house and is therefore liable. It has to be proved by evidence that the room in which the arms or offending articles are found or are recovered was indeed in possession of that room or was under his control. It has to be proved that some particular person or individual was in possession or control of the room or that portion of the house from which the arms were recovered in order to justify a conviction under S. 19 (*f*). 1932 A. L.J. 1072, foll. (*Sankar Saran, J.*) ALGOO MISIR *v.* REX. 4 D.L.R. (All.) 264=3 A. I. Cr. D. 657.

———S. 19 (f)—*"Possession and control"—Meaning of.*

The words "possession and control" in S. 19 (*f*) of the Arms Act mean something more than mere constructive or legal possession and control. They mean conscious possession and actual control. As under this section the mere possession of incriminating articles constitutes a serious criminal offence, there must be *mens rea* or guilty knowledge before a person can be convicted of such possession. [1948 Pat. 222, foll.] (*Hemeon, J.*) ABDUL RAHIM KHAN *v.* CROWN. I.L.R. (1949) Nag. 519=A.I.R. 1949 Nag. 289=50 Cr.L.J. 838=4 D.L.R. (Nag.) 59=3 A.I.Cr.D. 226=1949 N.L.J. 195.

———S. 19 (f)—*Possession and control—Meaning of.*

The words "possession" and "control" in S. 19 (*f*) of the Arms Act, mean something more than a mere constructive or legal possession and control. In order to constitute possession and control of an incriminating article which will make a person liable he must necessarily have knowledge of the existence of such an article in his house or place of living or a place in his occupation. A person obviously cannot be visited with legal liability unless it is established that he had *mens rea* or guilty knowledge of the existence of the incriminating article. (*Walford, J.*) CHITTA *v.* CHOTEY LAL. 22 Luck. 185=228 I.C. 15=1946 A.W.R. (C.C.) 252=1946 O.A. (C.C.) 252=48 Cr.L.J. 17=1947 Oudh (Rul.) 10=1947 O. W.N. 82=1947 A.Cr.C. 31=A.I.R. 1947 Oudh 114.

———S. 19 (f)—*"Possession and Control"—Meaning of.*

"Possession and Control" in S. 19 (*f*), Arms Act, must be construed as meaning conscious possession and actual control. Mere constructive or legal possession and control would not be sufficient to constitute an offence. There must be *mens rea* or guilty knowledge before a person can be convicted of such possession. (*Sinha and*

Dalziel, JJ.) Sahendra *v.* Emperor. 26 Pat. 46=A.I.R. 1948 Pat. 222=49 Cr.L.J. 445.

———**S. 19 (f)**—Possession and control—Meaning—Articles found in place belonging to whole family—Any member apart from the manager, if in 'possession' of them. [*See* Q.D. 1941—1945, Vol. I, Col. 151.] Hirdey Ram *v.* Emperor. 222 I.C. 393=1946 All. (Rul.) 173=47 Cr.L.J. 437=A.I.R. 1946 All. 4.

———**S. 19 (f)**—*"Possession" and "control"—Meaning of—Duty of prosecution—Gun recovered from room in possession of joint family—Absence of evidence, to fix responsibility on any particular member—Conviction of karta—Sustainability.*

The fact that a gun in a dilapidated condition is recovered from a room in a house belonging to a Hindu joint family, does not justify the conviction of the karta or eldest male member of that family of an offence under S. 19 (*f*) of the Arms Act, when there is no evidence at all showing which particular individual member kept it there. Mere proof that an incriminating article is found in premises occupied by a number of persons does not itself establish *prima facie*, the guilt of any particular person or of all of them jointly. "Possession" and "control" required under S. 19 (*f*) mean conscious possession and actual contol. It is the duty of the prosecution to prove affirmatively *mens rea* or guilty knowledge in some one particular individual or group of individuals. The burden lies heavily and entirely on the prosecution, and all the time on the prosecution to prove such guilty knowledge. Where the prosecution fails to fix the liability of any particular individual or individuals, it is not legally pemissible to call upon all the occupants of the place to account for the presence of the incriminating article in the premises, and in the absence of any satisfactory explanation by them, to hold all of them or the eldest male member, to be in possession or control of the same. (*Sinha, J.*) Bhekha Ahir *v.* Emperor. 228 I.C. 64=13 B.R. 129=1947 Pat. (Rul.) 66=48 Cr.L.J. 53=A.I.R. 1947 Pat. 236.

———**S. 19 (f)**—*"Possession and control"—Meaning of—Essentials for conviction*—Mens rea—*Proof of—Necessity—Unlicensed weapons found in family house of Hindu family—Conviction of manager—Sustainability.*

The words "possession and control" in S. 19 (*f*) mean something more than constructive or legal possession and control. To constitute an offence under S. 19 (*f*) there must be conscious possession and actual control; there must be *mens rea* or guilty knowledge before a person can be convicted of such possession or control. Merely because the accused is the *karta* or manager of a joint family, he cannot be held responsible for the possession of unlicensed weapons found in the family house; and he cannot be convicted in the absence of a finding that he was consciously and personally in possession of the weapons. A.I.R. 1944 Lah. 339; 1947 Pat. 236, foll. (*Meredith, Ag.C.J. and Sarjoo Prosad, J.*) Mohan Lahiri *v.* The King. 29 Pat. 243=A.I.R. 1950 Pat. 243=4 A.I.Cr.D. 232=5 D.L.R. (Pat.) 86=51 Cr.L.J. 977.

———**S. 19 (f)**—*Possession and Control—What amounts to—Gun found in house occupied by accused and other members of his family—Production by accused when other members were absent—Conviction—Legality.*

The prosecution in a criminal case must stand or fall on the evidence produced by it, and until a *prima facie* case is established by that evidence, the onus cannot shift on to the accused. To throw the onus on the accused to prove his innocence is opposed to the fundamental principles of criminal jurisprudence.

The petitioner was standing with his wife in the courtyard of the house occupied by him and his relations, namely, his father, brother, nephews, etc., when the Police went there. On being questioned by the Police the petitioner went in and produced a gun from the house. On these facts he was charged and convicted under the Arms Act on the ground that the gun was in his possession and control.

Held: that in the absence of any evidence to show where the gun had been lying in the house at the time when the petitioner picked it up and produced it, the mere production by him could not lead to the conclusion that the gun was in his possession or to throw the onus on him to explain the possession. The prosecution had to establish affirmatively that the petitioner was in exclusive possession and control of the gun before he could be convicted of the offence. (*Teja Singh, J.*) Surain Singh *v.* Emperor. 229 I.C. 455=1947 Lah. (Rul.) 180=48 Cr.L.J. 390.

———**Ss. 19 (f) and 30**—*Scope—Illegality of search—If vitiates conviction under S. 19 (f).*

The circumstance that a search was illegally held has obviously no bearing on the question of the guilt of the accused; and a conviction under S. 19 (*f*) of the Arms Act may be perfectly sound and legal notwithstanding that the evidence upon which it is based may have been procured as the result of an illegal search of the accused's house. 47 All. 575, rel. on. (*Meredith, Ag. C.J. and Sarjoo Prasad, J.*) Mohan Lahiri *v.* The King. 29 Pat. 243=5 D.L.R. (Pat.) 86=4 A.I.Cr.D. 232=A.I.R. 1950 Pat. 243=51 Cr.L.J. 977.

———**S. 19 (i)**—*Failure to deposit gun pending receipt of renewal of expired license—Offence, if committed—Period of grace, if extends period of license or condones failure to deposit on expiry of license.*

The license in respect of a gun expired on 31st December, 1945 and the license-holder had applied before that date for its renewal, but it was received only on the 5th February, 1946. As a month's period of grace was usually allowed during which the license-holder may keep the weapon though the renewed license was not received, the license-holder did not deposit his gun as required by the Arms Act.

Held, that the period of grace was not intended to extend the period of the licence, or, in any manner, to limit the scope of S. 16 of the Arms

Act. The weapon which is not covered by a license has to be deposited as soon as the license expires. Technically, therefore, an offence under S. 19 (*i*) must be held to have been committed, but, in the circumstances, the sentence has to be very nominal. (*Yahya Ali, J.*) ALAGATHORAI PADAYACHI, *In re.* 1947 M.W.N. 280=60 L. W. 221=A.I.R. 1947 Mad. 361=(1947) 1 M. L.J. 200.

———**S. 20**—*Intention mentioned under—Onus—Carrying a pistol in a locked hand-bag.*

The intention mentioned in S. 20 of the Arms Act has to be proved by the prosecution though it will usually be proved from circumstantial evidence. But there must be circumstances from which it can be presumed; the Court cannot start with assumption of the intention from the mere circumstance that the arms are not exposed to the public view. The Legislature has laid the onus of proving the special intention on the prosecution and the latter cannot be disburdened of that onus. Hence, when a person is found carrying an unlicensed pistol in a locked hand-bag and on being questioned admits the bag containing a pistol, he cannot be convicted under S. 20 of the Arms Act as there is no proof of concealment. (*Desai, J.*) RAMCHANDER *v.* REX. 1950 A.L.J. 811=A.I.R. 1950 All. 386=4 A.I.Cr.D. 401 =5 D.L.R. (A.) 202=51 Cr.L.J. 1064.

———**S. 21**—Applicability—Possession of more gun powder than that mentioned in the licence. *See* ARMS ACT, Ss. 14, 19 (*f*), 21 AND 29. (1947) 2 M.L.J. 102.

———**S. 22**—*"Delivery"—Meaning of.*

S. 22 of the Arms Act punishes 'delivery.' It must be a conscious delivery. It need not necessarily be a physical delivery in that there must be proof that the accused delivered with his hands a firearm to another; but from the circumstances of the case the only possible inference must be that the firearm in question was delivered. Merely because a person lives in a house of his, which is temporarily leased to another, a fiream belonging to him, from that factum alone, it cannot be inferred that the firearm was delivered to the tenant for his use. (*Rajagopalan, J.*) PUBLIC PROSECUTOR *v.* GOPALASWAMI PILLAI. 1949 M.W.N. 451=3 A.I.Cr. D. 671=A.I.R. 1949 Mad. 850=4 D.L.R. (Mad.) 242=51 Cr.L.J. 54=(1949) 2 M.L.J. 110.

———**S. 27 and Government of India Act (1935), S. 124 (1)**—*Function conferred on Central Government by S. 27, Arms Act—If can be delegated to Provincial Government.*

The subject-matter of "arms" is a matter to which the executive authority of the Central Government extended by virtue of Item 29 in List I of the 7th Schedule to the Government of India Act. S. 27 of the Arms Act conferred a function upon the Central Government in relation to that matter. Consequently that function fell within the purview of S. 124 (1) of the Government of India Act. Under that section, the Central Government could delegate its functions under S. 27, Arms Act, to the Provincial Government with the consent of the Provincial Government. (*Agarwala and Bhargava, JJ.*) AMIR KHAN *v.*

STATE. 1950 A.W.R. 328=A.I.R. 1950 A. 423=51 Cr.L.J. 1144=1950 A.L.J. 407.

———**S. 29**—*Construction and scope—Sanction—Absence of—Effect—Sanction when to be obtained—Proceedings in respect of offence under S. 19 (f)—When commence or when initiated.*

S. 29, Arms Act, lays down absolutely that no proceedings shall be instituted without the previous sanction of the District Magistrate or the Commissioner of Police, as the case may be. On the clear language of the section it must be held that proceedings taken in the absence of a sanction required by law are a complete nullity. It is not a question of a technical defect which can be remedied by a belated sanction.

The proceedings against the accused in respect of an offence commence only after the Magistrate has taken cognizance of the case and made the accused person a party to the proceedings by taking some action against him, such as, a summons. In the case of an offence under S. 19 (*f*), Arms Act, the proceedings cannot be said to have been started until after a charge-sheet is submitted and the Magistrate decides to institute a case in Court. It would therefore be sufficient if sanction is obtained prior to such institution. A. I. R. 1945 F. C. 16; 22 Pat. 433, ref. (*Meredith, Ag. C.J. and Sarjoo Prasad, J.*) MOHAN LAHIRI *v.* THE KING. 29 Pat. 243=5 D.L.R. (Pat.) 86=4 A.I.Cr.D. 232=A.I.R. 1950 Pat. 243=51 Cr.L.J. 977.

———**S. 29**—*Offence committed in Meerut district—Necessity for sanction.*

Under S. 29 of the Arms Act, no sanction is needed for the institution of any proceedings in respect of an offence under S. 19 (*f*) of the Arms Act committed in the District of Meerut three months after the coming into force of the Act, as the District of Meerut is a place to which S. 32 (2) of Act XXXI of 1860 applied. It is manifest from this latter section read with S. 29, Arms Act, that no sanction for the institution of proceedings under S. 19 (*f*), Arms Act, is needed where an offence has been committed within an area in respect of which an order for general search for arms had been made under S. 24 of Act XXVIII of 1857. As the District of Meerut must be regarded to be comprised in the area "north of the rivers Jumna and Ganges" within the meaning of that expression in the Notification, dated 21st December, 1858, published in the Government Gazette, North Western Provinces of the Bengal Presidency, an order for search of arms was made in respect of that district under Act XXVIII of 1857. The tract of land indicated by this Notification was the tract of land to the north of the river Jumna up to its confluence with the river Ganges and thereafter the land to the north of the river Ganges. 1929 A.L.J. 28, referred to. (*Seth, J.*) RIKHA SINGH *v.* REX. A.I.R. 1949 All. 625=50 Cr.L.J. 982.

———**S. 29**—*"Proceedings" — Meaning of — Proceedings for bail—If judicial proceeding—If "institution of proceedings" for purposes of sanction.*

"Proceedings" in S. 29, Arms Act, must mean judicial proceedings. The word means legal proceedings in Court and not searches or arrests or investigations by the police under the Cr. P. Code, or other law. Proceedings for bail may in a sense be judicial proceedings when a magistrate applies his mind to the question whether bail should be granted. But that would be a separate judicial proceeding quite apart from the actual prosecution for an offence under the Arms Act; hence the mere consideration of the question of bail in the initial stage when the accused is sent up in custody cannot amount to the initiation or institution of proceedings in the sense of a Court prosecution for the offence in respect of which the sanction is required under S. 29. 6 Mad. 63, Cons. A.I.R. 1946 Pat. 160, dist. A.I.R. 1927 Cal. 721; 6 Pat. 768, foll. 47 All. 575; A. I.R. 1931 All. 269; 17 Cal. 574, ref. (*Meredith, Ag. C. J. and Sarjoo Prosad, J.*) MOHAN LAHIRI *v.* THE KING. 29 Pat. 243=5 D.L.R. (Pat.) 86=4 A.I.Cr.D. 232=A.I.R. 1950 Pat. 243=51 Cr.L.J. 977.

———**Ss. 29 and 30**—*Sanction granted after search and before proceedings in Court—Validity of trial—Evidence as to search—Admissibility.*

The time of the institution of the proceedings referred to in Ss. 29 and 30 of the Arms Act is the same, and in view of the terms of S. 30 it has reference not to the actual institution of the proceedings in Court but to the earlier stage when proceedings are started by the police in connection with the case before they proceed to search acting on information.

Where, however, the sanction required by S. 29 is granted at a later stage (*i.e.*) after the search by the police and before the *chalan* is submitted to Court, and a clear severance is possible between the proceedings at the investigating stage and the proceedings in Court, the trial is valid.

The absence of the sanction prior to the search does not affect the actual admissibility of the evidence as to the search. (*Roxburgh and Chakravarti, JJ.*) MUZAFFAR SHAH *v.* EMPEROR. I.L. R. (1948) 2 Cal. 245=52 C.W.N. 265.

———**S. 29**—Sanction under—Necessity—Possession of more gunpowder than that mentioned in the licence. *See* ARMS ACT, Ss. 14 (*f*), 19, 21 AND 29. (1947) 2 M.L.J. 102.

———**S. 29**—*Scope—Non-compliance—Sanction for prosecution — Absence of—Effect—Subsequent sanction—If validates proceeding.*

A prosecution for an offence under S. 19 (*f*) of the Arms Act, instituted without the previous sanction of the District Magistrate as required by S. 29 of the Act is null and void. Sanction obtained subsequent to the institution of the proceedings would not validate the proceedings as the absence of sanction prior to the institution is not a mere irregularity, or technical defect, but renders the whole proceedings null and void. (*Varma and Pande, JJ.*) GIRIJA *v.* EMPEROR. 24 Pat. 641=1946 P.W.N. 175=47 Cr.L.J. 927=12 B.R. 765=1946 Pat. (Rul.) 400=A. I.R. 1946 Pat. 160.

ARMY ACT (VIII OF 1911)—*Court-martial—Appeal to Privy Council against findings of—Maintainability.*

The intention of the Indian Army Act is that the findings of a Court-martial as and when confirmed by the proper confirming officer, are to be final, subject to the power of revision as provided in the Act. Hence, there is no room for an appeal to His Majesty in Council in such a matter, consistently with the subject-matter and scheme of the Act. (*Lord Thankerton.*) MAHOMED YAKUB KHAN *v.* EMPEROR. 74 I.A. 8=229 I.C. 420=1947 A.L.J. 189=1947 O.A. (P.C.) 11=1947 P.C. (Rul.) 88=13 B.R. 425=1947 M.W.N. 344=48 Cr.L.J. 514=51 C.W.N. 776=49 Bom.L.R. 567=60 L.W. 594 =A.I.R. 1947 P.C. 87=1947 A.W.R. (P.C.) 17=(1947) 1 M.L.J. 403 (P.C.).

———Offence of criminal breach of trust by army personnel—Court competent to try. *See* CR. P. CODE (V OF 1898), Ss. 561-A AND 549. (1949) 2 M.L.J. 44.

———**S. 2**—*Military store-keepers employed by Army authorities—If triable by Court-martial—Ordinance X of* 1941, *S.* 2.

Military store-keepers attached to or employed with military forces raised in British India must be deemed to be on active service for the purposes of the Army Act so long as the hostilities continued, by virtue of S. 2 of Ordinance X of 1941, and could therefore be tried by a Court-martial. (*Harries, C.J., Abdur Rahman, Mehr Chand Mahajan, JJ.*) SARDAR JIT SINGH *v.* IMPERATOR. I.L.R. (1945) Lah. 419=227 I.C. 216=47 P.L.R. 423=1947 Lah. (Rul.) 7=A. I.R. 1946 Lah. 103 (F.B.).

———**S. 27**—*Offence under—Good faith, if a defence.*

Good faith can never afford a defence to a charge under S. 27 of the Indian Army Act, although it may be relevant in considering the question of sentence. (*Harries, C.J., Abdur Rahman and Mehr Chand Mahajan, JJ.*) SARDAR JIT SINGH *v.* IMPERATOR. I.L.R. (1945) Lah. 419=227 I.C. 216=47 P.L.R. 423=A.I.R. 1946 Lah. 103=1947 Lah. (Rul.) 7 (F.B.).

———**S. 41**—*If* ultra vires—*Trial of subject of Indian State for offences committed outside British India—Government of India Act,* 1833, *S.* 73—*Indian Councils Act, S.* 22.

S. 41 of the Indian Army Act, 1911, is in all respects *intra vires* the Indian Legislature. It is not *ultra vires* the Indian Legislature in so far as it empowers a Court-martial constituted under that Act to try a subject of an Indian State for offences committed outside British India. This section was enacted in exercise of the powers given by S. 73 of the Government of India Act, 1833. S. 73 of the Government of India Act gave the Governor-General in Council power to make rules and regulations to govern all native officers and soldiers in the military service of the company whersoever they may be serving. The words "native officers and soldiers" as used in this section mean officers and soldiers belonging to non-European races in the military service of the company. These words would cover all the forces raised from coloured races, whether they resided in British India or in Indian States. They have not been used in a territorial sense, but in a purely racial sense. S. 73 of the Government of India Act is not repugnant to or inconsistent with any of the provisions of the Indian Councils Act, 1861, and it stood unrepealed till the passing of the Government of India Act, 1915. If provisos 1 and 2 to S. 22 of the Indian Councils Act are read together, it is clear that instead of re-enacting S. 73, Government of India Act, 1833, its operation was saved by stating that its provisions should not in any way be affected by the passing of the Indian Councils Act and should remain in force. If an Act gives the Governor-General in Council power to frame laws and regulations with regard to a certain territory and also states that the provisions of an earlier Act which gives the Governor-General power to frame rules and regulations governing a much larger territory shall remain in force, the later provisions cannot be said to be repugnant to the former, simply because they enlarge the area of the operation of the laws which can be framed by the Governor-General in Council. The provisions of the substantive part of S. 22 and the provisions of the two provisos to that section are supplementary to each other, and their combined effect is that so far as native officers and soldiers are concerned, the Governor-General has been given power to pass legislation with extra-territorial operation throughout the world. (*Abdul Rashid, Sale and Munir, JJ.*) MD. MOHYUDDIN *v.* EMPEROR. I.L.R. (1947) Lah. 327=224 I.C. 608=47 Cr.L.J. 645=1946 Lah. (Rul.) 377=A.I.R. 1946 Lah. 158 (F.B.).

——**S. 41 and Government of India Act of 1833, S. 73**—*S. 41 of the Army Act if valid and* intra vires *the Indian Legislature—Competency to legislate with extra-territorial effect—Construction of statutes—Scope of the presumption against construing general words as intended to have extra-territorial effect.*

The Ruler of an Indian State became an Indian Commissioned Officer in the Indian Army. As he was suspected of having committed offence under Ss. 121 and 302, Indian Penal Code, he was kept in military custody according to the usage of the service, pending investigation of those offences. He was subsequently arraigned before a Court-martial on those charges. During the pendency of the Court-martial proceedings an application under S. 491, Cr. P. Code was filed and in support of it, it was contended that the officer not being a British subject was not amenable to the criminal laws of British India for offences alleged to have been committed outside British India and that so much of S. 41 of the Indian Army Act as purported to confer jurisdiction on a Court-martial to try non-British subjects for offences committed by them beyond British India, was *ultra vires* the Indian Legislature.

Held, that such portion of S. 41 of the Indian Army Act of 1911 as purported to confer such jurisdiction on a Court-martial was *intra vires* the Indian Legislature because S. 73 of the Government of India Act, 1833, had conferred on the Indian Legislature the power to legislate with such extra territorial effect. There is no reason or justification for limiting the scope of the very general words "wheresoever they may be found" used in S. 73 of the Act of 1833. The words "native-officers and soldiers" occurring in S. 73 cannot be said to be used in any territorial sense. The expression was merely intended to refer to the non-British or non-European members of the Company's Army. Though it is true that every statute is to be so construed, so far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law, there is no rule of international law or principle of the comity of nations which is inconsistent with a State exercising disciplinary control over its own armed forces, when those forces are operating outside its territorial limits. In this view, it is very doubtful whether in the present case, there is any presumption necessitating or justifying a limited construction of the general words used in the statute. (*Spens, C.J., Varadachariar and Zafrullah Khan, JJ.*) MOHD. MOHYUDDIN *v.* EMPEROR. 1946 F.C.R. 94=1946 F.L.J. 64=I.L.R. (1947) Lah. 387=I.L.R. (1947) Kar. (F.C.) 1=1946 M.W.N. 541=12 B.R. 670=225 I.C. 520=47 Cr.L.J. 800=1946 F.C. (Rul.) 31=48 Bom.L.R. 740=1946 O.A. (F.C.) 7=81 C.L.J. 263=1946 A.W.R. (F.C.) 7=A.I.R. 1946 F.C. 27=(1946) 2 M.L.J. 23 (F.C.).

——**S. 69**—*Proceedings instituted in ordinary Criminal Court—If can be withdrawn for trial by Court-martial.*

Under S. 69 of the Army Act, proceedings instituted in the ordinary Criminal Court in respect of an offence which is triable also by a Court-martial can be withdrawn from that Court for trial by the Court martial. (*Harries, C.J., Abdur Rahman and Mehr Chand Mahajan, JJ.*) SARDAR JIT SINGH *v.* IMPERATOR. I.L.R. (1945) Lah. 419=227 I.C. 216=47 P.L.R. 423=A.I.R. 1946 Lah. 103=1947 Lah. (Rul.) 7 (F.B.).

——**S. 69**—Scope of. *See* CR. P. CODE (V OF 1898), Ss. 561-A AND 549. (1949) 2 M.L.J. 44.

ARMY RULES, S. 62—*Trial of person on active service—Power of officer empowered by Central Government or Commander-in-Chief to convene Court-martial.*

S. 62 of the Indian Army Rules does not mean that the Central Government or the Commander-in-Chief lose their right to empower an officer to convene a Court-martial when the troops are on active service. The Central Government or the Commander-in-Chief can empower an officer to convene a Court-martial at all times, whereas the officer commanding forces in the field can only empower an officer to convene such a Court on active service. (*Harries, C.J., Abdur Rahman and Mehr Chand Mahajan, JJ.*) SARDAR JIT SINGH *v.* IMPERATOR. I.L.R. (1945) Lah. 419=227 I.C. 216=47 P.L.R. 423=A.I.R. 1946 Lah. 103=1947 Lah. (Rul.) 7 (F.B.).

ARMY ACT (ENGLISH 1879), S. 154—*Proceedings under—Validity—Evidence not taken—Applicant for warrant not examined on oath.*

The proceedings before a Magistrate under S. 154 of the Army Act are bad, if the applicant for the warrant is not examined on oath and no evidence is taken as required by the section. (*Roxburgh and Ellis, JJ.*) EVELYN BETTY VIVIAN PERRY *v.* EMPEROR. I.L.R. (1946) 1 Cal. 95.

———**(1879, 44 and 45 Vic., C. 58), S. 170—** Findings of Court-martial—Jurisdiction of High Court. [*See* Q.D. 1941—1945, Vol. I, Col. 153.] G. R. F. X. MONTESERRAT *v.* MAJOR GENERAL HAMMOND. 1946 Oudh (Rul.) 1=46 Cr.L.J. 746.

———**(1881), Ss. 48 and 49—***"Field General Courts-martial"—Convening—Procedure — Ordinance X of* 1941—*Definition of active service.*

S. 48, Army Act, is the general clause relating to Courts-martial, and an officer can only be tried by a "General Court-martial" which can be convened by His Majesty or on officer deriving authority immediately or mediately from His Majesty and a General Court-martial is to consist of not less than five officers, each of whom must have held a commission for not less than three years. S. 49 of the Act is a special clause providing for "Field General Court-martial", such a Court-martial may be composed of three officers, or in some cases only of two and no particular length of service is laid down as a qualification. It can only be convened except in one special case, by an officer commanding a corps or portion of a corps on "active service". By virtue of Ordinance X of 1941 every person in the army in India is deemed to be on active service for the purposes of the Army Act and the officer in immediate command is empowered to convene a Field General Court-martial. If all the individuals are on active service the force itself must be deemed to be on active service. (*Blacker, J.*) A. W. MEADS *v.* IMPERATOR. 225 I.C. 102=47 Cr.L.J. 687=A. I.R. 1946 Lah. 112.

ASSAM ACTS, ETC.

- **Agricultural Income-tax Act (IX of 1939).**
- **Cotton Cloth and Yarn Control Order (1946).**
- **Frontier (Administration of Justice) Regulation (1945).**
- **High Courts Order (1948).**
- **Land and Revenue Regulation (I of 1886).**
- **Maintenance of Public Order Act (V of 1947).**
- **Money-Lenders Act (IV of 1934).**
- **Money-Lenders (Amendment) Act (VI of 1943).**
- **Municipal Act (I of 1923).**
- **Opium Prohibition Act (XXIII of 1947).**
- **Revenue Tribunal (Transfer of Powers Act (IV of 1948).**
- **(Temporarily Settled Districts) Tenancy Act (1935).**
- **Vegetable Oil and Oil Seeds Control Order (1944).**

ASSAM AGRICULTURAL INCOME-TAX ACT (IX OF 1939)—*Applicability and scope—Ruler of Indian State holding property in Assam in his capacity as ruler—Liability to taxation under Act—International law.*

A sovereign prince is not liable to taxation in another state. State property of another state is not subject to the jurisdiction of another state though the property lies in the latter state. English Courts have treated Indian Rulers as independent and entitled to the privileges granted to such rulers by International law; and Rulers of Indian States are not amenable to taxation in British India particularly where the property is state property. In India ruler or state is not assessable to income-tax if the property held by him in British India is held as part of the royal or Durbar property. There is nothing in the Assam Agricultural Income-tax Act to show that the Provincial Legislature intended to take away the privileges of a foreign sovereign, and that Act has therefore to be so construed as to preserve such privileges. The ruler of an Indian state is not therefore assessable to agricultural income-tax in respect of property held by him in the Province of Assam and outside the borders of his state. 10 I.T.R. 322, dist. 15 I.T.R. 367; 16 I.T.R. 307, foll. 12 M.I.A. 523; 9 Cal. 535; 12 C.W.N. 777; 42 C.W.N. 705, ref. (*Harries, C.J. and Mukherjea, J.*) MAHARAJA BIKRAM KISHORE *v.* PROVINCE OF ASSAM. (1949) I.T.R. 220=53 C.W.N. 164.

———*Property belonging to Ruler of State as Ruler—Liability to assessment.*

The property belonging to a Ruler of a State in his capacity as a Ruler and which is not his private property, is not liable to be assessed for agricultural Income-tax under the Assam Agricultural Income-tax Act. (*Harries, C.J. and Mukherjea, J.*) NARENDRA NARAYAN *v.* PROVINCE OF ASSAM. 52 C.W.N. 919=1949 I.T.R. 243.

———*Whether* ultra vires.

The Assam Agricultural Income-tax Act is not *ultra vires* the Provincial Legislature as on its true construction it does not authorise the assessment of agricultural income-tax on a Ruler of a State. (*Harries, C.J. and Mukherjea, J.*) NARENDRA NARAYAN *v.* PROVINCE OF ASSAM. 52 C.W.N. 919=1949 I.T.R. 243.

———**Ss. 2 and 3—**Applicability—Co-operative Society incorporated in England and owning tea estate in Assam—Manufacture and sale of tea to members—Profits—Taxability — Transactions — If sales or mutual dealings. [*See* Q.D. 1941—1945, Vol. I, Col. 155.] ENGLISH AND SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY, LTD. *v.* COMMISSIONER, AGRICULTURAL INCOME-TAX, ASSAM. 227 I.C. 527=A.I.R. 1946 Cal. 261=1947 Cal. (Rul.) 26.

———**S. 2 (a) (1)—**"Agricultural income"—Salami received for settlement of agricultural land. [*See* Q.D. 1941—1945, Vol. I, Col. 156.] JYOTINDRA NARAYAN SINHA, *In the matter of.* 224 I.C. 354=1946 Cal. (Rul.) 240=A. I. R. 1946 Cal. 15.

———**S. 2 (e) and (m)—**"Assessee"—Executor—Death of assessee—Proceedings, do not abate—Executor has to pay tax. [*See* Q.D. 1941—1945, Vol. I, Col. 156.] SUDHA TARANGINI DEBYA, *In re.* 1946 Cal. (Rul.) 9.

———**S. 2 (1) (a)—***Applicability.*

Money payable to and received by an assessee annually under an agreement or compromise under which the assessee gives up all his claims to agricultural lands may be regarded as the assessee's income but not agricultural income as defined in the Assam Agricultural Income-tax Act. (*Harries C.J. and Mukherjea, J.*) Maharaja Bikram Kishore *v.* Province of Assam. (1949) I.T.R. 220=53 C.W.N. 164.

———**S. 2 (1) (a)**—Salami—*Taxability.*

Salami arising from the settlement of waste lands would be "agricultural income" as defined in S. 2 (1) (*a*), Assam Agricultural Income-tax Act, but would not be such income if the payments were made in respect of transfers of holdings by one tenant to another. 48 Cal. 766; 48 C.W.N. 59; (1948) I.T.R. 68; 18 Pat. 805; (1939) I.T.R. 536; 20 Pat. 699; (1941) I.T.R. 318; 5 P.L.T. 497; (1940) I.T.R. 650, ref. (*Harries, C.J. and Mukherjea, J.*) Maharaja Bikram Kishore *v.* Province of Assam. (1949) I.T.R. 220=53 C.W.N. 164.

———**S. 7 (c)**—"Accrued due in the previous agricultural year"—Meaning—If refers to arrear as well as current dues. [*See* Q.D. 1941—1945, Vol. I, Col. 156.] Sudha Tarangini Debya, *In re.* 1946 Cal. (Rul.) 9.

———**S. 7 (c)**—Construction—Assessment to first year and subsequent years—No distinction—Special deduction for collection expenses in first year on whole amount due for rent—Not available. [*See* Q.D. 1941—1945, Vol. I, Col. 157.] Sudha Tarangini Debya, *In re.* 1946 Cal. (Rul.) 9.

———**S. 7 (c)**—*Construction—Computation of 15 per cent.—Basis of when rents accrued due as well as arrears due are collected in same year.*

The deduction of 15 per cent. under S. 7 (*c*) of the Assam Agricultural Income-tax Act is 15 per cent. of the total amount of rent accrued due and not 15 per cent. of the total amount of rent collected. If in a particular year all the accrued rent is collected together with arrears due for past years, the deduction allowed is 15 per cent. of the rent which accrued due and not 15 per cent. of the total collected. (*Harries, C.J. and Mukherjea, J.*) Maharaja Bikram Kishore *v.* Province of Assam. (1949) I.T.R. 220=53 C.W.N. 164.

———**S. 24 (5)**—*Powers of Appellate Assistant Commissioner—Alteration of assessment on State as association of individuals into one on its ruler personally.*

The Assistant Commissioner of Agricultural Income-tax has no jurisdiction on appeal to alter an assessment made by the Agricultural Income-tax Officer on a State as an association of individuals into an assessment on the ruler of that State personally where no proceedings were started and no notices were served under the Assam Agricultural Income-tax Act on the Ruler himself personally. It is in fact an entirely new assessment upon a new assessee. In such a case he should act under S. 24 (5) (*b*) of the Act and set aside the assessment and send the matter back to the Agricultural Income-tax Officer to make a fresh assessment. (*Harries, C.J. and Mukherjea, J.*) Maharaja Bikram Kishore *v.* Province of Assam. 1949 I.T.R. 220=53 C.W.N. 164.

———**S. 28 (1)**—Reference under—Competency—Conditions—No time limit—Reference can be made even after order by Commissioner of tax. [*See* Q.D. 1941-1945, Vol. I, Col. 157.] Sudha Tarangini Debya, *In re.* 1946 Cal. (Rul.) 9.

———**S. 30**—*Applicability—"Escaped assessment"—Income returned and made the subject of inquiry, but held not assessable—Proceedings in respect of such income under S. 30—Legality of.*

Income which has already been duly returned for assessment cannot be said to have "escaped assessment" within the statutory meaning. Where an item of income is duly returned and is made the subject of an inquiry by the Income-tax Officer and held by him to be not assessable, such income cannot be held to have "escaped assessment" within the meaning of S. 30, Assam Act (IX of 1939) and proceedings under that section cannot be taken in respect of such income. 35 C.W.N. 310, dist.; 2 I.T.R. 71; 61 Cal. 285, foll.; (1933) I.T.R. 129; (1940) I.T.R. 236; 12 Rang. 118; 16 Lah. 937; ref. (*Harries, C.J. and Mukherjea, J.*) Maharaja Bikram Kishore *v.* Province of Assam. 1949 I.T.R. 220=53 C.W.N. 164.

———**S. 50**—*Rules under, R. 22—Assessment of agent of non-resident Ruler of a State—Non-resident Ruler not himself liable.*

An agent of a non-resident Ruler of a State cannot be assessed under the Assam Agricultural Income-tax Act, if the Ruler himself is not liable. (*Harries, C.J. iand Mukherjea, J.*) Narendra Narayan *v.* Province of Assam. 52 C.W.N. 919=1949 I.T.R. 243.

———**S. 50**—*Rules under, R. 22—If* ultra vires.

R. 22 of the Assam Agricultural Income-tax Rule is made within the powers conferred by S. 50 of the Assam Agricultural Income-tax Act and therefore is not *ultra vires.* (*Harries, C.J. and Mukherjea, J.*) Narendra Narayan *v.* Province of Assam. 52 C.W.N. 919=1949 I.T.R. 243.

ASSAM COTTON CLOTH AND YARN CONTROL ORDER (1946), S. 12—*Order sanctioning prosecution—Validity—Absence of reference to facts constituting offence.*

Where it has been proved by the statement of the investigating officer and the reports placed on the record that all the facts bearing on the case were placed before the sanctioning authority, an order sanctioning prosecution is valid, although it does not refer to the facts constituting the offence. 52 C.W.N. 325 (P.C.), referred to. (*Ram Labhaya, J.*) Purnamal Agarwala *v.* The King. A.I.R. 1949 Assam 84=51 Cr.L.J. 63.

ASSAM FRONTIER (ADMINISTRATION OF JUSTICE) REGULATION (1945), Ss. 26, 28 and 32—*Orders of acquittal—Appellate and revisional jurisdiction of High Court—Cr. P. Code, S.* 439.

Cl. 2 of S. 26 of the Assam Frontier (Administration of Justice) Regulation, necessarily refers to orders of convictions which are not covered by cl. (1). By no stretch of imagination can the words "in other cases" occurring in cl. (2) be considered to cover appeals against orders of acquittal.

S. 32 of the Regulation cannot be utilised to extend the jurisdiction of the appellate or the revisional authorities under the Regulation. All that it lays down is that the Courts and officers acting under the Regulation shall be guided in regard to their procedure by the principles of the Cr. P. Code, which are consistent with the provisions of the Regulation. They cannot enlarge their jurisdiction by reference to the provisions contained in the Cr. P. Code as doing so would not be consistent with the express provision of the Regulation.

It is not open to the High Court to interfere with an order of acquittal in revision either, under S. 28 of the Regulation. Like S. 26, this section also deals with cases of conviction only as distinguished from those of acquittal. The revisional jurisdiction of the High Court under the Regulation is as restricted as its appellate jurisdiction. The High Court cannot have recourse to its revisional jurisdiction under S. 439, Cr. P. Code, when exercising jurisdiction in a case under the Regulation. Such a course of action would involve a clear contravention of the provisions of Ss. 28 and 32 of the Regulation. (*Thadani, Ag. C. J. and Ram Labhaya, J.*) PROVINCE OF ASSAM *v.* LAKHI NAYAK. 51 Cr.L.J. 447=A.I.R. 1950 Assam 43.

ASSAM HIGH COURTS ORDER (1948), S. 3—*Constitution of High Court on 5th April, 1948—Validity—Chief Justice alone appointed on that day—Government of India Act, S. 220.*

Under S. 3 of the Assam High Courts Order, the Assam High Court came into existence on 5th April, 1948, although the Chief Justice alone was appointed on that day and not the other Judges, and the Calcutta High Court ceased to exercise jurisdiction from that day so far as the Assam province is concerned. If the Chief Justice is the only Judge of the High Court, he could perform the duties of the Chief Justice and also dispose of such judicial business of the Court as he is empowered to dispose of sitting singly, but the constitution of the High Court cannot be affected by delay in the appointment of other Judges required to be appointed under S. 220 of the Government of India Act or under S. 3 of the Assam High Court Order, 1948. I.L.R. (1938) Pat. 550, 9 A. 625 and I.L.R. (1936) All. 322, approved. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) SAMPATLAL KESHAN *v.* BALIPRASAD SHAH. A.I.R. 1950 Assam 6=54 C.W.N. 92.

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*Annual patta—Issue of—Person other than annual pattaholder in possession.*

An annual patta, until it is either cancelled or notice of non-renewal given to the pattaholder by the authorities concerned, confers good title upon the person to whom the patta is issued. The possession of a person other than the annual pattaholder is irrelevant. His possession might be that of a trespasser or a permissive possession emanating from the pattaholder himself in which case obviously he cannot claim the rights of a pattaholder and claim that the annual patta be issued to him. (*Thadani, Ag. C.J.*) PRASANNA RAM *v.* BALABOX. I.L.R. (1950) 2 Assam 77=A.I.R. 1950 Assam 209.

———*Rules framed under, R. 190-A—Settlement of fishery otherwise than by auction sale—Powers of Provincial Government—Order of Government settling fishery—Appeal.*

When a Sub-Divisional Officer or Deputy Commissioner decides to settle a fishery otherwise than by an auction sale, he would communicate to Government the name of the person on whom the fishery is proposed to be settled. But that does not mean that the Provincial Government can make a counter proposal as regards the person upon whom the Sub-Divisional Officer or Deputy Commissioner should settle the fishery. If the Government decides to accord sanction for settlement of a fishery otherwise than by an auction sale, there is no rule framed under the Regulation which empowers the Provincial Government to name the person upon whom the Sub-Divisional Officer or the Deputy Commissioner is obliged to settle the fishery. An order of the Sub-Divisional Officer settling a fishery upon a certain person, if influenced by an order of the Provincial Government, is liable to be set aside.

An order of Provincial Government settling a fishery upon a certain person is one against which no right of appeal is given under the Regulation. (*Thadani, Ag.C.J.*) PAHARATDIN AHMAD *v.* BHATTI BANGAON CO-OPERATIVE FISHERY SOCIETY. I.L.R. (1950) 2 Assam 45=A.I.R. 1950 Assam 212.

———*Settlement offered to appellant on payment of certain sum—Appellant coming into possession with knowledge of revenue authorities—Order enhancing premium not served on him—Order of eviction without affording him opportunity to have settlement on reasonable terms—If justified.*

The Deputy Commissioner offered settlement of land to the appellant on payment of a premium at a certain rate. The land was surveyed in the name of the appellant and was given a number. Payment at the rate ordered was made by the appellant who came into possession with the consent and the knowledge of the revenue authorities as a person on whom the land was settled. He was not made aware of the order by which premium at enhanced rate was made payable. There was no refusal on his part to pay at this rate.

Held, that in those circumstances it would not be equitable to order eviction without offering the appellant an opportunity to have the settlement of the land on reasonable terms. (*Ram Labhaya. J.*) JITENDRALAL CHATTERJEE *v.* STATE. A.I.R. 1950 Assam 127.

———**S. 32**—*Scope of.*

Under S. 32 of the Assam Land and Revenue Regulation, mere occupation is not enough, for occupation may be the occupation of a trespasser. The occupants contemplated by the section must have a permanent, heritable and transferable right of use and occupation in the land, or be in possession as mortgagees of persons having such a right. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) Kanteswar Chowdhury *v.* Province of Assam. A.I.R. 1950 Assam 77.

——S. 53-A (2) (as amended)—*Time-limit for application—Retrospective effect.*

The time-limit of three years prescribed by S. 53-A (2) of the Assam Land and Revenue Regulation, as amended by the Amendment Act of 1946, for filing an application, applies to orders which had been passed before the Amendment Act came into force. (*Thadani, C.J.*) Muzafar Sheik *v.* Jahuruddin Sheikh. I.L.R. (1950) 2 Assam 110=A.I.R. 1950 Assam 215.

——S. 59—*Landlord suing for rent without getting himself registered—Proper course for Court.*

If a landlord institutes a suit for recovery of rent without getting himself registered as required by S. 59 of the Assam Land and Revenue Regulation, the proper course for the Court is to suspend the proceedings in the suit and to direct the plaintiff to get himself registered. For this purpose a reasonable period of time can be allowed. On his satisfying the Court that necessary registration has taken place, the bar to his claim would disappear and a decree can be granted to him. This would be a better course than to pass a conditional decree directing the plaintiff not to execute the decree till he gets the requisite qualification by getting himself registered. 23 C. 87 (F.B.), applied. (*Ram Labhaya, J.*) Badrinarain Kanu *v.* Maisan Manipurini. A.I.R. 1950 Assam 69.

——Ss. 63, 67, 70 and 71—*Person acquiring title by adverse possession committing default in payment of revenue—Revenue sale—Effect—Purchaser's title.*

A person who acquires good and valid title to an estate or a part of it on account of adverse possession for more than 12 years, incurs a corresponding liability to pay Government revenue under S. 63 of the Assam Land and Revenue Regulation. If he commits default in payment of the arrears of revenue, he is in the position of a defaulting proprietor, and the purchaser at the revenue sale gets his right, title and interest free from all incumbrances. 44 C. 412, 24 C.L.J. 60 and 62, referred to. (*Akram, C.J. and Amin Ahmed, J.*) Maha Badan Banu *v.* Abdul Aziz Khan. A.I.R. 1950 Dacca 11=2 D.R. 285.

——Ss. 81 and 82—*Applicability—Sale ordered under S.* 91.

Ss. 81 and 82 of the Assam Land and Revenue Regulation do not govern sales made or ordered under S. 91 of that Regulation. (*Ram Labhaya, J.*) Narayan Bedia *v.* Dambarunath. A.I.R. 1950 Assam 40.

——S. 81—Locus standi *to apply—Purchaser at revenue auction—Sale in contravention of S.* **74 (2).**

S. 81, Assam Land and Revenue Regulation, manifestly refers to an application by anybody whatsoever. A person having ostensible title to property purchased by him at a revenue auction, is not debarred from applying under the provisions of this section on the ground of hardship or injustice.

A sale held in contravention of S. 74 (2) of the Assam Land and Revenue Regulation before the expiration of thirty days from the date on which the list of estates was published under S. 72, is liable to be set aside under S. 81 of the Regulation. (*Thadani, C.J.*) Gayanath *v.* Dhruba. I.L.R. (1950) 2 Assam 155=A.I.R. 1950 Assam 210.

——S. 91—*Sale not justified under—Validity—If can be questioned in collateral proceedings.*

Where the circumstances which justify action under S. 91 of the Assam Land and Revenue Regulation did not exist when the sale of a property was ordered, nor was the officer concerned authorised in law to order the sale, the sale is without jurisdiction. It is open to a person whose interest in the property is affected by that sale to challenge the order of the Revenue Officer as well as of the Revenue Tribunal in collateral proceedings on the ground that they had no jurisdiction to pass the orders that they did. The mere fact that he was a party to the proceedings before the Revenue Tribunal would not make the order of that Tribunal binding on him. A.I.R. 1936 Cal. 138, rel. on. (*Ram Labhaya, J.*) Narayan Bedia *v.* Dambarunath. A.I.R. 1950 Assam 40.

——Ss. 94 and 147—*Certificate under S. 46 (2), Income-tax Act, forwarded by Excess Profits Tax Officer to Collector—Order of Collector—Appeal to Development Commissioner under Bengal Public Demands Recovery Act—If competent—Bengal Public Demands Recovery Act, S.* 53.

When action is taken by an Excess Profits Tax Officer under the provisions of S. 46 (2), Income-tax Act, read with S. 21, Excess Profits Tax Act, the certificate referred to in S. 46 (2) is to be forwarded to the Collector, and not to the certificate officer, as required by the Public Demands Recovery Act. The Collector, on receipt of such a certificate, is competent to act under S. 94 of the Assam Land and Revenue Regulation and an appeal lies from his order under S. 147 of that Regulation. An appeal to the Development Commissioner under the Public Demands Recovery Act against the assumption of jurisdiction by the Collector under the Regulation is clearly incompetent. So also an application to the High Court under S. 53 of the Public Demands Recovery Act against an order of the Development Commissioner. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Surma Valley Food-grain Syndicate, Silchar *v.* Excess Profits Tax Officer, Dibrugarh. A.I.R. 1949 Assam 54.

——S. 100—*Objection to partition raising question of title—Duty of Deputy Commissioner to stay proceedings.*

Under S. 100 of the Assam Land and Revenue Regulations, the Deputy Commissioner must stay the partition proceedings if an objection to partition is filed which raises a question of title, whether he considers the objection to be frivolous or not. It is no function of the revenue authorities to decide these questions of title. The Deputy Commissioner is at liberty under the section to determine the time within which the civil suit is to be filed and also the party (*i.e.*), applicant or objector—by whom it is to be filed. (*Lodge, C.J.*) ABDUL JABBAR *v.* MANCHAB ALI. 53 C.W.N. 796.

———**Ss. 140 and 141**—*Revenue Officer entering house or club on official business—Whether can regard it as his Court.*

A Revenue Officer described in S. 140 or S. 141 of the Regulation cannot, in virtue of his presence in a house or club, on official business, regard the house or club as his Court. Nor can we accept the position that having regard to the multifarious duties which a Revenue Officer has to perform under widely different conditions and circumstances, his right to enter a place, whether it be a house or a club, at any time of the day or night, and to regard it as a Court, ought to be recognised. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) DAS GUPTA *v.* DEPUTY COMMISSIONER, GOALPARA. A.I.R. 1950 Assam 32.

———**Ss. 141, 142 and 147**—*Proceedings held by Sub-Deputy Collector on original side and by Deputy Commissioner on appellate side—If judicial proceedings—Criticism of such proceedings—If contempt of Court—Contempt of Court Act, S. 2.*

The proceedings taken by a Sub-Deputy Collector under Ss. 141 and 142 of the Assam Land and Revenue Regulation are not judicial proceedings, and do not become so if an appeal is preferred to the Deputy Commissioner in pursuance of S. 147 of the Regulation. There is no justification for the proposition that a non-judicial proceeding must be regarded as a judicial proceeding merely because there is a statutory provision for a right of appeal from an order made in a non-judicial proceeding. On the contrary, there is ample justification for maintaining the character of the original proceeding, notwithstanding the statutory right of appeal against an order made in non-judicial proceedings. As the Deputy Commissioner does not become a Court while the appeal is pending before him, anything said or done attacking the action of the S. D. C. during the pendency of the appeal, does not constitute contempt of the Court, which the High Court is competent to punish. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) DEPUTY COMMISSIONER, GOALPARA *v.* UPENDRA SARAN SANYAL. GOALPARA *v.* UPENDRA SARAN SANYAL. 54 C.W. N. 268=51 Cr.L.J. 247=A.I.R. 1950 Assam 25.

———**S. 147 and Rr. 2 and 66**—*Order of Deputy Commissioner on advice of District Land Settlement Advisory Board rejecting application for settlement of waste land in town—Appeal.*

An order of the Deputy Commissioner, acting on the advice of the District Land Settlement Advisory Board, rejecting an application of a person for settlement of waste land in town and offering settlement to another person, is one passed by him and not by the Government of Assam, and is therefore appealable under S. 147 of the Assam Land and Revenue Regulation. In R. 66 of the rules framed under the Regulation, the words "subject to confirmation" only mean that when a settlement is made by the Deputy Commissioner, the Government either confirms

the settlement so made or refuses to confirm it. R. 66 does not empower the Government to settle land in the first instance with an applicant; that power is vested in the Deputy Commissioner only. The words "subject to the general or special orders of the Provincial Government" in R. 2 cannot affect the power of disposal which vests only in the Deputy Commissioner under the Regulation. (*Thadani, C.J.*) SALIGRAM RAI & Co. *v.* JAJNA CHANDRA. A.I.R. 1950 Assam 157.

———**S. 147 (b)**—*Non-renewal notice issued to annual patta-holder—Rule issued to him to show cause against prosecution under S. 193, I. P. Code—Appeal, if lies.*

A non-renewal notice issued to an annual patta-holder is not an order passed within the meaning of S. 147 (*b*), Assam Land and Revenue Regulation; nor is a rule issued to him to show cause why he should not be prosecuted under S. 193, I. P. Code. No appeal, therefore, lies from such an order passed by a Deputy Commissioner. (*Thadani, Ag. C.J.*) RAFIQUDDIN *v.* MUKLUSA BIBI. A.I.R. 1950 Assam 99.

———**Ss. 151 and 81**—*Powers of Tribunal—Order setting aside sale on ground of hardship after one year—Legality—Jurisdiction of civil Court.*

S. 151 of the Assam Land and Revenue Regulation merely empowers the Tribunal to pass any orders it may deem fit within the scope of its authority. Its orders also must be legal and within the limit of its jurisdiction. It may therefore interfere on appeal or in revision under the section with orders of sale on all legal grounds. But if a sale is sought to be set aside on the ground of hardship and injustice, it could be set aside only within one year from the date the sale became final having regard to S. 81 of the Regulation. The Tribunal would be exceeding its jurisdiction in setting aside a sale more than one year after the date on which it became final and the civil Court has undoubtedly jurisdiction to declare such an order null and void. (*Thadani, C.J. and Ram Labhaya, J.*) SIB CHARAN DAS *v.* MANIK CHANDRA. A.I.R. 1950 Assam 141.

———**S. 151**—Revisional powers under—If exercisable by High Court. *See* ASSAM REVENUE TRIBUNAL (TRANSFER OF POWERS) ACT (IV OF 1948), S. 3 (2). A.I.R. 1950 Assam 32.

———**Ss. 154 and 39**—*Jurisdiction of Civil Court—Validity of settlement.*

Per *Ram Labhaya, J.*—Where a settlement was granted to the defendant and he had no legal right in the property, it would be competent to the Civil Court not only to declare the title of the plaintiff but also to put him in possession by ejectment of the defendant. 23 C.W.N. 540, foll. (*Thadani, C.J. and Ram Labhaya, J.*) DHARAMESHWAR SARMA *v.* LAKHYADHAR. A.I.R. 1950 Assam 107.

———**Ss. 154 (1) (a) and 62**—*Bar of Civil Court's jurisdiction—When inoperative.*

Before the bar of Civil Court's jurisdiction under S. 154 (1) (*a*) of the Assam Land and Revenue Regulation can be said to be inoperative, the plaintiff must lay the foundation for his contention that he had an existing right under the Regulation which the Government of Assam had violated. S. 62 of the Regulation does not control S. 154 of the Regulation which deals with certain specified subjects. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) Kanteswar Choudhury *v.* Province of Assam. A.I.R. 1950 Assam 77.

ASSAM MAINTENANCE OF PUBLIC ORDER ACT (V OF 1947)—*If* ultra vires—*Prior consent of Governor-General—If necessary.*

The Assam Maintenance of Public Order Act is not *ultra vires* the Provincial Legislature for want of prior consent of the Governor-General, as such consent is not necessary. 1949 Cal. 1 (F.B.), foll. (*Lodge, C.J. and Thadani, J.*) Nirendra Mohan Lahiri *v.* Government of Assam. 50 Cr.L.J. 754=A.I.R. 1949 Assam 37.

——**Ss. 2 and 9**—*Powers of District Magistrate—District Magistrate acting as delegate of Provincial Government—Order of detention exceeding two months—Validity.*

A District Magistrate is empowered by S. 2 (2) of the Assam Maintenance of Public Order Act to pass an order of detention for a period not exceeding two months, so long as no powers are delegated to him by the Provincial Government. District Magistrates are not excluded from the category of officers to whom the powers of the Provincial Government may be delegated under S. 9 of the Act. If, therefore, the Provincial Government later on delegates to a District Magistrate its powers to him under S. 2 (1) (*a*) by virtue of S. 9, S. 2 (2) which limits his powers of detention becomes inoperative for he can pass any order of detention for any period not exceeding six months under S. 2 (1) (*a*). It is then unnecessary for him to exercise any powers under S. 2 (2). The effect of delegation is practically to reduce S. 2 (2) to a mere surplusage. For all practical purposes it stands suspended as the District Magistrate then can exercise the powers of the Provincial Government under S. 2 (1) (*a*). It is therefore not correct to say that even when the District Magistrate exercises his delegated authority under S. 2 (1) (*a*), his power is limited by the provisions contained in S. 2 (2). (*Ram Labhaya, J.*) Tarun Sen Deka *v.* The State. 53 C.W.N. 422=A.I.R. 1949 Assam 50=51 Cr.L.J. 118.

——**S. 2 (1)**—*Grounds for detention—Sufficiency—Power of High Court to consider—Cr. P. Code, S.* 491.

The Assam Maintenance of Public Order Act provides that the Provincial Government may make orders under S. 2 (1) if the Provincial Government is satisfied of the necessity—not, if the necessity of doing so is proved. The only test is whether the Provincial Government is satisfied. There is no question of the Courts or any other authority being so satisfied. If the Provincial Government is so satisfied, it is not the function of the High Court under S. 491, Cr. P. Code, to examine the grounds of detention and decide whether the grounds are such as in the opinion of the Court would justify the orders passed. [1949 Cal. 1 (F.B.), foll.] (*Lodge, C.J. and Thadani, J.*) Nirendra Mohan Lahiri *v.* Government of Assam. 50 Cr.L.J. 754=A.I.R. 1949 Assam 37.

——**S. 2 (1)**—*Order by Provincial Government or District Magistrate—When may be made—Period of validity of order—Whether may be extended.*

The power conferred by S. 2 (1) of the Assam Maintenance of Public Order Act may be exercised either by the Provincial Government or by the District Magistrate, and if exercised by the former, the order shall be in force for a period not exceeding six months, and if exercised by the District Magistrate, it shall be in force for a period not exceeding two months. There is no provision in the Act whereby the period during which an order under S. 2 (1) remains valid, can be extended; and there is no provision whereby an order passed by one authority can be extended by another authority.

In each case, the order may be made only if the authority making the order is satisfied that it is necessary to make the order on the particular person with a view to preventing him from acting in any manner prejudicial to the public safety and the maintenance of public order. It is immaterial that some other authority considers that such an order is or is not necessary; the responsibility for determining the necessity is placed on the person making the order. (*Lodge, C.J.*) S. A. Chyne *v.* The State. 53 C.W.N. 222.

——**S. 4**—*Grounds furnished to detenu—Sufficiency.*

Where the grounds of detention furnished to a detenu stated that he threatened public peace and tranquillity in a particular district by urging violent methods specifically among the labouring classes and that he professed communist ideology and had actively engaged himself to put Communist directives into effect for a "political struggle" by bringing a revolution,

Held, that the grounds furnished were sufficient to enable the detenu to make a representation to the Provincial Government under S. 4 of the Assam Maintenance of Public Order Act. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) Benoy Bhusan Chakravarty *v.* Government of Assam. 51 Cr.L.J. 477=A.I.R. 1950 Assam 49.

——**S. 4**—*Oral communication of grounds for detention—If sufficient.*

Under S. 4 of the Assam Maintenance of Public Order Act, the reasons for detention may be communicated to the detenu orally or in writing, though it is desirable that the communication should be made in writing so that a representation against the order may deal with all the grounds set out. (*Lodge, C.J.*) S. A. Chyne *v.* The State. 53 C.W.N. 222.

——**S. 9**—*Provincial Government empowering District Magistrate to take action—If divests itself of its power.*

The fact that the Government of Assam has authorised under S. 9 of the Assam Maintenance of Public Order Act the District Magistrate in each district of the province to exercise the powers conferred by S. 2 (1) of the Act, does not mean that it has divested itself of the power to take action. (*Lodge, C.J. and Thadani, J.*) Nirendra Mohan Lahiri *v.* Government of Assam. 50 Cr.L.J. 754=A.I.R. 1949 Assam 37.

ASSAM MONEY-LENDERS ACT (IV OF 1934), S. 9 (as amended)—*Applicability—Pending execution case.*

S. 9 of the Assam Money-Lenders Act, as amended by Act VI of 1943, does not apply to an execution case pending on the date on which the amendment came into force. (*Mitter and Clough, JJ.*) Sylhet Loan and Banking Co., Ltd. *v.* Syed Ahmad Mojtoba. I.L.R. (1946) 1 Cal. 455=81 C.L.J. 373=226 I.C. 303=1946 Cal. (Rul.) 356=50 C.W.N. 417=A.I.R. 1946 Cal. 337.

ASSAM MONEY-LENDERS (AMENDMENT) ACT (VI OF 1943)—*Applicability—Suit for declaration of title to property.*

The Assam Money-Lenders (Amendment) Act VI of 1943, has no application to a suit in which a declaration of title to property is sought. (*Thadani, J.*) Towahir Ali *v.* Md. Moniruddin. 53 C.W.N. 96.

———**S. 1 (2)**—*"Suit"—If includes execution proceeding.*

The word "suit" used in S. 1 (2) of the Assam Money-Lenders Amendment Act should not be taken to include a proceeding in execution. (*Mitter and Clough, JJ.*) Sylhet Loan and Banking Co., Ltd. *v.* Syed Ahmad Mojtoba. I.L.R. (1946) 1 Cal. 455=81 C.L.J. 373=226 I.C. 303=1946 Cal. (Rul.) 356=50 C.W.N. 417=A.I.R. 1946 Cal. 337.

———**Ss. 1 (2) and 9**—*"Suit"—If includes execution proceeding—Act, if applies to pending execution proceedings and appeals arising therefrom.*

The Assam Money-Lenders (Amendment) Act, 1943, cannot be applied to pending execution proceedings and appeals arising therefrom. The word "suit" used in S. 1 (2) does not include a proceeding in execution. S. 9 of the Act has to be read subject to S. 1 when any question relating to its scope arises. Therefore, a decree which became final before the Act came into force can be executed as it stands and the Act makes no provision for re-opening it or for going behind it. (*Thadani, C.J. and Ram Labhaya, J.*) Jyotirindra Narayan Singh *v.* Purna Chandra. **54 C.W.N. 413=A.I.R. 1950 Assam 161.**

———**S. 5 (2)**—*Applicability—Anomalous mortgage.*

Per *Ram Labhaya, J.*—S. 5 (2), Assam Money-lenders (Amendment) Act of 1943 covers usufructuary mortgages only. Where under a mortgage, possession is given to the mortgagee but there is a provision to the effect that if the mortgagor fails to pay the mortgage money within a stipulated period, the mortgagee will be entitled to enjoy the mortgage land as security for the money, the mortgage is anomalous and is therefore not hit by the provisions of the section. (*Thadani, C.J. and Ram Labhaya, J.*) Dharameshwar Sarma *v.* Lakhyadhar. A.I.R. 1950 Assam 107.

———**S. 9 (2)**—*Suit for title and possession against prior usufructuary mortgagee by mortgagee-decree-holder-purchaser—Right of latter to invoke section.*

S. 9 (2) of the Assam Money-lenders Act can be invoked by a mortgagee-decree-holder who has purchased the property in execution of his decree in a suit by him for declaration of title and possession against a prior usufructuary mortgagee of the property. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Rahimuddin Choudhury *v.* Nayan Chand Das. A.I.R. 1950 Assam 18.

ASSAM MUNICIPAL ACT (I OF 1923), S. 236—*Powers of Municipal Board—Prohibition of offensive trade within municipal limits without licence.*

S. 236 of the Assam Municipal Act merely authorises the Board to define limits within which certain dangerous or offensive trades may be carried on. The Municipality can merely regulate certain trades by defining the areas where they may be carried on within municipal limits. If the Municipality merely imposes a fee for carrying on such a trade without defining any limits as regards locality, it exceeds its powers and completely loses sight of the purpose underlying the section. (*Thadani, C.J. and Ram Labhaya, J.*) Tinsukia Municipal Board *v.* Bankim Chandra Ghose. A.I.R. 1950 Assam 101.

———**Ss. 320 and 286**—*"An act done"—If implies "purporting to be done"—Chairman of Municipal Board serving notice on plaintiff to turn off water connection from his premises and threatening action in case of default—Suit for perpetual injunction against Board—Notice, if necessary.*

The omission of the words "purporting to be done" in S. 320 of the Assam Municipal Act is of no consequence, for the words "purporting to be done" are a necessary implication of the words "an act done".

The giving of a notice by the Chairman of a Municipal Board under S. 286 of the Assam Municipal Act to an owner or occupier of premises calling upon him to turn off the water-pipe connection from the premises and the threatening of action in the event of his failure to do so, is an act done under that section, and a notice under S. 320 of the Act is, therefore, obligatory before a suit for a perpetual injunction can be brought by him against the Board. In the absence of such a notice, the suit must fail. (*Thadani, C. J. and Ram Labhaya, J.*) Rukmini Kumar Das *v.* Chairman of the Silchar Municipal Board. A.I.R. 1950 Assam 139=54 C.W.N. 647.

———**S. 320**—*Applicability—Suit for malicious prosecution against Chairman of Municipal Board—Limitation—Exclusion of period of notice.*

Per *Ram Labhaya, J.*:—S. 320 of the Assam Municipal Act covers all suits against the Board or any of its officers for anything done under the Act. A suit for malicious prosecution against the Chairman of a Municipal Board would be covered by it. The period of limitation for such a suit is three months under S. 320 (2) of the Act, and the plaintiff is entitled to exclude the period of one month's notice when computing this period of three months. S. 320 of the Assam Municipal Act is subject to S. 15 (2), Limitation Act, as the operation of S. 15 (2) has not been excluded by anything contained in the Assam Municipal Act. 56 B. 135, foll.

Per *Thadani, C.J.*:—S. 320, Assam Municipal Act, has no application to a suit for damages for malicious prosecution, for the plain reason that malicious prosecution is not something done under the Act; indeed, if anything, it is something done outside the Act. A suit for damages for malicious prosecution is governed by Art. 23, Limitation Act. (*Thadani, C.J. and Ram Labhaya, J.*) TINSUKIA MUNICIPAL BOARD *v.* BANKIM CHANDRA GHOSE. A.I.R. 1950 Assam 101.

ASSAM OPIUM PROHIBITION ACT (XXIII OF 1947), Ss. 5 (a) and 28—*Possession of opium*—Mens rea—*Burden of proof—Presumption in favour of prosecution—When arises.*

Possession of opium within the meaning of S. 5 (*a*), Assam Opium Prohibition Act, must imply knowledge. It must be conscious possession making some kind of control possible, or in other words, there must be *mens rea* or guilty knowledge before a person could be convicted of an offence under S. 5 (*a*) for possessing opium. Mere recovery of opium from a house in which he lives along with other persons would not be sufficient to show that he was in possession with knowledge of its existence.

Before the presumption under S. 28 of the Act comes into operation, conscious possession on the part of the accused has to be proved by the prosecution. The burden of proving conscious possession on the part of the accused remains on the prosecution and that burden is not shifted to the accused by anything that is contained in S. 28. (*Thadani, C.J. and Ram Labhaya, J.*) ABDUL ALI *v.* THE STATE. A.I.R. 1950 Assam 152=51 Cr.L.J. 973.

———**Ss. 28 and 5 (a)—Presumption in favour** of prosecution—When arises. *See* ASSAM OPIUM PROHIBITION ACT, Ss. 5 (*a*) AND 28. A.I.R. 1950 Assam 152.

ASSAM REVENUE TRIBUNAL (TRANSFER OF POWERS) ACT (IV OF 1948), S. 3—*Revenue case—Enquiry by S.D.C. purporting to be under Ss.* 141 *and* 142 *of Assam Land and Revenue Regulation.*

If the S.D.C. acts or purports to act under S. 141 or S. 142 of the Assam Land and Revenue Regulation with reference to an enquiry, even though the enquiry itself does not come within the purview of the Regulation the S.D.C. acts as a Revenue Officer in a revenue case within the meaning of S. 3 of Assam Act IV of 1948. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) DAS GUPTA *v.* DEPUTY COMMISSIONER, GOALPARA. A.I.R. 1950 Assam 32.

———**S. 3 (2)**—*Revisional powers under S.* 151 *of Assam Land and Revenue Regulation—If exercisable by High Court.*

In Col. 3 of Sch. A of Act IV of 1948, under the head "jurisdiction", the revisional jurisdiction of the Provincial Government vested in the Provincial Government immediately before 1st April, 1937, was transferred to the High Court under S. 3 (2) of Assam Act IV of 1948. Between 1946 and 6th April, 1948, the day on which Assam Act IV of 1948, received the assent of the Governor, the 'revisional jurisdiction' of the Provincial Government under S. 151 of the Assam Land and Revenue Regulation was exercised by the Revenue Tribunal under S. 5 of Assam Act II of 1946, and by Assam Act IV of 1948, the jurisdiction exercised by the Revenue Tribunal up to 6th April, 1948, was transferred to the High Court to the extent mentioned in Sch. A. Item No. 5 in Col. 3 of the Sch. A to Assam Act IV of 1948, contains the powers in revision under S. 151 of the Regulation. It follows from the above that the revisional powers under S. 151 of the Regulation are now exercisable by the High Court. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) DAS GUPTA *v.* DEPUTY COMMISSIONER, GOALPARA. A.I.R. 1950 Assam 32.

ASSAM (TEMPORARILY SETTLED DISTRICTS) TENANCY ACT (1935), S. 3 (13) (a)—*Revenue rate—What is.*

Every parcel of land in an estate settled temporarily is settled at full rates which is the normal rate, and the revenue rate for that parcel of land is the rate at which revenue is for the year actually payable to Government. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) AMBAR ALI *v.* ANJAB ALI. A.I.R. 1949 Assam 87.

———**S. 33, Proviso**—*Proof required of plaintiff.*

According to the proviso to S. 33 of the Assam (Temporarily Settled Districts) Tenancy Act, all that the plaintiff is required to do is that he should satisfy the Court that he requires the land for his homestead or for cultivation in the manner stated in the proviso. The word "requires" is not used as synonymous with "needs". The emphasis is really on a *bona fide* demand for building a homestead or for cultivation. There is no limit placed on his requirements. A plaintiff may have land in possession and he may be wanting more land. If he can satisfy the Court that he wants it for his own cultivation, he can have as much land for his own cultivation as he can manage. Similar consideration will govern where ejectment is prayed for in order to build a homestead though so far as residential accommodation is concerned, the question may be somewhat on a different footing so far as proof goes. In order to satisfy the Court that he requires the land for building a homestead, a plaintiff may have to bring out the circumstances which go to indicate that he has reasons for acting in the manner that he proposes to do. If a homestead is needed, the selection of land is a matter which should rest with him. If plaintiff is asking for ejectment *bona fide*, the fact that it will cause inconvenience to the defendant can be no reason for refusing the relief to the plaintiff. (*Ram Labhaya, J.*) JAJNESWAR NATH *v.* JARMA SINGH. A.I.R. 1950 Assam 15.

———**Ss. 46 and 88**—*Alteration of tenant's rent on landlord obtaining remission of revenue—Proper procedure.*

Under S. 46 of the Assam (Temporarily Settled Districts) Act, where a landlord obtains a remission of revenue, the tenant's rent is liable to be altered fairly and equitably. The machinery provided is an application to the Revenue Courts. Under S. 88 (1) (*b*), Civil Courts are prohibited from exercising jurisdiction in connection with these matters. (*Henderson, J.*) Sarat Chandra Deb *v.* Roymoni Das. I.L.R. (1946) 1 Cal. 337=225 I.C. 307=50 C.W.N. 224=A.I.R. 1946 Cal. 259.

———**Ss. 58 and 103**—*Suit for arrears of rent and on default in payment for eviction—Second appeal.*

Where in the prayer clause in the plaint the plaintiff asks for an order for arrears of rent and in case of default in payment within the time fixed by the Court for an order directing eviction of the defendant, the suit is in substance one for ejectment under S. 58 of the Assam (Temporarily Settled Districts) Tenancy Act. A second appeal from the decision in such suit is, therefore, not barred by S. 103 of the Act. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) Ambar Ali *v.* Anjab Ali. A.I.R. 1949 Assam 87.

———**Sch. I, Part 1, Cl. 4**—*Applicability.*

Cl. 4, Part 1, of Sch. I, Assam (Temporarily Settled Districts) Tenancy Act, is inapplicable where there has been no dispossession of the raiyat or the under-raiyat either by the landlord himself or by his agent acting within the scope of his authority. 25 C.W.N. 102, Dist. (*Ram Labhaya, J.*) Krishna Kanta *v.* Bhuran Priya Debi. A.I.R. 1950 Assam 71.

ASSAM VEGETABLE OIL AND OIL SEEDS CONTROL ORDER (1944), Para. 6—*Notification No. S. D. 398|43|206 prohibiting storage after specified date—Whether* ultra vires—*Notification, if applicable to partially excluded areas.*

Para. 6 (*a*) of the Assam Vegetable Oil and Oil Seeds Control Order, 1944, sanctions a notification prohibiting *purchase* of oil seeds after a specified date, it does not sanction a notification prohibiting the storing for sale of any oil seeds, if the purchase was made before the prescribed date. Notification No. S.D. 398|43|206 issued under this paragraph is, therefore, *ultra vires* and of no effect to the extent to which it prohibits the storage of oil seeds after the prescribed date.

The Notification is not applicable to the partially excluded areas of the Sibsagar and Nowgong Mikir Hills Tract. (*Lodge, C.J.*) Budhuram Chaudhury *v.* Emperor. 52 C.W.N. 801.

ASSIGNMENT OF DECREE. *See* C. P. Code, O. 21, R. 16.

ASSOCIATIONS. *See* Clubs and Associations. I.L.R. (1948) Nag. 449.

ATTACHMENT. *See* C. P. Code, Ss. 60, 64, O. 21, Rr. 46 and 63.

ATTESTATION. *See also* (1) Evidence Act, S. 68; (2) Mys. T. P. Act, S. 3; (3) T. P. Act, S. 3.

———Effect of—Presumption of knowledge of contents of deed attested—Attestation by person interested in transaction effected—If implies consent to same. *See* Mysore T. P. Act, S. 3. 23 Mys.L.J. 131=50 Mys.H.C.R. 224.

———If imports knowledge of contents of deed—Reversioner attesting deed of gift by widow and identifying her before the Sub-Registrar—If can challenge the gift on the widow's death. [*See* Q.D. 1941-1945, Vol. I, Col. 162.] Rajammal *v.* Sabapathi Pillai. I.L.R. (1945) Kar. (P.C.) 200=1946 O.A. (P.C.) 27=1946 A. W.R. (P.C.) 27=1946 P.C. (Rul.) 16 (P.C.).

———*Knowledge of contents of document—Presumption.*

The attestation by a person of a document ordinarily proves no more than that the signature of an executing party has been attached to a document in the presence of a witness and it does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. An attestation may take place in circumstances which show that the witness did in fact know of the contents of the document but no such knowledge ought to be inferred from the mere fact of attestation. (*Pollock and Sen, JJ.*) Nainsukhdas Sheonarayan *v.* Goverdhandas. I.L.R. (1947) Nag. 510=A.I.R. 1948 Nag. 110.

AUTREFOIS ACQUIT. *See* Cr. P. Code, S. 403.

AVADH LAWS ACT (1876), S. 9—*Applicability—Appeal from pre-emption decree—Both parties claiming equal rights and suggesting lots—Joint request to Court to draw lots—Decision of appeal by drawing lots—Legality.*

Although cases in Courts are to be decided according to the procedure laid down in the Civil Procedure Code and not otherwise, in suit for pre-emption where two or more persons are equally entitled to the right of pre-emption, S. 9 of the Avadh Laws Act provides for the determination of the question by drawing lots. Hence where a right is claimed by two rival claimants, and both parties and their advocates suggest in the grounds of appeal and request the Court jointly that the matter should be decided by drawing lots, the Court would be justified fully in adopting the procedure under S. 9 and deciding the matter by lots. (*P. K. Kaul, J.*) Likha Singh *v.* Chittar. 5 D.L.R. (All.) 13.

AWARD. *See* (1) Arbitration; (2) Arbitration Act; (3) C. P. Code, Sch. II.

BAIL. *See* Cr. P. Code, Ss. 496 to 502.

BAILMENT. *See also* Contract Act, S. 151.

———*Nature of obligation arising under—Government recovering stolen articles of citizen and subsequently losing them—If liable to indemnify the citizen for the loss.*

The obligation of a bailee is contractual obligation and springs only from the contract of bailment. It cannot arise independently of a contract.

Where after the Government recovered the stolen articles belonging to a citizen, they are again stolen while in its custody the Government does not stand in the position of a bailee and is not liable as such to indemnify the citizen. (*Seth, J.*)

Ram Gulam *v.* The Government of the U.P. 1950 A.L.J. 46=A.I.R. 1950 A. 206=5 D.L.R. (A.) 105=1950 A.W.R. 56.

BANKER AND CUSTOMER. *See also* Contract Act, S. 171.

———*Bank collecting cheque of customer—Position and function of—If mere agent or otherwise.*

When a Bank collects a cheque it may do so as a holder for value or a mere agent of the holder for purpose of collection. In the latter case the proceeds of the cheque are held by the bank as a trustee for the holder of the cheque. When the holder of the cheque or claimant has no account with the Bank, the latter is only an agent for collection. (1942) 2 M.L.J. 128, ref. (*Tendolkar, J.*) Bank of India, Ltd. *v.* Official Liquidator. 5 D.L.R. (Bom.) 16=A.I.R. 1950 Bom. 375=1950 Comp. C. 49=52 Bom.L.R. 587.

———Banker's lien—Right of banker to combine accounts of customer—Limitation—English law—Contract Act, S. 171. [*See* Q.D. 1941-1945, Vol. I, Col. 165.] Seth Devendrakumar *v.* Gulab Singh. I.L.R. (1946) Nag. 210=1946 Comp. C. 89=A.I.R. 1946 Nag. 114.

———Banker's lien—Trust money in hands of customer—Right of bank to lien on—Payee of cheque entrusting another to cash cheque and to obtain draft in name of payee—Person entrusted cashing cheque and getting draft in his own name—Breach of trust—Suit by person entrusting to declare beneficial interest in draft—Maintainability—Bank's right to set-off amounts due to it by person obtaining draft—Prayer for recovery of amount of draft—If to be included. [*See* Q.D. 1941-1945, Vol. I, Col. 164. Chettinad Mercantile Bank, Ltd. *v.* Pichammai Achi. I.L.R. (1946) Mad. 200.

———*Deposits by customers—Nature of relationship.*

The receipt of deposits and the repayment of the sums deposited to the depositors or their successors is an essential part of the business of banking. The relation between banker and customer who pays money into the bank is the ordinary relation of debtor and creditor with a superadded obligation arising out of the custom of bankers to honour the customer's drafts. No question of possession of or property in the deposit arises. The obligation is *mutuum* not *commodatum*. Once the deposit is made there remains only a debt due from the banker to the customer. (*Lord Porter.*) Attorney-General of Canada *v.* Attorney-General of the Province of Quebec. 1946 F.L.J. 128=229 I.C. 196=1947 P.C. (Rul.) 55=51 C.W.N. 427=13 B.R. 345=1947 M.W.N. 259=1947 Comp. C. 1=A.I.R. 1947 P.C. 44 (P.C.).

———*Deposit in joint names of husband and wife—Instruction to pay "either or survivor"—Wife's right to operate upon account after husband's death.*

A joint account opened in the names of husband and his wife and payable to either or survivor, can be operated upon by the wife after the death of her husband, and the Bank is not entitled to demand proof of consent of the heirs or legal representatives of the deceased husband before payment, unless it is established or proved that the monies deposited in the Bank were the monies of the husband. There is no question of any resulting trust in favour of the husband's estate in the absence of proof that the money that was put in the Bank at the time the account was opened or the different sums which were deposited later in the joint account were the monies of the husband. The Bank is bound to carry out the instruction given to it to pay to either or the survivor unless a competent Court issues an injunction before the presentation of the cheque to the Bank by the survivor.

The widow is entitled to sue the Bank if payment to her is refused. The contract is made by the Bank with both the husband and the wife and it is a joint and several contract. 55 I.A. 235, Expl. 49 C.W.N. 27 (P.C.), referred to. (*Chatterjee, J.*) Shantimoyee Debi *v.* Bengal Central Bank. 53 C.W.N. 680.

———*Draft—Presentation to bank for payment before moratorium—Refusal of payment without lawful excuse—Administration of scheme of management—Power of Court to order payment of draft in full.*

Where a demand draft was presented for payment at the proper places when the bank was still functioning and before the moratorium, but payment was refused without any lawful excuse and on a fictitious ground, the Court in working out and giving effect to a scheme of management which has been accepted by the creditors and the shareholders in preference to compulsory winding up, can order the payment of the draft in full on considerations of equity, justice and good conscience. By allowing full payment to be made of the amount of the draft no real injustice is being done to the general body of creditors. The only effect of the order will be that the general body of creditors will not get the benefit of a wrong and improper action of some of the officials of the bank. (*Achhru Ram, J.*) New Bank of India, Ltd., Amritsar, *In the matter of* A.I.R. 1949 E.P. 373.

———*Draft—Relationship between Bank and holder of draft—Debtor and creditor, or Agent and Principal—Draft obtained for purposes of transmitting money—Bank closing business before payment—Payee's right to be paid in full.*

A banker's draft is a bill drawn either on demand or otherwise by one bank on another in favour of a third party or by one branch of a bank on another branch of the same Bank or by the head office on a branch or *vice versa* and is negotiable instrument. In the face of it, therefore, the relationship between the holder of a draft and any prior party (*e.g.*) the Bank issuing the draft, is that of a creditor and a debtor. If, however, a person pays money into one branch of a bank and accepts a draft for the amount paid by him drawn on another branch and the sole object of making the payment as understood by both the parties to the transaction is the transmission of the money from one place to another for the express purpose of being paid to himself or some nominee of his, the bank being intended to be used merely as a transmitting agent, the parties may none the less be held to stand to each other in the relation of a principal and an agent, the money paid being specifically appropriated for transmission according to the instructions of the principal. Although the banker in such a case does not transmit the money received by him *in specie,* the exact coins and notes, to the place of destination for payment to the payee he stands to the customer from whom he has received the money for transmission in the relation of an agent and till he has actually remitted the sum, which he may do, where he has got a branch at the place to which remittance has to be made, by crediting it to such branch and advising that branch to pay an equivalent sum to the party to whom the money is to be transmitted, he holds it in a fiduciary capacity. From the time of the receipt of such advice, the branch must be deemed to hold the money as the agent of the payee, unless of course, the payee has an account with such branch and the money is, under his general or special instructions, credited to that account. If the banker has no branch at the place to which money is to be transmitted, he will have to make use of the services of some other banker at that place and to remit the money to him in some form. Such other banker also will hold the money, as from the time of the receipt of the remittance, as an agent of the payee. If in either of the two cases the banker employed for the purpose of transmitting the money, instead of sending the letter of advise to his branch or to the other banker by means of post, hands it over to the party concerned, or, in addition to sending the advice, direct, gives such party a letter or note addressed to the manager of his branch or the other banker directing him to pay such party the sum remitted by him, that will not alter the nature of the jural relationship that is otherwise to exist between the branch of the other bankers and the payee. There is no reasonable ground for holding that a different result must follow if the original banker instead of giving such party a letter of the above description gives him a demand draft as evidence of the contract entered into between the two. Money which has been received by the branch of the banker for payment to a particular person and which the branch of the banker must otherwise in law be deemed to hold as an agent for that person, cannot become a debt merely because the instruments that has been handed over to such person as evidence of his title to the money and containing a direction for the payment of such money to him has been given the form of a bill of exchange or a negotiable instrument. The position may be different if the instrument has been negotiated and the question to be decided is one not arising between the original parties to it, but one between a subsequent holder and a prior party. It may also be different if in a given case the instrument has been presented for acceptance to the drawee and has been accepted by such drawee. Different considerations may possibly govern such cases.

It follows from the above that where a banker remits a certain sum of money, either to his own branch at another place, or to some other bank doing business at that place, whether by means of book entries, made in the case of another banker with the express or implied consent of such banker, or according to some other usual method of transmitting money, for the express purpose of such sum being paid to a named individual or his nominee, the sum must be deemed to have been specifically appropriated for the purpose of such payment. In case the bank charged with the duty of paying the said sum closes business before discharging the obligation, the payee will have the right to be paid that sum in full and cannot be obliged to rank with the general body of creditors, his having accepted a draft for the amount drawn on the branch of the bank notwithstanding. This rule will, however, apply only to a case where it is proved beyond the possibility of reasonable doubt that the holder of the draft, or the person who secured the draft in his name, had paid the money to a banker only and expressly for the purpose of being transmitted to another place for being paid to a specified person or for being otherwise spent in a specified manner and that the draft was obtained merely with the object of facilitating realisation of the money at the place of destination by the party to whom it was intended to be transmitted. The rule will have no application where the draft was obtained by the party concerned either for gain in the shape of exchange commission or under a contract for giving accommodation to the prior or any other party or otherwise for commercial purposes generally. (*Achhru Ram, J.*) NEW BANK OF INDIA, LTD., AMRITSAR, *In the matter of.* A.I.R. 1949 E.P. 373.

———*Duty of banker to inquire about proposed customer—Duty to make further inquiries after opening of account.*

There is no absolute and unqualified obligation on a bank to make inquiries about a proposed customer. After a bank has been given a proper reference with regard to a proposed customer, and when there are no suspicious circumstances attendant upon the opening of the account, it is not incumbent upon the bank to make further inquiries with regard to the customer or to notice the account of the customer from time to time. (*Chagla, J.*) BAPULAL PREMCHAND *v.* THE NATH BANK, LTD. 227 I.C. 67=1946 Comp. C. 133=48 Bom.L.R. 393=A.I.R. 1946 Bom. 482.

———*Head office and branch—Relationship of—If one of agency or different banks—Cheque drawn by customer on branch—Liability of Head office.*

While there is no doubt that a branch of a Bank is an agency of the Head office, for certain special purposes of banking business they may be treated as different banks. For instance, the obligation to honour the cheque of a customer rests on the branch on which the cheque is drawn and no other. Similarly where different branches of a Bank are endorsers of a negotiable instrument notice of dishonour must be given to each branch in succession. But a Bank cannot be heard to say that it was not prepared to accept the credit of one of its branches, who were its own agents, and whom it had set up in different localities for the purpose of carrying out banking business. In the case therefore of a cheque drawn on a branch it must be assumed that the Head office is under an obligation to accept the credit of the branch and if the cheque is honoured by the branch and the amount debited to the customer and credited to the Head office, the Head office must be deemed to have collected the cheque in the sense that they have received the equivalent of money. (*Tendolkar, J.*) BANK OF INDIA, LTD. *v.* OFFICIAL LIQUIDATOR. 5 D.L.R. (Bom.) 16=A.I.R. 1950 Bom. 375=1950 Comp. C. 49 =52 Bom.L.R. 587.

——*Money paid to Bank for purchase of draft—Person paying, not a normal customer of Bank—Money, if held by Bank on trust.*

If a person who has no account with a Bank and who is thus in fact not a normal customer of the Bank, hands over a sum of money to the Bank for the specific purpose of the purchase of a draft, the money is not received by the Bank as money to which the ordinary relationship of banker and customer applies but as a trustee. As the money is held as trust money, the person depositing the money is entitled to claim the rights of a beneficiary under a trust and is, therefore, entitled to be paid in full out of the available funds of the Bank, if any scheme comes to be sanctioned by the Court in relation to the Bank. [7 L. 155, referred to.] (*Ormond, J.*) PIONEER BANK, LTD., *In re.* 1 D.R. 162.

——Person depositing shares or other goods with company for safe custody—If can rank as creditor. *See* COMPANIES ACT, S. 153. 52 C. W.N. 708.

——*Relationship between—Nature of—Constituent handing cheque or bill to banker for collection—Banker suspending business before receipt of money.*

The law on the subject of the nature of the jural relationship existing between a banker and a customer while the money received by the former on collection of a cheque, bill or other document remains in his possession, may be summed up as follows:—(1) Where the banker has, pursuant to the instructions, express or implied, of the customer, credited the proceeds of the cheque or the bill or the other document entrusted to him for collection to the account of such customer, the parties stand, as from the time of his doing so, to each other in the relation of a debtor and a creditor. (2) The above rule, however, does not apply where the banker had suspended his business before the receipt by him of the amount of such cheque or bill or other document. In such a case the banker holds the money as a trustee for the customer, irrespective altogether of the consideration whether or not the latter had an account with him on the date of the receipt of the money, and whether or not the money has been credited in that account. (3) Unless and until the proceeds of such cheque, bill, or other document have actually been credited to the customer's account under the latter's express or implied authority, the relationship of debtor and creditor does not come into existence between the banker and the customer and the former holds such proceeds as the latter's agent. The mere circumstance that the customer was the banker's constituent at the relevant date and had an account with him to which the proceeds could properly have been credited is not enough to create such a relationship. (*Achhru Ram, J.*) JUJ SPORTS, LTD. *v.* NEW BANK OF INDIA, LTD. 50 P.L.R. 173=A.I.R. 1949 E.P. 88=1948 Comp. C. 253.

——*Rights and liabilities—Cheque sent by customer to bank for realisation from drawee bank—Bank sending same to branch of drawee bank for realisation—Branch receiving amount but not paying same to first bank due to liquidation of drawee bank—Liability to payee for amount.*

For the price of timber sold by the plaintiff to the 1st defendant, the latter drew a cheque in favour of the plaintiff on the *S.* Branch of the *E.* Bank. The plaintiff sent the cheque to the Branch Bank for collection and credit to his account. The Branch Bank in turn sent the cheque in return for realisation to another Branch of the *E.* Bank, who realised the amount from the *S.* Branch of the *E.* Bank but did not pay the amount to the Branch Bank, as in the meanwhile the *E.* Bank went into liquidation. In a suit by the plaintiff against the 1st defendant, and the Branch Bank, and the two branches of the *E.* Bank, the trial Court passed a decree against the Branch Bank alone and exonerated the other defendants,

..*Held,* in revision: (1) that the liability of the Branch Bank could only arise if the money was paid by the *E.* Bank by honouring the cheque, the latter having failed to pay the money, the Branch Bank could not be held liable;

(2) that the 1st defendant (drawer) was liable in any case and coud not plead that his bank had gone into liquidation; he was bound to pay his dues, and if payment of the cheque failed by reason of his bank going into liquidation, his liability to the plaintiff still remained, and he was the only party liable under the circumstances. (*Amarendra Nath Sen, J.*) BENGAL BANK, LTD. *v.* SATYENDRA NATH DAS. 1949 Comp. C. 198 =4 D.L.R. (Cal.) 164.

BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 6—*Order under—When may be made.*

Under S. 6 of the Banker's Books Evidence Act an order should only be made in cases in which the entries in the Banker's Books are relevant to the matters in issue in the proceedings in which they are required. (*Edgley and Clough, JJ.*) BHARATI CENTRAL BANK, LTD. *v.* PIONEER BANK, LTD. I.L.R. (1947) 1 Cal. 490.

BANKING COMPANIES ACT (X OF 1949), S. 5 (1) (c)—*Banking Company—Meaning.*

The definition of a Banking Company in S. 5 (1) (*c*) of the Banking Companies Act does not mean that the company must, at the time in question, be able to accept deposits of money from the public repayable on demand or on such terms on which the money might have been deposited. It must mean that banking should be the primary business of the company even if, by reason of certain supervening causes, it is not able for the time being to carry on the work of receiving deposits and of making payments. (*Malik, C.J. and Raghubar Dayal, J.*) THE JWALA BANK, LTD. *v.* SHITLA PARSHAD SINGH. 1950 A.L.J. 845=A.I.R. 1950 All. 309=5 D.L.R. (A.) 192=1950 Comp C. 238.

———S. 45—*Applicability—Pending appeal.*

An application for sanction of a scheme under S. 153 of the Companies Act was dismissed on the ground that it was not accompanied by a report or certificate of the Reserve Bank that such scheme was not detrimental to the depositors as required by Cl. 12 of the Banking Companies (Control) Ordinance, 1948. Pending appeal against the order of dismissal, an alteration in the law was effected by S. 45 of the Banking Companies Act, 1949, which dispensed with such certificate at the initial stage and required it only before the sanction of the scheme. The later enactment was not in terms made retrospective.

Held, that the Banking Companies Act, 1949, applied to pending actions as it did not impair or abrogate any substantive right but only dealt with the method or manner of invoking the Court's jurisdiction under S. 153 of the Companies Act, and that the appellant should therefore be given the benefit of S. 45 of that Act. (*Harries, C.J. and Chatterjee, J.*) TRIPURA MODERN BANK, LTD., *In re.* 54 C.W.N. 262=A.I.R. 1950 Cal. 240.

BANKING COMPANIES (AMENDMENT) ACT (XX OF 1950), S. 45-F—*Scope and effect —Suspension of limitation.*

S. 45-F, Banking Companies (Amendment) Act says that notwithstanding anything to the contrary contained in the Limitation Act, the period of one year immediately preceding the date of the order for the winding-up of the Banking Company should be excluded, in other words, there would be a suspension of limitation for this period. The word "suspension" suggests that there is something to suspend. It follows, therefore, that if the time had already run out before this period of one year there cannot be any question of suspension. The question of suspension arises when the period expires within or after this period of one year. If therefore time expired within or after this period of one year, that year should be excluded in computing the period of limitation. But in suits or proceedings in which time has already run out before this period of one year, there is no revival of the cause of action. (*Banerjee, J.*) PIONEER BANK LTD. *v.* BAMANDEV BANERJEE. 54 C.W.N. 710.

———S. 45-H—*Orders under—Power of winding-up Court to transfer for execution.*

Reading Ss. 45-A, 45-B, 11 and 45-H together, it is clear that the Court which winds up the company and passes orders referred to in S. 45-H of the Banking Companies Act, 1950, may execute the Orders in the manner provided in the C. P. Code. For example, if necessary, it may transfer the order to any Court for execution. (*Harries, C.J. and Banerji, J.*) BHARATI CENTRAL BANK, LTD. *v.* RATHINDRA NATH SEN. 54 C.W.N. 975.

BANKING COMPANIES (CONTROL) ORDINANCE (1948), Cl. 12—*Scope of.*

Cl. 12 of the Banking Companies (Control) Ordinance, 1948, was not restricted to an application for sanctioning a scheme or compromise resulting in an amalgamation and to amalgamations by banking companies outside Court. The heading of that clause which was in the following terms: "Restrictions or amalgamations" was somewhat misleading, and it did not cut down the natural meaning of the clear words of the enactment by reading into the same any restrictions derived from the heading. (*Harries, C.J. and Chatterjee, J.*) TRIPURA MODERN BANK, LTD., *In re.* 54 C.W.N. 262=A.I.R. 1950 Cal. 240.

BAR COUNCILS ACT (XXXVIII OF 1926), Ss. 7 and 9—*Rules framed under (All.), R. 1—Refugee lawyers from Punjab and Frontier Province—If can be enrolled in the Allahabad High Court.*

There is no reason to give the word "High Court" in the second proviso to R. 1 of the rules framed by the Allahabad High Court under Ss. 7 and 9 of the Bar Councils Act, a narrow interpretation as High Court to which the Act applies. Accordingly, refugee lawyers from Punjab and the Frontier Provinces can be enrolled as Advocates of the Allahabad High Court. (*Malik, C.J. and Agarwala, J.*) *In the matter of* REFUGEE ADVOCATES. I.L.R. (1949) All. 728.

———S. 12—*Reinstatement—Principles governing.*

The striking the name of a practitioner off the rolls of the Court does not mean perpetual disability or that the person must be deemed to be for *ever* unfit for the legal profession. When an application for reinstatement is made, the conduct subsequent to the striking off is to be carefully considered and the Court must be satisfied that the order of expulsion has had the salutary effect of awakening in the applicant a higher sense of honour and duty than he evinced when the disciplinary action was taken. In the interval between removal from practice and fresh application for re-admission, the conduct of the applicant must be such that, notwithstanding his prior delinquency, he might be safely entrusted with the affairs of the clients and be received once again as a member of an honourable profession without detriment to the profession or the disparagement of the colleagues with whom he must work and without impairing the dignity of the Courts. In order to ensure all this Courts have always insisted that sufficient time must elapse before re-admission. (*Wali Ullah, A.C.J., Sapru and Bhargawa, JJ.*) RAGHUBIR SARAN, AN ADVOCATE, *In the matter of.* 50 Cr.L.J. 852=A.I.R. 1949 A. 568=1949 A.L.J. 424 (F.B.).

———S. 12 (6)—*Powers of the High Court under—Scope of—If restricted in any way.*

The word 'review' in S. 12 (6) of the Bar Councils Act has been used in a generic sense meaning "reconsider" or "re-examine". The powers of the Court under S. 12 (6) are not hedged in by any such restrictions as are contained in O. 47, C. P. Code, and it is left entirely to the discretion of the High Court to pass such suitable orders in each case as it considers necessary. (*Wali Ullah, A.C.J., Sapru and Bhargawa, JJ.*) RAGHUBIR SARAN, AN ADVOCATE, *In the matter of.* 50 Cr.L.J. 852=A.I.R. 1949 A. 568=1949 A.L.J. 424 (F.B.).

BENAMI—*Advancement— Doctrine of—Purchase in favour of concubine claiming to be* Avarudh Stree—*Onus.*

Even where a purchase is made in the name of a concubine (who claims the status of *Avarudh Stree*) but with the funds of the paramour, it would be for the lady to establish that it was made for her, because the doctrine of advancement does not apply to India. It would be for her to satisfy the Court, by cogent evidence, that the paramour was only an ostensible and not the real purchaser or that he made in her favour a gift of the money with which the purchase was made. (*Allsop and Sinha, JJ.*) SHIVA KUMARI DEVI *v.* UDEYA PRATAP SINGH. I.L.R. (1947) A. 642=1947 A.L.J. 144=1947 A.W.R. (H.C.) 179=1947 A.L.W. 456=A.I.R. 1947 A. 314.

———*Advancement—Presumption—Money deposited in bank in joint names of deceased and his sister's son.*

From the mere fact that the deceased deposited money in the Bank, in the joint names of himself and his sister's son and on terms that it is payable to either or survivor, no presumption in favour of any intended advancement would arise. It is for the sister's son to establish the contrary intention. If the contrary intention is not established there will be a resulting trust in favour of the deceased. (*Mahomed Ibrahim, J.C. and Ram Labhaya, J.*) ABDUL LATIF KHAN *v.* MAHOMED AKBAR KHAN. 228 I.C. 352=1947 Pesh. (Rul.) 12=A.I.R. 1947 Pesh. 1.

———*Benami purchase—Essence of.*

The essence of a benami purchase is that there should be a real purchaser as well as an ostensible purchaser and the real owner should be in a position to enforce the rights of a beneficiary in trust against the ostensible owner. (*Cornelius, J.*) MAHOMED SHAFI *v.* BASHIR AHMAD. A.I.R. 1947 Lah. 288.

———*Beneficial owner—Right to sue for declaration of his title.*

A plaintiff in possession, who is merely a beneficial owner, can sue for getting a declaration that the *benamidar* has no right. (*Kapur, J.*) MST. GOGI *v.* CHIRAGH ALI. 5 D.L.R. (Simla) 53=52 P.L.R. 387.

———Burden of proof. [*See* Q.D. 1941—1945, Vol. I, Col. 171.] RATANCHAND FAKIRCHAND *v.* DEOCHAND DAHYA BHAI. 223 I.C. 618=1946 Bom. (Rul.) 151=A.I.R. 1946 Bom. 157.

———*Burden of proof.*

The burden of proving that a transaction is not real but benami is on the party pleading it. It is for the party setting it up to prove that the apparent is not the real state of things. (*Sinha and Mukerji, JJ.*) ASOKE CHANDRA *v.* CHOTA NAGPUR BANKING ASSOCIATION, LTD. 2 D.L.R. 939=A.I.R. 1948 Pat. 247.

———*Burden of proof.*

The burden of proving that a transaction of sale in favour of the plaintiff is benami for a third party is on the defendant who pleads it. (*Krishna Pillai, C.J. and Simon, J.*) OUSEPH VARKEY *v.* PETER JOHN. A.I.R. 1950 T.C. 82.

BENAMI.

———*Burden of proof—Donor having debts at time of gift.*

The burden of proving that a transaction is benami rests on the person who argues against the tenor of the deed. It is also well established that no conclusion as regards the benami character of a transaction can be founded on suspicion. The fact that the donor had debts at the time of the gift is not conclusive to show that the gift was a benami transaction. (*G. N. Das and Lahiri, JJ.*) MAYA DEBI *v.* RAJLAKSHMI DEBI. A.I.R. 1950 Cal. 1.

———*Burden of proof—Duty of Court.*

The onus of establishing that a transaction is *benami* is on the plaintiff and it must be strictly made out. The decision of the Court on such a question cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence the apparent title must prevail. Where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) GANGADARA AYYAR *v.* SUBRAMANIA SASTRIGAL. 1949 F.L.J. 90=A.I.R. 1949 F.C. 88=4 D.L.R. (F.C.) 50=62 L.W. 403=(1949) 1 M.L.J. 568 (F.C.).

———*Burden of proof—Property purchased by Hindu woman—Presumption of benami purchase by husband—If arises—Rule—Plea of benami—Onus—Doctrine of advancement—Applicability.*

There is no principle of law that property apparently purchased by a Hindu woman is not hers, but her husband's, and that she should prove as against a stranger that it was with her money that she purchased the property. On the other hand the person alleging that the apparent owner is not the real owner must establish by cogent evidence that the purchase-money came from the real owner who is another. Where it is suggested that the purchase money was supplied by the husband of the lady in whose name the property was purchased and that the purchase in her name was benami; the onus is heavily on him who suggests it to show that that was the fact. In the absence of strict proof of such fact the presumption is that the apparent owner is the real owner as well.

Narasimham, J.—The doctrine of advancement has no application in India, and once it is proved that the purchase money was paid by the husband though the property was purchased in the name of the wife, the property should be held to be that of the husband in the absence of any other evidence to show that the husband really intended to make a gift of it to his wife so as to make it her stridhan. (*Panigrahi and Narasimham, JJ.*) AMRUTI DEI *v.* SARADAMONI DEI. 5 D.L.R. (Cut.) 75=A.I.R. 1950 Orissa 143.

———Burden of proof—Sale certificate. [*See* Q. D. 1941—1945, Vol. I, Col. 171.] Jitendra Nath Sur *v.* Amarendra Nath Sur. 222 I. C. 319=1946 Cal. (Rul.) 86.

———*Burden of proof—Transfer in favour of female member of family.*

Where an alleged benami transaction is in favour of female members of the family it is, of course, extremely difficult to secure definite evidence on the point of subsequent possession, but the onus to establish benami is on the person who alleges it, and thus where there is no satisfactory evidence of possession one way or the other it must be held that it was not established that the transaction was not real. (*Meredith and Sinha, JJ.*) Girija Kumari *v.* Kiran Chandra. 26 Pat. 253=A.I.R. 1947 Pat. 471.

———*Decree against benamidar's heirs—If binds real owner—Real owner refused permission to be joined as party.*

As a matter of law, in a suit a benamidar or after his death, his heirs, can represent the real owner and a decree passed against them fully binds the real owner. If in a suit against the benamidar's heirs, the real owner applies to be joined as a party but is refused permission, and the real owner takes no steps against this decision but actively prosecutes his defence through the benamidar's heirs, there is no cesser of representation and a decree eventually passed against the benamidar's heirs will be binding upon the real owner. (*Blank and Chakravartti, JJ.*) Prokash Chandra Ghose *v.* Mahima Ranjan Chakravartty. I.L.R. (1947) 2 Cal. 185=51 C.W.N. 273=A.I.R. 1947 Cal. 320.

———*Finding as to—Basis of—Evidence necessary.*

A finding of *benami* must be based on tangible evidence, and not on mere surmise or suspicion, however strong. (*Sinha and Mukherji, JJ.*) Asoke Chandra *v.* Chota Nagpur Banking Association, Ltd. 2 D.L.R. 939=A.I.R. 1948 Pat. 247.

———Fraudulent conveyance—Real owner —Right to urge plea of benami. *See* Fraud—Party to. A.I.R. 1950 Orissa 123.

———*Husband and wife—Property purchased in name of wife—Object being to place property beyond reach of husband—Rule of benami if applicable.*

The fact that the consideration for a purchase has been found by the husband is not conclusive against the wife in whose name the property had been purchased. It is only when the purchase is unexplained by other proved or admitted facts that the conclusion should follow that the transaction is benami for the husband. Where the evidence showed that the mortgage and the subsequent sale were taken in the name of the wife with the object that the property should belong to her and that it should not be within the reach of her husband as it was feared that he might dissipate it. *Held,* that the transaction entered into in the name of the wife was not benami for her husband. (*Gentle, C.J. and Rajamannar, J.*) Thirumal Nadar *v.* Pichai Ammal. 61 L. W. 347=1948 M.W.N. 338=A.I.R. 1948 Mad. 349=(1948) 1 M.L.J. 364.

———*Purchase of property in name of stranger —Resulting trust—Presumption.*

It is settled law that when real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of purchaser. (*Kapur, J.*) Mst. Gogi *v.* Chiragh Ali. 5 D. L.R. (Simla) 53=52 P.L.R. 387.

———*Right to sue—Right of benamidar—Suit in effect against beneficial owner.*

A benamidar has no right to bring a suit claiming title and for possession when he is suing in effect the beneficial owner. It is not material that the beneficial owner is brought in to cure a defect of parties. (*Blank, J.*) Nazu Meah Choudhury *v.* Mahomed Hussain. A. I. R. 1946 Cal. 528=228 I.C. 348=1947 C. (Rul.) 76.

———*Test.*

The best criterion for determining whether a transaction is benami or not is the source of purchase money. (*Nawal Kishore, C.J.*) Anand Ram *v.* Mt. Lada. 1946 M.L.R. 26 (Civil).

———*Test of—Purchase by father in name of son—Presumption—Doctrine of advancement—Applicability of—Source of purchase-money—If conclusive—Considerations.*

There is no presumption of advancement in India, and ordinarily, a purchase by a father in the name of his son, unexplained by other facts, would be regarded as a benami transaction and the beneficial interest in the property would vest in the father, once it is established that the consideration was provided by the father. The source of the purchase-money is not, however, the sole criterion, though it is a valuable test. The surrounding circumstances, such as the relative position of the parties, their mutual relations, their subsequent conduct and their dealings with or enjoyment of the disputed property often furnish important clues. (*Misra, J.*) Chandi *v.* Kalicharan. 4 D.L.R. (Luck.) 36=A.I.R. 1949 All. 733.

BENARES REGULATED TOWN CLOTH RATIONING ORDER (1946), Rr. 33 and 34—*If* ultra vires—*Contravention of the rules—Conviction—Legality.*

Rr. 33 and 34 of the Benares Regulated Town Cloth Rationing Order, 1946, are *ultra vires* and hence any contravention of those rules cannot be the basis of any conviction. (*Agarwala, J.*) Rex *v.* Khunni Lal. I.L.R. (1949) A. 195=1948 A.W.R. (H.C.) 222=4 D.L.R. (A.) 38=50 Cr.L.J. 101=3 A.I.Cr.D. 139=A.I.R. 1949 All. 32.

BENARES RENT CONTROL AND EVICTION ORDER (1944), S. 2—*Scope—Attempt to evict a tenant—If an offence under S. 2.*

S. 2 of the Benares Rent Control and Eviction Order only provides that the owner of a house or shop, shall not eject any tenant in actual possession but does not render any attempt to eject a tenant punishable. In the absence of any specific provision of law rendering any attempt punishable, the conviction of an owner or his agent of an offence for an act, which at the highest cannot amount to anything more than an attempt, cannot be sustained. The general provision in the Penal Code providing for punishment for an attempt to commit any offence under that Code would not be applicable to a case under the Benares Rent Control and Eviction Order. Nor is there anything in the Cr. P. Code that could justify conviction for an attempt to commit an offence against S. 2 of the Benares Rent Control and Eviction Order. (*Mulla, J.*) DWARKA DAS *v.* EMPEROR. 1946 A.W.R. (H.C.) 566.

BENGAL ACTS, REGULATIONS, ETC.

- **Agra and Assam Civil Courts Act (XII of 1887).** *See* BEN. CIVIL COURTS ACT.
- **Agricultural Debtors Act (VII of 1936).**
- **Agricultural Income-tax Act (IV of 1944).**
- **Alienation of Agricultural Land (Temporary Provisions) Act (V of 1944).**
- **Alluvial Land Settlement Act (XXXI of 1858).**
- **Alluvion and Diluvion Regulation (XI of 1825).**
- **Alluvion and Diluvion Act (IX of 1847).**
- **Calcutta Acts, Rules, etc.** *See* CALCUTTA ACTS, RULES, ETC.
- **Cess Act (IX of 1880).**
- **Civil Courts Act (XII of 1887).**
- **Co-operative Societies Act (XXI of 1940)**
- **Cotton Cloth and Yarn Control Order (1943).**
- **(Court-fees Act) Repealing and Amending Act (XVI of 1946).**
- **Court of Wards Act (IX of 1879).**
- **Criminal Law Amendment Act (VI of 1930).**
- **Criminal Law Amendment Ordinance (1947).**
- **Criminal Law (Industrial Areas) Amendment Act (IV of 1942).**
- **Cruelty to Animals Act (I of 1920).**
- **Embankment Act (II of 1882).**
- **Estates Partition Act (V of 1897).**
- **Ferries Act (I of 1885).**
- **Finance (Sales Tax) Act (VI of 1941).**
- **Food Adulteration Act (VI of 1919).**
- **Food Grains Control Order.**
- **General Clauses Act (I of 1899).**
- **House Rent Control Order.**
- **Irrigation Act (III of 1876).**
- **Landlord and Tenant Procedure Act (VIII of 1869).**
- **Land Registration Act (VII of 1876).**
- **Land Revenue Assessment (Resumed Lands) Regulation (II of 1819).**
- **Land Revenue Sales Act (XI of 1859).**
- **Land Revenue Sales Act (VII of 1868).**
- **Land Revenue Settlement Regulation (VII of 1822).**
- **Local Self-Government Act (III of 1885).**
- **Money-lenders Act (VII of 1933).**
- **Money-lenders Act (X of 1940).**
- **Motor Vehicles Rules (1940).**
- **Municipal Act (XV of 1932).**
- **Non-Agricultural Tenancy (Temporary Provisions) Act (IX of 1940).**
- **Patni Taluq Regulation (VIII of 1819).**
- **Police Regulations.**
- **Primary Education Act (IV of 1919).**
- **Private Fisheries Protection Act (II of 1889).**
- **Public Demands Recovery Act (III of 1913).**
- **Public Gambling Act (II of 1867).**
- **Putni Regulation.** *See* PATNI TALUQ REGULATION.
- **Regulation (XVII of 1806).**
- **Rent Act (X of 1859).**
- **Revenue Free Lands (Non-Badshahi Grants) Regulation (XIX of 1793).**
- **(Rural) Primary Education Act (VII of 1930).**
- **Sales-tax Act (VI of 1941).** *See* BENGAL FINANCE (SALES TAX) ACT (VI OF 1941).
- **Service Rules.**
- **Special Powers Ordinance (VI of 1946).**
- **State Prisoners Regulation (III of 1818).**
- **Survey Act (V of 1875).**
- **Tenancy Act (VIII of 1885).**
- **Village Chaukidari Act (VI of 1870).**
- **Village Self-Government Act (V of 1919).**
- **Village Self-Government (Amendment) Act (X of 1947).**
- **Wakf Act (XIII of 1934).**
- **Wills and Intestacy Regulation (V of 1799).**

BENGAL AGRICULTURAL DEBTORS ACT (VII OF 1936), S. 2 (6-A)—*"Civil Court"—If includes such Court established in Scheduled District—Scheduled Districts Act, S. 3.*

The words "civil Court" in S. 2 (6-A) of the Bengal Agri. Debtors Act include a civil Court established in a Scheduled District to which the Bengal, Agra and Assam Civil Courts Act has been extended by a notification issued under S. 3, Scheduled Districts. Act. (*Mitter, A.C.J. and Akram, J.*) KALIDAS CHAKRABARTI *v.* KALIPADA MANDAL. I.L.R. (1948) 1 Cal. 215.

———**S. 2 (8)**—*"Debt"—Liability under decree of Presidency Small Causes Court.*

Obiter.—Whatever doubt there might have been on the question previously, there can be none, after the amending Act of 1940, that the liability under a decree of a Presidency Small Causes Court is not a debt within the meaning of S. 2 (8) of the Bengal Agricultural Debtor's Act. (*Biswas, Blank and Chakravartti, JJ.*) MATI LAL SAHA *v.* CHANDRA KANTA SARKAR. I. L. R. (1947) 1 Cal. 537=229 I.C. 320=1947 Cal. (Rul.) 139=51 C.W.N. 1=A.I.R. 1947 Cal. 1 (S.B.).

———**Ss. 2 (8) and 8**—*Decree passed for arrears of rent—Debt that can be settled by Board—Debt arising under decree or pre-existing debt on account of arrears—Date on which such debt is incurred.*

On the passing of a rent decree, the debt in respect of arrears of rent for which the decree is passed must be deemed to be extinguished. The only debt, therefore, that subsists and that can be the subject-matter of an application to the Board under S. 8 of the Bengal Agricultural Debtors' Act is the decree in the rent suit and not the pre-existing liability on account of the arrears of rent for which the decree is passed. This debt is obviously one which is incurred on the date on which the decree is passed. (*Biswas, J.*) MONOMOHINI *v.* JABEDULLA MIA. 51 C.W.N. 927.

———**Ss. 2 (8), 20 and 34 (before amendment of 1940)**—*Decree of Presidency Small Cause Court—If debt—Executing Court staying its execution on notice from Board—Decree-holder submitting to jurisdiction of Board—If can subsequently contend that liability under decree is not debt.*

Prior to the amendment of 1940, a decree of a Presidency Small Causes Court did not constitute a debt as contemplated by the Bengal Agricultural Debtors Act.

But where the executing Court stayed the execution of such a decree on receipt of a notice from the Debt Settlement Board under S. 34 of the Act, and the decree-holder thereupon submitted to the jurisdiction of the Board and obtained the benefit of an award on the footing that the liability under the decree was a debt, he is precluded from subsequently putting forward a different view as to the nature of the liability. (*Chakravartti and Ellis, JJ.*) AMULYA CHANDRA BHADURI *v.* KRISHNA BONDHU ROY. A. I. R. 1947 Cal. 463.

———**Ss. 8 and 40**—*Appeal against order of Board filed only against some of debtors—Award of Appellate Officer inconsistent with that of Board—Effect of.*

During the pendency of a proceeding before a Board some of the debtors died and their heirs were duly brought on the record. But at the time of filing an appeal against the order of the Board these heirs were not impleaded as parties to the appeal and the Appellate officer modified the decision of the Board with the result his award was inconsistent with that of the Board.

Held, that there could be only one award for each debt upon an application filed under S. 8 of the B. A. D. Act and that the order of the Appellate Officer must be set aside and that of the Board restored. (*Mookerjee and Lahiri, JJ.*) RATI KANTA BISWAS *v.* JOYNAL ABEDIN. 54 C.W.N. 260.

———**S. 8**—*Debt larger than Rs.* 5,000—*Order without prior sanction of Collector—Validity.*

If the amount of the debt exceeds Rs. 5,000, an order of the Board without obtaining the prior sanction of the Collector is without jurisdiction. (*Chakravartti, J.*) KUNJA BEHARI DUTT *v.* BHUPENDRA KUMAR BOSE. 52 C.W.N. 608.

———**Ss. 8, 33 and Rr. 146, 147 and 148**—*Scope and effect of—Jurisdiction of Board—Test to determine—Amount of debt claimed by a creditor, or amount admitted by debtor or determined by Board—Award in case of debts exceeding Rs.* 25,000—*Validity—Suit—Bar of.*

It is perfectly clear that when an application is made by a debtor to a Debt Settlement Board under S. 8 of the Bengal Agricultural Debtors Act, and the Board has to decide whether it has jurisdiction or not, having regard to the amount of the debt or debts, the only amount which can furnish the necessary test is the amount claimed by the creditor. It is true that the Board may ultimately find the actual amount due to be much lower, but that decision would be arrived at in the course of the settlement; but a decision on that matter cannot be undertaken for the purpose of deciding whether the Board has or has not jurisdiction. The jurisdiction of the tribunal has to be determined by the amount of the claim made, and if that very matter were to be decided in advance for the purpose of ascertaining whether the Board has jurisdiction, it would amount to the Board assuming jurisdiction after deciding the main question on the merits. Both the form prescribed for an application under S. 8 and the rules framed under the Act, especially rules 146, 147 and 148, make it perfectly clear that the amount which must furnish the test as to whether the Board has pecuniary jurisdiction in the matter or not is the amount of the claim of the creditor and not the amount admitted by the debtor or determined by the Board. Where the amounts of the debt mentioned by the debtor make up a total in excess of Rs. 25,000, the Board has no jurisdiction whatever to deal with the application; the award made in such a case would be invalid and would have no legal existence and cannot be a bar to the entertainment of a suit in respect of the debt by a civil Court. (*Harries, C.J. and Chakravartti, J.*) GOSTHA BEHARI DUTT v. PALARAM PAL. 4 D.L.R. (Cal.) 83=A.I.R. 1950 Cal. 102.

———**S. 8 (1) (as amended in 1942)**—*Retrospective operation.*

The amendment of S. 8 (1) of the Bengal Agricultural Debtors' Act by Bengal Act VIII of 1942 by which the words "seven years" were substituted for the words "five years" came into force on the 14th January, 1943, and was not intended to be retrospective in its operation. (*Biswas, J.*) MONOMOHINI *v.* JABEDULLA MIA. 51 C.W.N. 927.

———**S. 9 (2), Proviso**—*Settlement of debt on application by one of joint debtors—Effect on liability of others—Latter, if entitled to apply for relief under S.* 36, *Bengal Money-lenders' Act.*

The Proviso to S. 9 (2) of the Bengal Agricultural Debtors Act makes it clear that the liability of the other persons jointly liable with the applicant and who were not before the Board is not affected in any way by the settlement of the debt of the applicant. The joint liability of the others is not, therefore, affected by the proceedings before the Board except to this extent that the decree-holder is not entitled to realise more than his dues from them. That being so, they cannot take advantage of the proceeding before the Board to which they were not parties to obtain relief under S. 36 of the Bengal Money-lenders Act. 43 C.W.N. 318, rel. on. (*Shahabuddin, J.*) MAHIRUDDIN AHAMED *v.* HARIKANTA. 2 D.R. 185.

———**S. 13 (2)**—*Applicability and scope of—Decree made before application to Debt Settlement Board—Execution in Civil Court—Bar of—Order under S.* 13 (2)—*If operates to bar execution.*

S. 13 (2) of the Bengal Agricultural Debtors Act does not contain an absolute prohibition against proceeding in a Civil Court with respect to a debt which has been dealt with under S. 13 (2) by a Debt Settlement Board. All that sub-S. (2) provides is that the debt due from the debtor shall be deemed to be the amount stated in the statement of debts for the purposes of the Act and that the order of the Board shall not be questioned in any Civil Court or in any manner other than that provided in the Act. S. 13 (2), therefore, only means that the amount declared by the Board under that sub-section shall be deemed to be the amount payable by the debtor for the purposes of this Special Act and for no other purpose and what the creditor is prevented or debarred from questioning is the order that for the purposes of the Act the amount admitted by the debtor shall be deemed to be the amount really due. The prohibition does not extend beyond those limits, and is not an absolute prohibition debaring the creditor from asserting a higher right against the debtor in any circumstances. An order under S. 13 (2) is not intended to and cannot affect the execution of a decree which was passed before an application was made to the Board, if such decree is otherwise executable. When the amount of such a decree could not be, and is not, rightly included in the award made by the Board, execution of the decree by the decree-holder in the Civil Court cannot be barred by reason simply of the fact that an order under S. 13 (2) has been made. (*Harries, C.J. and Chakravartti, J.*) Promode Kumar Roy *v.* Hirendra Nath Mukherjee. 4 D.L.R. (Cal.) 68.

——S. 18—*Application by usufructuary mortgagor—Allegation of discharge of mortgage by usufruct—Application, if maintainable.*

An application to a Debt Settlement Board to deal with a usufructuary mortgage which, according to the applicant, has been discharged by the receipt of the usufruct for a period of time, is an application which the Board can deal with and must deal with. If the Board is of opinion that the mortgage has been discharged, it will order possession to be given to the debtor applicant. (*Harries, C.J.*) Golapjan Bibi *v.* Sarif Ahmad. I.L.R. (1948) 1 Cal. 542=52 C.W.N. 103=A.I.R. 1949 Cal. 127.

——S. 18—*Award by consent of parties—Board exceeding its jurisdiction—Award, if binding.*

Where an award has been made by the Board by consent of parties and pursuant to the award the creditor has accepted several instalments, the award may be treated as an award by an arbiter chosen by the parties and as such binding on them, even if the Board has exceeded its jurisdiction. 13 I.A. 134, referred to. (*Akram, C.J.*) Rahi-Muddin Sheikh *v.* Nasimaddi Sheikh. 1 D.R. 62.

——S. 18—*Jurisdiction of Board—Settlement of debt due under anomalous mortgage.*

An anomalous mortgage creates a liability, and a Board, therefore, acts within its jurisdiction in dealing with an application for the settlement of a debt due under that mortgage and making an award. (*Akram, C.J.*) Rahimuddin Sheikh *v.* Nasimaddi Sheikh. 1 D.R. 62.

——Ss. 18, 20 and 33—*Jurisdiction of Civil Court—Question if transaction created liability or debt.*

Ss. 18, 20 and 33 of the Bengal Agricultural Debtors Act proceed upon the assumption that there is an existing liability or debt in a legal sense, but in case there is no such liability at all, then there can be no question of there being any "debt" within the technical sense given to that term under S. 2 (8) of the Act; consequently the sections aforesaid will not in such a case operate as a bar to the adjudication by a civil Court of the question whether or not a transaction created a liability, or debt in the legal sense of the term, in spite of a previous decision by the Debt Settlement Board. (*Akram, C.J.*) Rahimuddin Sheikh *v.* Nasimaddi Sheikh. 1 D.R. 62.

——S. 18—Question if judgment-debt is barred by limitation—Jurisdiction of Board to decide. [*See* Q.D. 1941-1945, Vol. I, Col. 178.] Hafizuddin Mandal *v.* Mahim Chandra. 221 I.C. 397=1946 Cal. (Rul.) 32 =80 C.L.J. 157.

——Ss. 18 and 19—*Scope—Award—Validity—Award settling debt in absence of consent of creditors entitled to at least* 40 *per cent. of the debts and including amount declared under S.* 13 (2)—*Validity of.*

An award which purports to settle a debt in the absence of the concurrence of the creditors to whom at least 40 per cent. of the total amount of the applicant's debt was due, and which includes an amount declared under S. 13 (2) of the Bengal Agricultural Debtors' Act in the absence of the consent of the creditor (decree-holder) is a bad award and is invalid, as the Board has no jurisdiction to make such an award under S. 19 under the circumstances. (*Harries, C.J. and Chakravartti, J.*) Promode Kumar Roy *v.* Hirendra Nath Mukerjee. 4 D.L.R. (Cal.) 68.

——S. 18 (1)—*Scope—Application to Board mentioning only one debt and one debtor and denying liability—Competency—Order on—If void—Power of Civil Court to ignore.*

Where a debtor's application to the Debt Settlement Board mentions only one debt and a single creditor, and also states that nothing at all is due to the creditor, the application is not maintainable before the Board, and any order which the Board might pass on the application (*e.g.,* that nothing is due to creditor) is altogether void. Such an order cannot therefore be pleaded in bar of a claim by the creditor in the Civil Court in respect of his debt. (*Chakravartti, J.*) Rahim Bux Talukdar *v.* Kanaklata Choudhurani. I.L.R. (1947) 1 Cal. 13=227 I.C. 89=1946 Cal. (Rul.) 410=51 C.W.N. 151 =A.I.R. 1947 Cal. 255.

——S. 18 (1) Proviso and (4)—*Scope and effect of—Decree debt—Jurisdiction of Board—Board holding debt not existing—If binding on*

Civil Court or bars claim in Civil Court.

The proviso to S. 18 (1) of the Bengal Agricultural Debtors' Act limits the authority of the Debt Settlement Board so far as decrees of Civil Courts are concerned. Such decrees are to be conclusive evidence of the existence of the debts and of the amounts thereof, and the Board therefore cannot go behind a decree or hold that a debt mentioned in a decree did not exist at the date of the decree. Nor would it be open to the Board to go behind the decree indirectly by giving credit to payments alleged to have been made by the debtor prior to the decree, which the Civil Court had denied to the debtor. A decision by the Board in such a case that the debt evidenced by the decree did not exist clearly contravenes S. 18 (1), Proviso, and therefore the Civil Court is entitled to disregard and ignore the Board's decision in spite of S. 18 (4) of the Act. Even where the jurisdiction of the Civil Court is explicitly or impliedly excluded by a special Act, the Civil Court is always competent and has jurisdiction to examine into cases where the provisions of the special Act had not been complied with. (*Chakravartti, J.*) Rahim Bux Talukdar *v.* Kanaklata Choudhurani. I.L.R. (1947) 1 Cal. 13=51 C.W.N. 151=1946 Cal. (Rul.) 410=227 I.C. 89=A.I.R. 1947 Cal. 255.

——**S. 18 (2) and (5)**—*Scope—Omission to comply with—Effect—Reference and resort to S. 26-G, Bengal Tenancy Act—If precluded—Decision that debt ceased to exist by reason of S. 26-G, B. T. Act—If illegal.*

S. 18 of the Bengal Agricultural Debtors' Act does not enjoin that the Board shall follow the procedure laid down in sub-Ss. (2) and (5) in deciding whether a debt exists or not; omission to follow that procedure would not render its decision a nullity on the mere ground that the special procedure prescribed by the special Act had not been followed. But as a matter of fact the Board need not, in all cases, resort to an accounting in order to find that no debt exists. If the facts of case bring it, within some provision of law under which the debt must be deemed to have been extinguished, (*e.g.*, S. 26-*G* (*I*-a), Bengal Tenancy Act), the Board can straightaway decide against the existence of the debt. The Act does not exclude S. 26-*G* of the Bengal Tenancy Act; the latter Act, having been enacted by the Bengal Legislature which enacted the Agricultural Debtors' Act also, is a law made for the province of Bengal and is available to all persons and bodies within the province of Bengal, including Debt Settlement Boards. The Debt Settlement Board, though a special tribunal created by the Agricultural Debtors' Act, is not precluded from applying other laws of the country, because matters dealt with by the Act are not, in the absence of special provision, withdrawn from the general law of the land. (*Chakravartti, J.*) Mahendra Nath Sardar *v.* Kali Pada Haldar. 1946 Cal. (Rul.) 431=51 C.W.N. 140=227 I.C. 189=A.I.R. 1947 Cal. 249.

——**(as amended in 1940), S. 18 (2) and (5)**—*Scope—Omission to follow—Effect—Decision that debt has ceased to exist—If bad for non-compliance with S.* 18 (2) *and* (5).

S. 18 (4) of the Bengal Agricultural Debtors' Act contemplates two distinct things: (1) a decision as to whether a debt exists, and (2) the amount of the debt. The question of determination of the amount of a debt can only arise after the existence of the debt has been found. Sub-Ss. (2) and (5) of S. 18 expressly relate to the second matter, *i.e.*, the amount of the debt and not to the first. Neither sub-S. (2) nor sub-S. (5) requires the Board to follow any particular procedure in deciding whether a debt exists or not. Where the Board, therefore, merely decides that the debt has ceased to exist or has been extinguished, the decision is not open to challenge on the ground that the procedure prescribed by S. 18 (2) and (5) has not been followed. (*Chakravartti, J.*) Mahendra Nath Sardar *v.* Kalipada Haldar. 227 I.C. 189=1946 Cal. (Rul.) 431=51 C.W.N. 140=A.I.R. 1947 Cal. 249.

——**S. 18 (4)**—Applicability to case transferred from one Board to another—S. 39 (2)—Effect of—If controls or overrides S. 18 (2). *See* Bengal Agricultural Debtors' Act, S. 39 (2). 229 I.C. 121.

——**S. 19 (1) (c)**—*Construction and scope—Extinguishment of debt—If contemplated by—Resort to S. 26-G, B. T. Act.*

The true meaning of S. 19 (1) (*c*) of the Bengal Agricultural Debtors' Act is that it only directs that in the case of *raiyats* and *under-raiyats*, their land is not to be allowed to remain in the possession of the mortgagee for more than fifteen years, but it has nothing to do with the extinction of the debt. The section by itself does not provide for such extinction. But the Debt Settlement Board may hold the debt to have been extinguished by applying S. 26-G of the Bengal Tenancy Act in cases to which that section applies and to the extent provided for therein. (*Chakravartti, J.*) Mahendra Nath Sardar *v.* Kalipada Haldar. 227 I.C. 189=1946 Cal. (Rul.) 431=51 C.W.N. 140=A.I.R. 1947 Cal. 249.

——**S. 20 (as amended)**—Applicability—Proceedings before Board terminating before amendment. [*See* Q.D. 1941-1945, Vol. I, Col. 179.] Surendra Nath Chakrabarti *v.* Narayan Chandra. I.L.R. (1946) 1 Cal. 73=224 I.C. 80=1946 Cal. (Rul.) 204=A.I.R. 1946 Cal. 53.

——**S. 20 (as amended)**—*Applicability—Proceedings before Board terminating before amendment.*

S. 20 of the Bengal Agricultural Debtors Act, as amended by Bengal Act VIII of 1940, cannot apply to a case, where the proceedings before the Board terminated before the date of the amendment. In such a case, it is open to a Civil Court to consider whether a liability amounts to a "debt" within the meaning of the Act, 49 C.W.N. 592, foll. (*Ellis and Amin Ahmed, JJ.*) Sasadhar Palit *v.* Satya Ram. 1 D.R. 17.

——**S. 20**—*Function of Board—Application defective—Absence of proper entries in proper schedules—Jurisdiction of Civil Court.*

The Board, on an application made by a debtor for settlement of his debt, has to see whether there is a liability sufficient to confer jurisdiction and whether that liability is a debt or not within the meaning of the Act.

If an application is defective owing to the absence of a meticulous observance of proper entries in the proper schedules and yet on a broad view it is one for a settlement of debts of which the debtor has given a detailed history, the Board in entertaining the application cannot be said to have acted in contravention of the provisions of the Act and the Civil Court has, therefore, no jurisdiction to interfere. (*Ellis and Amin Ahmed, JJ.*) Abdul Majid *v.* Satish Chandra Karmakar. 1 D.R. 41.

——**S. 20 (as amended)**—*Jurisdiction of Board—Settlement of debt—Usufructuary mortgage.*

A usufructuary mortgage does not create a "debt" within the meaning of the Bengal Agricultural Debtors Act, and the Debt Settlement Board has therefore no jurisdiction to deal with an application by the mortgagor on the footing that there was such a debt in existence. If it does so, the Civil Court has jurisdiction to entertain a suit by the mortgagee for the establishment of this title. [1940 Lah. 401 (F.B.), Rel. on.] (*Ellis and Amin Ahmed, JJ.*) Sasadhar Palit *v.* Satya Ram. 1 D.R. 17.

——**S. 20 (as amended)**—*Jurisdiction of Civil Court—Decision by Board that transaction is loan and not lease.*

The Board acts within its statutory powers in deciding whether a transaction is in truth a lease or a loan on mortgage, and it is not thereafter open to the Civil Court to consider further the matter or to question or vary the decision of the Board. [48 C.W.N. 699, rel. on. 46 C.W.N. 951, dist.] (*Ormond, J.*) Abinash Chandra Biswas *v.* Mangal Biswas. 1 D.R. 20.

——**S. 20 (as amended)**—*Jurisdiction of Civil Court—Usufructuary mortgage, if creates liability—Decision of Board if such liability is "debt"—If open for investigation by Civil Court.*

Although a civil suit is maintainable regarding the question whether a transaction creates a liability or not, the question whether the liability itself amounts to a debt or not under S. 2 (8) of the Bengal Agricultural Debtors Act is solely for the Board to decide and cannot be gone into by a Civil Court in view of S. 20 of the Act.

A usufructuary mortgage creates a liability and a decision of the Board whether the liability amounts to a debt or not is not open for investigation by a Civil Court. (*Akram, C.J.*) Tasenaddin Sheikh *v.* Asiraddi Mallick. 1 D.R. 15.

——**Ss. 20 and 18**—Powers of Board—Decisions of question if transaction between parties is mortgage or sale. [*See* Q.D. 1941—1945, Vol. I, Col. 179.] Bazler Rahman *v.* Apsarddi. I.L.R. (1945) 1 Cal. 506.

——**S. 20**—*Question if transaction creates liability—Jurisdiction of Civil Court—Materials placed before Board inadmissible under Evidence Act—If may be excluded.*

A Civil Court has, no doubt, jurisdiction to determine whether or not an admitted transaction creates a liability. But it has to consider the question with reference to the materials placed before the Board which is untrammelled and unfettered by the provisions of the C. P. Code and the Evidence Act, although they may be inadmissible before the Civil Court in view of the Evidence Act. (*Akram, C.J.*) Madar Chandra Goldar *v.* Manindra Nath Goldar. 1 D.R. 149=A.I.R. 1949 Dacca 20 (2).

——**S. 20**—*Sale of land by* kabala *by defendant to plaintiff—Application to Board by defendant alleging that* kabala *was really* kot-kabala—*Allegation by him that there was arbitration between parties fixing liability on him to pay—Finding by Board that transaction was* kot-kabala *on basis of arbitration and award and other documents—Jurisdiction of Civil Court.*

The defendant sold to the plaintiff a certain land by a *kabala* and later started a case before a Debt Settlement Board alleging that the *kabala* was really a *kot-kabala,* and that there was an arbitration between the parties which fixed the liability on the defendant to pay in consideration of his getting back the disputed land. The Board held that the transaction was really a *kot-kabala* after referring to the arbitration and award and also to the *kabala* and other documents. In a suit for a declaration that the award of the Board was illegal and *ultra vires.*

Held, that according to S. 45 of the Bengal Agricultural Debtors Act, except as provided by the said Act, the Board was not bound by the law of evidence and Code of Civil Procedure, and that it was not open to the Civil Court to go into the question of arbitration once again and come to a finding as to whether there was an arbitration or not on the basis of which liability was determined by the Board and to hold that the arbitration was a myth. (*Akram, C.J. and Amin Ahmed, J.*) Ahejaddi Howladar *v.* Wajed Aly. 1 D.R. 146.

——**Ss. 20 and 34 (as amended)**—*Validity—Execution of decree of Presidency Small Causes Court by Civil Court—Notice from Board—Civil Court, if bound to stay execution—Enquiry by it whether liability under decree is debt—If necessary—Presidency Small Causes Courts Act, S. 31—Government of India Act, S.* 107 (2).

Between S. 20 of the Bengal Agricultural Debtors Act, as amended and S. 34 of the same Act as substituted by Bengal Act VIII of 1940 and S. 31 of the Presidency Small Causes Courts Act, there is a repugnancy and the said two sections of the Bengal Act are, to the extent of such repugnancy void, for the reason that assent of the Governor-General to the amending Act was not obtained. The two sections, so far as they bear on execution of decrees of the Presidency Small Causes Court by a Civil Court, are invalid.

It follows that a notice received from a Board under S. 34 by a Civil Court executing on transfer a decree paassed by a Presidency Small Causes Court, is a nullity, and the executing Court is not bound to stay the proceedings on its receipt. The notice being *per se* a nullity, the executing Court is entitled to disregard it on that ground alone, and it is not necessary for it to enquire whether the liability under the decree is or is not a "debt" as defined in S. 2 (8) of the Bengal Agricultural Debtors' Act. (*Biswas, Blank and Chakravartti, JJ.*) Mati Lal Saha *v.* Chandra Kanta Sarkar. I.L.R. (1947) 1 Cal. 537=229 I.C. 320=1947 Cal. (Rul.) 139=51 C.W.N. 1=A.I.R. 1947 Cal. 1 (S.B.).

———**Ss. 20 and 34**—*Wrong decision by Board on question of law—Power of civil Court to call in question.*

As a result of the amendment of S. 20 of the Bengal Agricultural Debtors Act, the Board has now been given exclusive jurisdiction to decide whether a liability is a debt or not. The Civil Court receiving notice under S. 34 of the Act cannot call the decision of the Board in question even though it is wrong on a question of law. (*Henderson, J.*) Azaharuddin Meah *v.* Abdul Huq. 50 C.W.N. 165.

———**S. 25 (3)**—*Scope and effect of—Order under S. 13 (2)—Award based on but not in accordance therewith—If binding and valid—Bar of execution in Civil Court.*

What is effective under the Bengal Agricultural Debtors Act is the award made under S. 19, which under S. 25 (3) debars the creditor from proceeding to pursue his remedies in a Civil Court. The Civil Court, when it finds a discrepancy between the order settling a debt under S. 13 (2) and an award drawn up in purported accordance with that order, cannot say that the order would prevail rather than the award. It has to take the award as it is, and if the award is not an award in accordance with the order upon which it purports to be based, is not a valid award at all, which will be binding on the decree-holder (creditor). Such an award, being bad, constitutes no bar to the execution of the decree in the Civil Court by the decree-holder. (*Harries, C.J. and Chakravartti, J.*) Promode Kumar Roy *v.* Hirendra Nath Mukherjee. 4 D.L.R. (Cal.) 68.

———**S. 26 (a)**—*Decretal debt included in award—Recovery by civil suit—If barred.*

S. 26 (*a*) of the Bengal Agricultural Debtors' Act permits the inclusion in a suit for recovery of arrears of rent of the land referred to therein of a claim for arrears of rent in respect of which decrees had been obtained and which had been subsequently included in an award. (*Das, J.*) Bibhuti Bhusan Das *v.* Bijoy Chandra Saha. 51 C.W.N. 931=A.I.R. 1948 Cal. 34.

———**Ss. 33 and 35**—*Applicability—"Award"—Decision under S. 18 (1)—Application mentioning single creditor and denying liability for debt—Order that debt did not exist—If bar to proceedings in Civil Court.*

Ss. 33 and 35 of the Bengal Agricultural Debtors' Act only prevent a Civil Court from acting in the face of an award made by a Debt Settlement Board. But the Act confers no power on the Board to make a declaration in the case of a single debt that nothing is payable in respect of it nor to make an "award" in respect of a debt which it holds not to be due. And a decision or an order of this type does not constitute a bar to the prosecution of any proceedings in a Civil Court. (*Chakravartti, J.*) Rahim Bux Talukdar *v.* Kanaklata Choudhurani. I. L. R. (1947) 1 Cal. 13=227 I.C. 89=1946 Cal. (Rul.) 410=51 C.W.N. 151=A.I.R. 1947 Cal. 255.

———**Ss. 33 and 39**—*Powers of transfer—Transfer by Collector to Board having no territorial jurisdiction—Award by such Board—Validity of—If bar to civil suit pending in Civil Court.*

The Bengal Agricultural Debtors Act does not by itself give the Collector any power of transfer. S. 39 of the Act, read with the rules framed under the Act, prescribes the limits of the Collector's power to make an order of transfer; and the Collector would have power to transfer only in cases where he has been authorised by the Provincial Government by the Rules framed, to do so. The Collector has therefore no power to transfer an application to a settlement Board which has no territorial jurisdiction to deal with the same, there being no specific rule authorising the Collector to make a transfer to a Board having no territorial jurisdiction over the parties to the proceedings. An award made by a Board which has no territorial jurisdiction on an application transferred to it is invalid, and consequently the civil Court is not debarred from proceeding with a suit before it in respect of the debt of the debtor-applicant, S. 33 of the Act not being applicable to the case. There is no warrant for the view that the proceedings before the Board are still pending, though the award is out of the way as being invalid. (*Harries, C.J. and Chakravartti, J.*) Gostha Behari Dutt *v.* Palaram Pal. 4 D.L.R. (Cal.) 83=A.I.R. 1950 Cal. 102.

———**Ss. 33 and 34**—Sale held in violation of—If nullity—Remedy of judgment-debtor. [*See* Q.D. 1941—1945, Vol. I, Col. 180.] Kishoreganj Co-operative Town Bank, Ltd. *v.* Rukmini Kanta Bhattacharjya. I.L.R. (1944) 2 Cal. 509.

———**S. 33 (a) and (b)**—*Applicability—Application to Debt Settlement Board—Debt not mentioned in columns 8 and 9, but referred to only in Sch. B—If included in application—Award—If includes such debt—Suit in respect of debt—If affected.*

Where a mortgagor-debtor omits to ask for an adjudication on a particular debt due by him and relegates all reference made by him to such debt to Sch. B, he is not entitled to say that his application included that debt or that it is covered by the award which is subsequently made. In such a case it must be held that the debt is not included in the application made under S. 8 of the Bengal Agricultural Debtors Act, and that there was no amount payable with regard to it under the award; it must therefore follow that neither S. 33 (*a*) nor S. 33 (*b*) of the Act would apply. (*Harries, C.J. and Chakravartti, J.*) Gostha Behari Dutt *v.* Palaram Pal. 4 D.L.R. (Cal.) 83=A.I.R. 1950 Cal. 102.

———**S. 34**—Jurisdiction of Civil Court—Question as to jurisdiction of Board to entertain application—Power to decide. [*See* Q.D. 1941—1945, Vol. I, Col. 184.] Dinanand Singh *v.* Nazimannessa. I.L.R. (1945) 2 Cal. 274=A.I.R. 1949 Cal. 246.

——**S. 34**—*Applicability—Suit for declaration of title—Whether may be stayed.*

S. 34 of the Bengal Agricultural Debtors' Act has no application to a suit which does not relate to a debt but is one for a declaration of title to property, and such a suit cannot, therefore, be stayed under the section. (*Edgley, J.*) Majeda Khatun *v.* Nurul Huq. A.I.R. 1947 Cal. 389 (2).

——**S. 34**—*Notice for stay—Subsequent dismissal of judgment-debtor's application by Board—Effect.*

A notice for stay issued by a Board under S. 34 of the Bengal Agricultural Debtors' Act, in connection with a judgment-debtor's application ceases to be operative with the dismissal of that application by it, although an application for review of the order of dismissal is filed before the Board. There is no provision which empowers a Board to issue notice for stay of execution proceedings under that section in a case in which an application for review has been filed before it. It follows, therefore, that after the dismissal of the application by the Board, the executing Court has no jurisdiction to give effect to any order for stay which purports to have been issued by the Board in connection with the judgment-debtor's application. (*Edgley and Clough, JJ.*) Appalnarsiah *v.* Venkata Rao. A.I.R. 1947 Cal. 350.

——**Ss. 34 and 35**—*Notice from Board—Proceedings after sale stayed by executing Court—Application before Board subsequently dismissed for default but later restored—Order confirming sale during interval—Validity.*

On receipt of a notice from the Board under S. 34 of the Bengal Agricultural Debtors Act the executing Court which had already held the sale in execution of a decree stayed further proceedings with the result that the sale remained unconfirmed. The application before the Board was after sometime dismissed by it for default and the dismissal was communicated to the executing Court which thereupon confirmed the sale. Subsequently an application for review before the Board was allowed and the original application was restored.

Held, that neither S. 34 nor S. 35 of the Bengal Agricultural Debtors Act affected the validity of the order confirming the sale passed after the application before the Board had been dismissed and before it was restored. Assuming that on the restoration of a proceeding, dismissed for default, all orders made before the dismissal were revived, the revival could not have the effect of making interlocutory orders existent during the interval when the proceeding itself was in fact non-existent. It might be that after the proceeding was restored, it was not necessary to pass the interlocutory orders, made before the dismissal, over again, but they would revive automatically and be thenceforward in force. But orders which expired with the dismissal of the proceeding could not be brought into operation for and during the period that the dismissal lasted, by restoring the proceeding at a future date. (*Chakravartti, J.*) Nirmalabala Debi *v.* Provat Kumar Basu. 52 C.W.N. 659.

——**S. 34**—*Notice impugned as* ultra vires *of Board—Duty of Court.*

A notice under S. 34 of the Bengal Agricultural Debtors' Act operates almost automatically as a stay of the suit or proceeding pending in the Civil Court, and the Civil Court has apparently no say in the matter, but this presupposes that in giving the notice the Debt Settlement Board acts with jurisdiction. But where a notice is impugned on the ground that it is without jurisdiction and *ultra vires* of the Board, it is not only open to but the duty of, the Civil Court to go into the matter, and if the Civil Court, is of opinion that the action of the Board was *ultra vires,* it would be justified in disregarding the notice. (*Biswas, J.*) Monomohini *v.* Jabedulla Meia. 51 C.W.N. 927.

——**S. 34**—*Notice issued before its repeal by Act XVI of 1946—Effect of—Bengal Agri. Debtors Act XVI of 1946, S. 4.*

By reason of S. 4 of the Bengal Act XVI of 1946, the effect or consequences of a notice issued under S. 34 of the Bengal Agricultural Debtors Act is not affected by the subsequent repeal of S. 34 by the Bengal Act XVI of 1946. (*Mitter, A.C.J. and Akram, J.*) Kalidas Chakrabarti *v.* Kalipada Mandal. I.L.R. (1948) 1 Cal. 215.

——**S. 34**—*Notice of Board not received by Civil Court—Civil Court, if bound to stay proceedings.*

The expression "give notice" in S. 34 of the Bengal Agricultural Debtors Act implies not only the issue of the notice by the Board but also receipt of it by the Civil Court. The Civil Court is, therefore, not bound to stay the proceedings before it unless the notice issued by the Board reaches it. A.I.R. 1938 Cal. 869, foll. (*Shahabuddin, J.*) Mahiruddin Ahamed *v.* Harikanta. 2 D.R. 185.

——**S. 34**—*Notice under—Validity—Power of executing Court to determine—Sale held by it in spite of notice—Whether valid.*

A Civil Court before which an application for execution of a decree is pending has jurisdiction to determine whether a notice issued to it under S. 34 of the Bengal Agricultural Debtors Act is valid and to ignore it if it is of opinion that it is not so. If the Court erroneously decides the question, it is for the appropriate, appellate or revisional authority to correct the decision: the order or decision cannot be treated as or held to be a nullity in an independent proceeding. Accordingly, an order of an executing Court directing an execution case to proceed in spite of a notice under S. 34 of the Act is good until it is set aside. If it is not set aside the sale will stand and cannot be set aside or treated as a nullity in proceedings under S. 47, C. P. Code. If the judgment-debtor desires to challenge the order directing execution proceedings to continue he must challenge that particular order by appropriate appellate or revisional proceedings. 47 C.W.N. 796 and 891, foll.; 49 C.W.N. 578, comm. on.; 48 C.W.N. 606, referred to. (*Harries, C.J. and Sen, J.*) Subasini Debi *v.* Adhar Chandra. A.I.R. 1949 Cal. 105.

———**S. 34**—*Procedure—Appeal stayed on notice by Debt Settlement Board—Subsequent order by Board that debt was extinguished—Communication to Court—Proper order.*

Where an appeal has been stayed on a notice issued by the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act, and subsequently the Board decide that the debt which is the subject-matter of the appeal has become extinguished and communicates the decision to the Court the proper way of disposing of the appeal is not to dismiss it but to record an order in terms of S. 34 that the appeal has abated. (*Chakravartti, J.*) Mahendra Nath Sardar *v.* Kali Pada Haldar. 227 I.C. 189=1946 Cal. (Rul.) 431=51 C.W.N. 140=A.I.R. 1947 Cal. 249.

———**S. 34 (Repeal by Act XVI of 1946)**—*Scope and effect—Notice under S. 34 of the Act as amended in* 1940—*Order of stay—Refusal to vacate—Appeal—Repeal of Amending Act of* 1940 *pending appeal by enactment of Act XVI of* 1946—*Effect on stay.*

The repeal of S. 34 of the Bengal Agricultural Debtors Act, as amended in 1940, by the Amending Act, 1946, did not have the effect of cancelling altogether the notice issued by the Debt Settlement Board under the repealed section or the stay which ensued on that notice. Notice having issued under S. 34, when it was in force, S. 4 of the Amending Act XVI of 1946, which was a saving clause, had the effect of continuing the stay of execution which ensued as the result of the notice issued under S. 34, notwithstanding its repeal. Hence execution could not proceed until the final termination of the proceedings in the Debt Settlement Board, by the dismissal of the debtor's application or by the inclusion of the debt in an award of the Board. (*Mitter and Mahomed Akram, JJ.*) Kalidas Mondal *v.* Kalipada Mondal. 2 D.L.R. 40=52 C.W.N. 371.

———**Ss. 34, 35 and 39**—*Stay of execution proceeding—Duty of Civil Court—Board's notice to that Court after transfer of case from Board.*

Under S. 35, Beng. Agri. Debtors Act, the civil Court is bound to stay proceedings in execution of a decree as soon as it is apprised of the fact that the debt of the decree is the subject-matter of an application before a Debt Settlement Board.

A notice issued by a Board under S. 34 of the Act to a civil Court cannot be treated as a nullity merely on the ground that on the date of the notice the Sub-Divisional Officer had passed an order under S. 39 of the Act transferring the case from that Board to another Board. No doubt there is a serious irregularity relating to it, but it can at least be taken as a piece of information to the Court sufficient to oblige it under S. 35 of the Act to stay further proceedings in execution. I.L.R. (1944) 1 Cal. 312, Dist. 44 C.W.N. 1125, referred to. (*Akram, J.*) Haridas Parya *v.* Jyotish Chandra Pal. I. L. R. (1948) 1 Cal. 135.

———**Ss. 34 and 20**—Validity—Execution of decree of Presidency Small Causes Court by Civil Court—Notice from Board—Civil Court, if bound to stay execution—Enquiry by it whether liability under decree is debt—If necessary. *See* Bengal Agricultural Debtors' Act, Ss. 20 and 34. 51 C.W.N. 1 (S.B.).

———**S. 34, Expl.**—Application under O. 21, R. 90, C. P. Code—If execution proceeding. [*See* Q.D. 1941—1945, Vol. I, Col. 191.] Radha Benodine Debi *v.* Gajanchandra. 221 I.C. 313=1946 Cal. (Rul.) 33.

———**S. 35**—*Award by Board in respect of decretal amount declared void in title suit—Application before Board—If deemed to be pending.*

If in a title suit the award of the Board in respect of a decretal amount included in the judgment-debtor's application is declared to be void, the application before the Board must be deemed to be still pending, and S. 35 of the Bengal Agricultural Debtors Act is a bar to an application for execution of the decree. (*Henderson, J.*) Basiruddin Ahmad Chaudhuri *v.* Noakhali Loan Office, Ltd. I.L.R. (1946) 1 Cal. 373.

———**S. 35**—*Confirmation of sale while application before Board pending—Validity—No intimation given to executing Court.*

Where neither a notice under S. 34 of the Bengal Agricultural Debtors Act was served, nor any intimation given to the executing Court apprising the Court of the pendency of an application before the Debt Settlement Board, the proceedings confirming the sale cannot be said to be invalid or without jurisdiction and treated as a nullity. [44 C.W.N. 1125, ref. to.] (*Akram, C.J.*) Rash Mohan Choudhury *v.* Nabin Chandra Pal. 1 D.R. 143.

———**S. 35**—*Non-compliance with section—Sale, if nullity.*

If in the case of a decree partly governed by S. 35 (*i*) and partly by S. 35 (*ii*) of the Bengal Agricultural Debtors Act the provisions of that section have not been complied with, the execution sale is without jurisdiction and therefore a nullity. (*Lodge, J.*) Dwijendra Kumar Roy *v.* Ram Ranjan Hati. 51 C.W.N. 255.

———**Ss. 35 (ii) and 4**—*Board ceasing to exist—Notice to Collector—If necessary.*

If the notice required by S. 35 (*ii*) of the Bengal Agricultural Debtors Act could not be given to the Board which has made the award by reason of its having ceased to exist, the notice should be given to the Collector in view of the provisions of S. 4 of the Act. (*Lodge, J.*) Dwijendra Kumar Roy *v.* Ram Ranjan Hati. 51 C.W.N. 255.

———**S. 37 (2)**—*Application against decree-holder filed in time—Tenants added as parties beyond time—Relief against latter—If may be granted.*

Where an application by the judgment-debtor under S. 37 (2) of the Bengal Agricultural Debtors Act is filed against the decree-holder in time but the tenants with whom he had settled the land are added as parties beyond time, no order can be passed against the latter as the relief against him is barred by limitation. (*Harries, C.

J.) Basanta Kumar Roy *v.* Taheraddi Mondol. 82 C.L.J. 192.

———S. 37-A—*Applicability and scope.*

The terms of S. 37-A of the Bengal Agricultural Debtors Act are plain and unqualified and full effect must be given to them, as they stood. The section cannot be read as limited to cases where the sole purchaser at the sale in execution was the decree-holder and the sale proceeds were exactly sufficient to satisfy the decretal amount. It covers a case where certain properties were purchased by a third party at the same sale and the sale proceeds were either more or less than the decretal amount. (*Biswas and Chakravarthi, JJ.*) Madaripur Commercial Bank, Ltd. *v.* Lal Mohan Saha. I.L.R. (1946) 2 Cal. 191=225 I.C. 239=50 C.W.N. 809=A.I.R. 1947 Cal. 127=81 C.L.J. 365.

———S. 37-A—*Applicability—Auction-purchaser claiming title otherwise than under sale.*

S. 37-A of the Bengal Agricultural Debtors Act can only apply to cases where the sale has given the auction-purchaser a title to the property. If the sale has been given a go by and the auction-purchaser has another root of title other than the same, the section can have no application. (*Harries, C.J.*) Paniruddin Amin *v.* Mantazuddin Bepari. 52 C.W.N. 102.

———S. 37-A—*Applicability—Conditions of—Right of judgment-debtor to restoration of possession.*

Before a judgment-debtor can invoke the aid of S. 37-A of the Bengal Agricultural Debtors Act, to be restored to possession, three conditions have to be fulfilled: (*i*) the holding must have been purchased by the decree-holder after 12th August, 1935; (*ii*) the purchaser must be in possession on or after 12th December, 1935; and (*iii*) if he was not in possession on or after such date, the person in possession must be one deriving title from the judgment-debtor, *i.e.*, must be a privy of the decree-holder. If the person in possession is not one deriving title from the judgment-debtor, *i.e.*, if he is not a privy of the decree-holder purchaser, the judgment-debtor cannot claim restoration of possession under S. 37-A. (*R. C. Mitter, J.*) Hem Chandra *v.* Jugal Chandra. 3 D.L.R. (Cal.) 70.

———S. 37-A—*Applicability—Decree-holder in possession not as execution purchaser but as purchaser of equity of redemption—Restoration of possession—If can be ordered.*

Under S. 37-A of Bengal Agricultural Debtors Act, restoration of possession cannot be ordered if the decree-holder is not in possession of the property in his capacity as an execution-purchaser. If he is in possession not in that capacity, but in the capacity of a purchaser of the equity of redemption, who has subsequently redeemed the mortgage, the section has no application. · (*Harries, C.J. and Chakravartti, J.*) Niranjan Midya *v.* Ballav Chandra De. A.I.R. 1949 Cal. 310.

———S. 37-A—*Applicability—No debt outstanding at time of award.*

S. 37-A of the Bengal Agricultural Debtors' Act can have no application if the applicant is not found to be a debtor at the time of the award, (*i.e.*) if no liability is found to exist at that time. (*Akram, J.*) Bonamali Pramanik *v.* Radhagobinda Ghosh. A.I.R. 1947 Cal. 388.

———S. 37-A (1) (c)—*Applicability—Portion of property purchased by decree-holder leased to judgment-debtor—Decree-holder in possession of remaining portion—Judgment-debtor's right to relief.*

S. 37-A (1) (*c*) of the Bengal Agricultural Debtors' Act has no application where the decree-holder who purchased the property as one item and in one lot, has leased a portion of it to the judgment-debtor retaining the remaining portion in his own possession. In such a case, the judgment-debtor is not entitled under the section to recover the whole of the property or that portion of it which is still in the possession of the decree-holder. (*Edgley and Clough, JJ.*) Ahammad Mia *v.* Gunu Mia. 51 C.W.N. 922=A.I.R. 1948 Cal. 105.

———S. 37-A—*Applicability—Property lost by judgment-debtor as result of compromise subsequent to execution sale.*

The intention of the Legislature in enacting S. 37-A of the Bengal Agricultural Debtors Act is to provide that in certain circumstances a debtor should be entitled to recover his land provided that that land had been lost to him by reason of a sale in execution of a Civil Court decree. Where the immediate cause of the loss of the property to the debtor is not the Civil Court sale but a compromise subsequently effected between him and the decree-holder and by reason of this compromise the decree-holder obtained his title to the property, the section can have no application. (*Edgley and Clough, JJ.*) Banowari Lal Ray Chaudhuri *v.* Moyenuddin Pramanik. I.L.R. (1947) 1 Cal. 500.

———S. 37-A—*Applicability—Sale in execution of award under Co-operative Societies Act.*

An application by a debtor for restoration of possession under S. 37-A of the Bengal Agricultural Debtors Act is not maintainable if the creditor had purchased the property in execution of an award made under the Co-operative Societies Act. Such an award cannot be taken to be "a decree of a civil Court" although under the provisions of R. 22 (7) of the Rules framed under the Co-operative Societies Act it can be executed in the same manner as decrees of civil Courts. (*Mitter and Roxburgh, JJ.*) Bengal Co-operative Silk Union, Ltd. *v.* Sasadar Dalal. 4 D.L.R. (Cal.) 136=A.I.R. 1949 Cal. 616=53 C.W.N. 401.

———S. 37-A—*Application against idol represented by deceased shebait filed within time—Application for substitution of new shebait made beyond time—Application, if time barred.*

An application was made by a debtor under S. 37-A of the Bengal Agricultural Debtors' (Amendment) Act against an idol represented by a deceased shebait within one year of the date upon which the Act came into force. Later an application was made to amend the petition under S. 37-A by substituting the name of the then shebait, in place of the name of the deceased shebait. This application to amend was made more than a year after the Amending Act came into force.

Held, that the application was barred by limitation. The application asking for amendment brought into being for the first time an effective application, as there could be no application against the idol unrepresented. That being so, the application to amend would have to be within limitation and as it was not, it ought to be rejected. (*Harries, C.J.*) Brojo Kishore De *v.* Krishna Das. A.I.R. 1947 Cal. 389 (1).

———S. 37-A—*Application by debtor—Maintainability—Decree-holder purchaser leasing out portion of land to judgment-debtor.*

An application by a judgment-debtor under S. 37-A of the Bengal Agricultural Debtors Act is not maintainable in a case where the decree-holder after his purchase obtained delivery of possession and thereafter let out a portion of the land on lease to the judgment-debtor. [51 C. W. N. 922, ref. to.] (*Akram, C.J.*) Surat Mridha *v.* Kunja Behary. 1 D.R. 69.

———S. 37-A—*Application by debtor under—Maintainability—Decree-holder purchasing property in another's name and himself in possession on material date—Question of benami—If may be gone into—Award against decree-holder—If binds auction-purchaser.*

An application by the debtor for relief under S. 37-A of the Bengal Agricultural Debtors Act would lie in a case where the decree-holder has purchased the property in the name of another person but himself was in possession of the auction-purchased property as auction-purchaser on the material date, and the Debt Settlement Board can grant relief to the debtor though the relief is to be granted against the decree-holder merely and the auction-purchaser would not be in any way affected by this decision. In such cases, the question for consideration would be not merely whether the decree-holder was in possession on the material date, but whether or not he was in possession as purchaser of the property at the execution sale, even though the ostensible purchaser was somebody else, and to determine the character of possession, the question of benami may be gone into though only incidentally. The award made in such cases would not bind the auction-purchaser, and it would be open to him to set up his title in any appropriate proceeding that might eventually be started. (*Mukherjea and Das, JJ.*) Tara Prasanna Choudhury *v.* Adwaita Charan. I.L.R. (1949) 1 Cal. 118= A.I.R. 1948 Cal. 329.

———S. 37-A—*Application by heirs of deceased applicant—Competency—Limitation.*

The heirs of a deceased applicant for pre-emption may come in and make an application under S. 37-A, Bengal Agricultural Debtors Act, on their own account, although it may not be by way of substitution. An application by the heirs of the original applicant to continue the proceeding on the ground that the interest of the deceased applicant has devolved on them need not be made within one year from 18th June, 1942, or even within one year from the date of the death of the original applicant. (*Akram, C.J.*) Sadat Ali *v.* Hasem Ali. 2 D.R. 131.

———S. 37-A—*Application by insolvent—Maintainability.*

An application under S. 37-A of the Bengal Agricultural Debtors Act cannot be filed by a person who is an adjudged insolvent on that date although he is later discharged. (*Harries, C.J.*) Yakub Ali *v.* Ram Gobind Hazra. 52 C.W.N. 100.

———S. 37-A—*Application filed within time—Addition of interested parties after period of limitation and before final order—Application, if maintainable.*

Although it is desirable that all persons interested should be given notice of the application under S. 37-A of the B. A. D. Act before final orders are passed, there is nothing in the section which requires that in the original application all necessary parties shall be impleaded and that their names shall appear on the record within the one year specified in sub-S. (2). An application filed within the period of limitation prescribed is therefore maintainable, although the persons found to be proper parties are added subsequently before any final order is passed by the Debt Settlement Board. (*Lodge, J.*) Manindra Nath Panja *v.* Chandra Kanta Mandal. I.L.R. (1948) 1 Cal. 253.

———S. 37-A and R. 77-BB (2)—*Application filed within time containing serious mistakes—Mistakes corrected beyond time—Application, if barred.*

An application under S. 37-A of the Bengal Agricultural Debtors Act was filed within one year after the coming into force of the Amendment Act of 1942. In that application the date of sale and the date of delivery of possession were not given, and the number of the execution case, the khatian number of the property and its rental and the area of the land were wrongly given. The mistakes were corrected on the call of the Board by another application filed beyond one year of the coming into force of the Amendment Act. The question was whether the corrections to the application constituted a new application or merely completed the original application.

Held, that although the mistakes and omissions in the first application were of great seriousness, there was some substance remaining in the application in as much as the name of the Court ordering the sale, the names and the addresses of the decree-holder, occupiers of the land at the time of sale and of the landlord were correctly given; that the additional information supplied at the call of the Board was within the wide terms of R. 77-BB (2) and that there was no limitation or restriction of time within which the Board was competent to call for additional information. (*Blank, J.*) Tahiman Bibi *v.* Midnapore Zamindari Co. A.I.R. 1948 Cal. 332.

———S. 37-A (1) (b) (i) and (iii)—*Application for relief—Maintainability—Conditions.*

An application for relief under S. 37-A, B. A. D. (Amendment) Act, 1940, is maintainable if any of the conditions contained in S. 37-A (1) (*b*) (*i*) to (*iii*) are complied with.

The applicant under S. 37-A in order to get the benefit of S. 37-A (1) (*b*) (*iii*) must show that the case was of a debt for arrears of rent in respect of which the applicant was liable jointly with some other persons. The words "any other person" clearly mean some person other than the petitioner or petitioners. (*Sen and Chunder, JJ.*) Jatindra Nath Patra *v.* Bhutnath Patra. A.I.R. 1950 Cal. 531=5 D.L.R. (Cal.) 123.

———**S. 37-A (2)**—*Application making certificate-holders parties filed within time—Addition of alleged lessees after expiry of limitation—If attracts bar of limitation.*

In order that an application under S. 37-A of the B. A. D. Act may be an effective application all that is necessary is to mention the names of the decree-holder and the landlord and the mortgagees who may come within S. 37-A (4) of the Act. Where, therefore, an application making the certificate-holders parties is filed within time, the addition of the alleged lessees at a date beyond the period mentioned in S. 37-A (2) of the Act does not attract the bar of limitation. (*Das, J.*) Kunja Behari Barman *v.* Mritunjoy Prosad Roy. A.I.R. 1950 Cal. 54.

———**S. 37-A**—*Construction—"Date of sale"—Date of actual sale or date of confirmation—"Has been sold"—Interpretation of.*

The words "when any property has been sold" in S. 37-A, Bengal Agricultural Debtors Act, refer not to the confirmation of the sale already held, but to the acceptance of the highest bid at the auction. The property is sold on the date on which the hammer falls and not on the date on which the sale is confirmed by the Court. [1947 All. 171; 1931 Mad. 511, considered. 5 C.W.N. 776, rel. on.] (*Amarendra Nath Sen, J.*) Girija Bhusan Sinha *v.* Anandamoyee Devi. 4 D.L.R. (Cal.) 203.

———**S. 37-A**—*Costs of delivery of possession—Sum spent by decree-holder purchaser in redeeming usufructuary mortgage.*

It cannot be said that the money spent by the decree-holder purchaser in purchasing the right, title and interest of a usufructuary mortgagee is cost of delivery of possession within the meaning of S. 37-A of the Bengal Agricultural Debtors Act; neither can it be said that the redemption of the property is an improvement. (*Harries, C.J. and Chakravartti, J.*) Niranjan Midya *v.* Ballav Chandra De. A.I.R. 1949 Cal. 310.

———**S. 37-A (5)**—"Debt"—Meaning of. *See* Bengal Agricultural Debtors Rules, Rr. 145 and 146. 54 C.W.N. 586.

———**S. 37-A**—*Debt discharged from usufruct of property—Restoration of possession—If may be ordered.*

Upon a true construction of S. 37-A of the Bengal Agricultural Debtors Act there is nothing to prevent the Court making an award as to the restoration of possession when it finds that the decree-holder has recovered all that was due to him by possession of the property purchased by auction in execution of the decree. (*Harries, C.J. and Blank, J.*) Sukhendu Bikash Banerjee *v.* Srish Chandra Ghose. 52 C. W. N. 612=A.I.R. 1949 Cal. 91.

———**S. 37-A (3)**—"Entertain"—Meaning of—Application under Bengal Money-Lenders Act dismissed on ground that no suit or proceeding was pending on or after 1st January, 1939—If "entertained" by Court. [*See* Q.D. 1941—1945, Vol. I, Col. 192.] Nakul Chandra Ghose *v.* Shyama Pada Ghose. 221 I.C. 429=1946 Cal. (Rul.) 37.

———**S. 37-A**—*"Immoveable property"—If includes Zamindari property.*

The words "any immovable property" in S. 37-A (1) of the Bengal Agricultural Debtors Act, include Zamindari property, and an order for restoration of possession of such property can, therefore, be made under that section, if the conditions mentioned in Cls. (*a*), (*b*) and (*c*) are fulfilled. (*Mukherjea and Das, JJ.*) Bangsidhar Pal *v.* Satyendranath Ray. I.L.R. (1949) 1 Cal. 58.

———**S. 37-A**—*"Immovable property"—Whether includes equity of redemption.*

Although the term "immovable property," generally speaking, would include an equity of redemption as respects immovable property, since S. 37-A of the Bengal Agricultural Debtors Act contemplates restoration of possession, in using the term "immovable property" the section has in view only property of a corporeal character. A sale of equity of redemption is, therefore, not a sale of any immovable property within the meaning of the section and accordingly, the debtor in such a case is excluded from the benefit of the section. (*Harries, C.J. and Chakravartti, J.*) Niranjan Midya *v.* Ballav Chandra De. A.I.R. 1949 Cal. 310.

———**S. 37-A**—*Insolvency proceedings against debtors—If a bar to their seeking relief.*

The institution of the insolvency proceedings against the judgment-debtors does not operate as a bar to their seeking relief under S. 37-A of the Bengal Agricultural Debtors' Act provided all the conditions specified in that section are fulfilled. (*Mukherjea and Sharpe, JJ.*) Harinarayan Sen *v.* Aswini Kumar. 50 C.W.N. 469.

———**S. 37-A (1) (c) (iii)**—*Lease under which rent is payable annually—If for valuable consideration.*

A lease under which a rent is payable annually is a lease for valuable consideration under S. 37-A (1) (*c*) (*iii*) of the Bengal Agricultural Debtors' Act, although no *selami* is paid. (*Harries, C.J.*) Rajendra Nath Manna *v.* Jogjiban Hansda. 51 C.W.N. 767=A.I.R. 1947 Cal. 440.

———**S. 37-A**—*Parties to proceeding—Auction-purchaser, if necessary party.*

Besides the applicant, the only parties whose presence is necessary in a proceeding under S. 37-A of the Bengal Agricultural Debtors Act, are the decree-holder, the landlord and the mortgagee, if there is any subsisting mortgage upon the property. This is clear from sub-S. (4) of S. 37-A of the Act, as well as the rules framed thereunder. The auction-purchaser *qua* auction-purchaser is neither a proper nor a necessary party to the proceeding, and obviously any question of title as between him and the decree-holder is outside the purview of the section. (*Mukherjea and*

Das, JJ.) Tara Prasanna Choudhury *v.* Adwaitacharan. I.L.R. (1949) 1 Cal. 118=A. I.R. 1948 Cal. 329.

——**S. 37-A**—*Relief under—Right of debtor—Nothing found due to decree-holder.*

As soon as the conditions specified in S. 37-A (1), Bengal Agricultural Debtors Act, are fulfilled, the debtor is entitled to the relief provided for in the section by way of restoration of the properties which were sold in execution of a decree or of a certificate for debt. In framing sub-S. (5), the legislature seems to have assumed that something must have been due to the decree-holder from the debtor on account of the decree, but it cannot be held that, if nothing is found due as a result of the calculation made under sub-S. (4), the Board becomes *functus officio,* and the entire proceeding must be deemed to have been initiated without jurisdiction and must be dismissed. The reasonable construction to put upon sub-S. (5) is to hold that the direction to make payment could be made and should be made when any liability is found to exist as a result of the enquiry made by the Board. If nothing is found to be due, then it is not necessary that there should be any direction to make any payment and the award will simply declare that nothing is due by the debtor to the decree-holder, and consequently no payment has got to be made. A.I.R. 1947 Cal. 388, dissappr. (*Mukherjea and Das, JJ.*) Kalipada Mandal *v.* Bimal Chandra Singha. I.L.R. (1949) 1 Cal. 123.

——**S. 37-A**—*Right to apply—Fractional co-sharer of holding—Restoration of entire holding—Scheme of Act.*

Under S. 37-A of the Bengal Agricultural Debtors Act, a fractional co-sharer of an agricultural holding sold in execution of a rent decree can apply for relief and have the sale of the entire holding set aside if he fulfils the conditions prescribed in S. 37-A (1), and in that event the entire holding sold must be restored to his possession. Under S. 37-A (8) when a copy of the award is forwarded to the civil Court there is a mandatory provision for the setting aside of the sale. The Civil Court shall order the sale to be set aside. The scheme of S. 37-A is that the applicant will have to take upon himself the entire burden of the debt although he may be one of the judgment-debtors or a fractional co-sharer. Under S. 37-A (5), the Board is enjoined to make an award whereby he shall have to pay annually in cash to the decree-holder one half of the annual value of the average annual gross receipts of the property until the debt is extinguished or until 20 years have expired from the date of the award. The scheme of this statute indicates that the debt is to be liquidated out of the usufruct of the property. The property that will be restored is not the share of the applicant but the entire property that was sold, provided it is in the possession of the decree-holder and was not alienated before the date mentioned in Cl. (*c*). (*Das and Chatterjee, JJ.*) Monohardas Mohanta *v.* Golam Rahman. I.L.R. (1949) 1 Cal. 438=A.I.R. 1949 Cal. 225.

——**S. 37-A**—*Right to apply—Property sold belonging to several persons—All of them, if should join in the application.*

Where the property which has been sold belongs to a number of persons, any one of them is competent to make an application under S. 37-A, Bengal Agricultural Debtors Act. It is not necessary that all of them should join in the application before any relief under the section can be given. 51 C.W.N. 859, rel. on. (*Das Gupta, J.*) Sudarshana Chandra Karmakar *v.* Karuna Sindhu Mandal. A.I.R. 1949 Cal. 625.

——**S. 37-A**—*Right to apply—Right of one of judgment-debtors—Joint decree for rent.*

Having regard to the provisions contained in S. 37-A (1) (*b*) (*iii*) of the Bengal Agricultural Debtors Act, in a case where a decree was a joint decree for arrears of rent and the sale took place before 2nd May, 1940, when the Bengal Agricultural Debtors (Amendment) Act, 1940, came into force, one of the joint judgment-debtors whose property was sold in execution may make an application contemplated by the section. (*Chakravartti and Ellis, JJ.*) Gopi Ballow *v.* Aswini Kumar. I.L.R. (1948) 1 Cal. 359=51 C.W.N. 859=A.I.R. 1948 Cal. 31.

——**S. 37-A**—*Right to apply—Successor-in-interest of debtor not himself a debtor.*

S. 37-A (1) of the Bengal Agricultural Debtors Act is quite comprehensive. to enable the successor-in-interest of an agricultural debtor to make an application for relief under that section, even if he himself is not such a debtor. (*Das and Chatterjee, JJ.*) Monohardas Mohanta *v.* Golam Rahman. I.L.R. (1949) 1 Cal. 438=A.I.R. 1949 Cal. 225.

——**S. 37-A**—*Right to apply under—Transferee of non-transferable holding—Right of to apply.*

The joint liability for arrears of rent, contemplated in S. 37-A (1) (*b*) (*iii*) of the Ben. Agri. Debtors Act is one *vis a vis* the landlord and not merely as between the tenant and his co-sharers. The section thus connotes that the liability for arrears of rent should be a liability towards the landlord. The transferee of a non-transferable occupancy holding cannot be regarded as jointly liable with the old co-sharer tenants for rent, and neither such a transferee nor his successor-in-interest has any *locus standi* to apply under S. 37-A of the Act, in view of the terms of Cl. (1) (*b*) (*iii*) of S. 37-A. 52 I.C. 289, ref. (*G. N. Das, J.*) Upendra Nath Sinha *v.* Maharajadhiraj of Burdwan. 54 C.W.N. 310=A.I.R. 1950 Cal. 146=5 D.L.R. Cal. 16.

——**S. 37-A (1) (a)**—*"Such person"—Meaning of—Application by heir, executor or administrator—Status of applicant or his predecessor in interest—If relevant.*

It is quite clear from the provisions of S. 37-A of the Bengal Agricultural Debtors Act that although not merely the person whose immovable property was sold in execution but also his heir, executor or administrator may maintain an application under the section, still such heir, executor or administrator, if he makes an application, must prove that on the date of the sale, the person whose immovable property was sold was a debtor as defined in the Act. The words "such person" in sub-S. (1) (*a*) refer back to the person who has been referred to in the opening paragraph of the section; and that person is the person whose immovable property was sold in execution. The effect of the opening paragraph of sub-S. (1), read with sub-Cl. (*a*) is, the words "such person" in Cl. (*a*) do not refer to the applicant, as such, but refer to the person whose immovable property was sold at the execution sale, whether such person be the applicant himself or his predecessor-in-interest. (*Akram and Chakravartti, JJ.*) BHOLANATH PAL *v.* GOURANGDI ZEMINDARIES ESTATES, LTD. 222 I.C. 567=1946 Cal. (Rul.) 123=50 C.W.N. 470=A.I.R. 1946 Cal. 231.

——**S. 37-A**—*Usufructuary mortgage—Debtor denying liability for debt—Jurisdiction of Board.*

If the debtor claims account merely and expresses an opinion that on proper accounts being taken, there might be no debt whatsoever, the Debt Settlement Board has jurisdiction to entertain an application under S. 37-A of the Bengal Agricultural Debtors Act, but when he is positive in his assertion that nothing is due, no matter whether the debt was based on a usufructuary mortgage or not, it is doubtful whether the Board would have jurisdiction to entertain the application. (*Mukherjea and G. N. Das, JJ.*) RAJENDRA NATH BOSE *v.* SUBODH GOPAL BOSE. 52 C.W.N. 615.

——**S. 37-A (8)**—*Application to enforce award—Power of Munsif to consider validity of award.*

In an application made before a Munsif to enforce an award under S. 37-A (8) of the B. A. D. Act, the Munsif cannot himself take evidence and in effect make a declaration that the award is bad and cannot be enforced. (*Roxburgh, J.*) JITENDRA NATH *v.* SITAPATI PURKAIT. 5 D.L.R. (Cal.) 115.

——**S. 37-A (8)**—*Order for restoration—Objection by lessees of landlord—Proper procedure.*

The Bengal Agricultural Debtors Act itself provides no procedure for the Court to follow in a proceeding under S. 37-A (8) of that Act, which has many affinities with a proceeding under S. 144, C. P. Code. The proper procedure for a Court to follow is the procedure of the Code in regard to execution of decrees. Objectors as lessees from the landlord are not, therefore, entitled to be heard at the time when the application is made under S. 37-A (8). The proper time for them to be heard is if and when delivery of possession is sought to be given, they resist delivery when the applicant under S. 37-A (8) can come in with an application under O. 21, R. 97, C. P. Code, or in the event that the objectors are dispossessed they can come in under O. 21, R. 100, C. P. Code. Even if the order for restoration is made, they can still come before the Court in the manner above indicated and take the objection that the decision in the order so far as it affects the objectors is without jurisdiction; in other words, that the decision is not *res judicata.* (*Roxburgh, J.*) JATINDRA NATH NASKAR *v.* BAHARADDI MOLLA. 86 C.L.J. 106=A.I.R. 1950 Cal. 519=55 C.W.N. 64.

——**S. 37-A (8)**—*Order refusing to enforce award—Appeal.*

An award of a D. S. Board is not a decree nor has it the effect of a decree and a Munsif acting under S. 37-A (8) of B. A. D. Act is clearly not a Court executing a decree within the meaning of S. 47, C. P. Code. An order of the Munsif refusing to put into effect the provisions of S. 37-A (8) in respect of an award of the Board is, therefore, not appealable. (*Roxburgh, J.*) JITENDRA NATH *v.* SITAPATI PURKAIT. 5 D.L.R. (Cal.) 115.

——**S. 37-A (8)**—*Restoration of possession to judgment-debtor—Resistance by person not party to award—Procedure to be followed—C. P. Code, O.21, Rr. 97 to 100.*

S. 37-A (8) of the Bengal Agricultural Debtors Act cannot be construed to imply that a person who is not a party to the award can be evicted from the property for the purpose of giving possession to the judgment-debtor. If the judgment-debtor is resisted in taking possession of the property by a person who is not a party to the award, the procedure prescribed by the provisions of O. 21, Rr. 97 to 100, C. P. Code, must be followed, and the Court must summon such person to appear and say what he has got to say in support of his claim to retain possession of the property. If it finds that the resistance has been offered by him in his own right and that he was in possession of the property at the time when delivery of possession was attempted to be taken, the judgment-debtor's remedy is to file a title suit as laid down in O. 21, R. 100, C. P. Code. (*Mukherjea and Ormond, JJ.*) NARAYAN CHANDRA BASU *v.* RASH BEHARI BANERJI. I.L.R. (1948) 2 Cal. 68.

——**S. 39**—Construction—Collector's powers of transfer—Transfer to Board having no territorial jurisdiction—Legality of. *See* BEN. AGRI. DEBTORS ACT, Ss. 33 AND 39. 4 D.L.R. (Cal.) 83.

——**S. 39 (2)**—*Scope and effect of—Discretion of transferee Board—Decision given by first Board—If can be ignored or reviewed by transferee Board—S.* 18 (4)—*If controlled by S.* 39 (2).

S. 39 (2) of the Bengal Agricultural Debtors' Act, no doubt, confers upon a transferee board a certain discretion, either to act on evidence already recorded by the Board from which it was transferred or to take all evidence anew. But the transferee Board has no power to ignore all the proceedings taken before the first Board. Where a decision had been given by the first Board, and that has not been taken up in appeal or review, that decision is final and it is not open to the transferee Board to ignore that decision, because such a decision is final under S. 18 (4). S. 18 (4) is not inapplicable to a case transferred from one Board to another.

Quaere: Whether the transferee Board has power to review the decision given by the first Board from which the case was transferred. (*Lodge, J.*) GOPAL CHANDRA HALDAR *v.* NEPAL

Chandra Mondal. 229 I.C. 121=1947 Cal. (Rul.) 128=A.I.R. 1948 Cal. 81.

———**S. 40-A**—*Decision of appellate officer dismissing appeal on ground of limitation—Interference on merits in revision—Permissibility.*

Under S. 40-A, B. A. D. Act, the District Judge ought not to interfere in revision on the merits of the decision of the appellate officer, who had dismissed the appeal on the ground of limitation. (*Lodge, J.*) Manindra Nath Panja *v.* Chandra Kanta Mandal. I.L.R. (1948) 1 Cal. 253.

———**S. 40-A**—Orders of District Judge—Revision—Civil procedure Code, S. 115. [*See* Q.D. 1941-1945, Vol. I, Col. 194.] Bazler Rahman *v.* Apsarddi. I.L.R. (1945) 1 Cal. 506.

———**S. 42**—*Opinion of Appellate Officer—If binding on Board—Government circular interpreting same question in contrary sense—Value of.*

S. 42 of the Bengal Agricultural Debtors Act requires, though not by express terms but by necessary intendment, that the Board must act in accordance with the view of the Special Appellate Officers to whom the reference is made not only in cases in which that officer gives a direction to the Board but also when he merely gives his advice or opinion.

A Government Circular has no force of law and in a case where instructions have been obtained from the Special Appellate Officer under the provisions of the Act, a Government circular, interpreting the same question in a contrary sense, cannot override such instructions.

The question whether a Board is or is not bound to accept the opinion of the Special Appellate Officer is of importance only so long as the case is before the Board or, it may be, before the Appellate Officer. When the case reaches the District Judge or the High Court, the question ceases to be of importance, because the order of the Board cannot be upheld simply for the reason that it is in accordance with the opinion of the Special Appellate Officer, nor can it be reversed on the ground that it is not. The proper enquiry at this stage is whether the decision of the Board is in accordance with the Act and not whether it is in accordance with the opinion of the Special Appellate Officer. Even if it be in accordance with such opinion, it must be set aside if it is contrary to the provisions of the Act. (*Chakravartti and Ellis, JJ.*) Gopi Ballow *v.* Aswini Kumar. I.L.R. (1948) 1 Cal. 359=51 C.W.N. 859=A.I.R. 1948 Cal. 31.

———**S. 44**—*Application to Board for review of its decision after its culmination in award—Competency.*

It is competent for the Board to entertain an application for review of its decision under S. 44 of the Bengal Agricultural Debtors Act after an award has been signed. The words "order" and "decision" in the section are quite clear and make no differentiation between certain classes of orders and others. Looking at it from the practical point of view, there must be certain orders or decision by the Board before an award can be drawn up and if there be any defect or any ground on which review will be allowed, such

previous order or decision being modified on review, the award also falls to the ground as a corollary. Even if it were taken that the term "award" was not specifically included in the section, that would not take away the right of the Board to review its own decision which had ultimately culminated in the award. (*R. P. Mookerjee, J.*) Harendra Nath *v.* Dakhyamoni Dassi. A.I.R. 1950 Cal. 191.

———**S. 44 (a)**—*Application for review—Limitation—Bengal Agricultural Debtors' Rules, R. 91-B.*

An application for review under Cl. (*a*) of S. 44 of the Bengal Agricultural Debtors' Act made on the first date on which the Board was sitting after the 59th day of the period of limitation, is within time. (*Lodge, J.*) Bepin Chandra Dutta *v.* Sita Nath Das. 51 C.W.N. 29=A.I.R. 1949 Cal. 378=83 C.L.J. 158.

———**S. 44 and R. 91 (b)**—*Board exercising powers of review* suo motu—*Subsequent filing of application—Whether can be rejected for delay.*

Where the Board was exercising its powers to review its own order of its own accord on receipt of the order from Collector although there had been no application filed for review before the Board itself, it is not open to it on the subsequent filing of such an application to reject it on the ground of any supposed delay on the part of the debtor. (*R. P. Mookerjee, J.*) Harendra Nath *v.* Dakhyamoni Dassi. A.I.R. 1950 Cal. 191.

———**S. 44**—*Order made on application for review not on merits—Application for review of that order—If competent—Rule 91-D.*

Under R. 91-D of the Rules framed under the Bengal Agricultural Debtors Act, an application to review an order made on an application for a review, cannot be entertained by the Board, although that order is not on the merits. (*Sen, J.*) Amarendra Nath Ghose *v.* Nilratan Baidya. 84 C.L.J. 46.

———**S. 44 and R. 91 (*b*)**—*Review beyond 60 days—Prior application to Board before obtaining Collector's permission—If necessary.*

If an application is made within 60 days under R. 91 (*b*) of the Rules made under the Bengal Agricultural Debtors Act, that application has to be filed before the Board immediately. If the Board exercises its right to review its own order *suo motu* within 60 days that also can be done without any reference to the Collector. If review, however, of the earlier order or decision is to be made beyond the period of 60 days such an application cannot be dealt with by the Board unless the permission of the Collector has been obtained. If the application itself cannot be dealt with by the Board before the permission of the Collector is obtained, there is nothing in the rule which requires the previous filing of the application in the Board and then approaching the Collector for permission. (*R. P. Mookerjee, J.*) Harendra Nath *v.* Dakhyamoni Dassi. A.I.R. 1950 Cal. 191.

———**S. 52**—*Applicability—Decree against several defendants—Application to Debt Settlement Board by one only—Order of stay—If operates as stay of whole decree in respect of all.*

Where a Debt Settlement Board, having before it an application by one of several joint debtors (in the case of a decree against several defendants) yet serves a notice on the Civil Court covering the entire execution case before the Court, and the Civil Court passes an order staying the whole execution case, the decree-holder so long as that stay order subsists, is "debarred" under S. 52 of the Bengal Agricultural Debtors Act from executing the decree even as against the judgment-debtors who did not apply to the Board and were not before the Board, if the section is otherwise applicable. 43 C.W.N. 813, ref. (*Harries, C.J. and Chakravartti, J.*) PROMODE KUMAR ROY *v.* HIRENDRA NATH MUKHERJEE. 4 D.L.R. (Cal.) 68.

——**S. 52**—*Applicability—If saves bar under S. 48, C. P. Code.*

S. 48, C. P. Code, does not form part of the law of limitation. If an application for execution of a decree is barred under that section, S. 52 of the Bengal Agricultural Debtors Act is in applicable to save such bar. (*Henderson, J.*) BASIRUDDIN AHMAD CHAUDURI *v.* NOAKHALI LOAN OFFICE, LTD. I.L.R. (1946) 1 Cal. 373.

——**S. 52**—*Applicability—Period of 12 years in S. 48, C. P. Code—If a period of limitation.*

There is no warrant for holding that S. 52 applies only to periods of limitation prescribed by the Limitation Act or by some other Act, and does not apply to the period of 12 years mentioned in S. 48, C. P. Code. The period of 12 years mentioned in S. 48, C. P. Code, has to be truly regarded as a period of limitation for execution, and can be enlarged by excluding the period mentioned in S. 52 of the Beng. Agri. Debtors Act. (*Harries, C.J. and Chakravartti, J.*) PROMODE KUMAR ROY *v.* HIRENDRA NATH MUKERJEE. 4 D.L.R. (Cal.) 68.

——**S. 52**—*Application under S. 174 (3) of Bengal Tenancy Act—Limitation—Exclusion of time during which proceeding regarding decretal debt was pending before Board.*

An application for setting aside an execution sale under S. 174 (3) of the Bengal Tenancy Act is an application "regarding a debt" within the meaning of S. 52 of the Bengal Agricultural Debtors Act if the decretal debt has been subject of any proceedings under that Act, and the time during which such proceedings continued should therefore be excluded in computing the period of limitation for the application. (*Chakravartti, J.*) NIRMALABALA DEBI *v.* PROVAT KUMAR BASU. 52 C.W.N. 659.

——**S. 54**—*Applicability—Award—Alteration by member by including his debt and making of false entries in order sheet purporting to evidence application by debtor—Offence—Cr. P. Code, S. 195 (1)—Section for prosecution.*

Where after an award is made by the Debt Settlement Board on an application by a debtor in respect of debts due by him to a single creditor, a member of the Board makes false entries in the order sheet of the Board to make it appear that an application had been made by the debtor for settlement of a debt due by him to the member, and amends the award by including his debt also

in the award, altering the date of the award, and further applies to the certificate officer for execution, it must be held that the offence does not fall under S. 54 of the Bengal Agricultural Debtors' Act. The offence, if any, is one under the Penal Code, in respect of which a complaint under S. 195 (1), Cr. P. Code, would be necessary. (*Lodge, J.*) HARILAL SARNAKAR *v.* ABHOY CHARAN JHA. 230 I.C. 302=1947 Cal. (Rul.) 207=48 Cr.L.J. 604=A.I.R. 1948 Cal. 5=51 C.W.N. 925.

——**R. 22**—Transfer of application to ordinary Board having no territorial jurisdiction—Effect. [*See* Q.D. 1941-1945, Vol. I, Col. 197.] BAZLER RAHMAN *v.* APSARDDI. I.L.R. (1945) 1 Cal. 506.

BENGAL AGRICULTURAL DEBTORS RULES, Rr. 145 and 146—*Application under S. 37-A—Amount of debt—Jurisdiction of Board.*

It is clear from R. 145 of the Bengal Agricultural Debtors Rules that where there is a dispute as to the amount of a debt stated by the applicant in his application, the Board may informally decide the matter and when it does consider the matter it must consider it in the light of R. 146. When it is considering what is the amount of the debt in an application under S. 37-A of the B. A. D. Act, it must consider what the term "debt" means in S. 37-A (5). The word "debt" in S. 37-A (5) cannot mean what is stated in the definition of that word in S. 2 (8) of the Act, as that definition will not apply if there is anything repugnant in the subject or context. There is another definition of the word "debt" in S. 37-A (7) of the Act. Applying this definition it is quite clear that the amount excluded in the definition in S. 2 (8) as being barred by limitation must be included in ascertaining the amount of the debt. The debt is the amount of the decree, in execution of which the property was sold together with certain other charges. Where, therefore, the amount of the decree exceeds Rs. 25,000 the Board has no jurisdiction to deal with an application under S. 37-A of the Act by reason of R. 146 (2). (*Harries, C.J. and Banerjee, J.*) RAMBANDHU MISRA *v.* BRAHMANANDA LAIK. A.I.R. 1950 Cal. 524=54 C.W.N. 586.

BENGAL AGRICULTURAL INCOME-TAX ACT (IV OF 1944)—*Declaration in the form of return signed by illiterate assessee by the pen of his son—If properly signed.*

There are many clear indications in the provisions of the Bengal Agricultural Income-tax Act and of the rules and forms thereunder, of an intention on the part of the Legislature to insist on the personal signature of the assessee, and the common law rule of *qui facit per alium facit se*, is excluded by necessary implication or intendment of the Act and the rules. Where a statute requires personal signature of a person, which includes a mark, the signature or the mark must be that of the person himself. There must be physical contact between the person and the signature or the mark put on the document. A declaration in the form of a return signed by an illiterate assessee by the pen of his son cannot be treated as properly signed.

(Contra, per *Mahajan, J.*)—In India it is a well-known practice that when the executant of a document is illiterate he simply touches the pen wherewith some one else signs his name for him. It is his autograph. Without an enquiry into the circumstances in which the pen of the son affixed the signature of the assessee on the return it could not be assumed that the son acted as the agent of the father and signed his name in that capacity. In the absence of any material to the contrary it must be held that the assessee signed the return personally.

If the Income-tax Officer felt that the assessee had not touched the pen or the hand of the person who put the signature on the return he should have called upon the assessee to appear before him and ascertained from him the circumstances in which the son's pen was used for the signature. It is the duty of the Income-tax Officer before he rejects a return of an illiterate assessee to satisfy himself that there was no physical contact of the person with the mark or the signature put on the form. Though there should be physical contact between the person and the signature or the mark put on the document it cannot be said in this case that it had not happened.

Income-tax Officers should not while administering the law create unnecessary problems for the Courts. (*Fazl Ali, Patanjali Sastri, Mehrchand Mahajan, Mukherjea and Das, JJ.*) The Commissioner of Agricultural Income-tax, West Bengal *v.* Keshab Chandra Mandal. 1950 I.T.R. 569=5 D.L.R. (S.C.) 98=A.I.R. 1950 S.C. 265=(1950) S.C.J. 364 (S.C.).

——**S. 2 (1)**—*Agricultural income*—Selami *received by Zemindar on settlement of* khas *lands with tenants in ordinary* raiyati *right.*

Selami received by a Zemindar on settlement of lands in his *khas* possession with tenants in ordinary *raiyati* right for periods which were not fixed, is agricultural income within the meaning of the Bengal Agricultural Income-Tax Act. 2 D.R. 225, foll. (*Amiruddin Ahmad, J.*) Gopal Das *v.* Commissioner of Agricultural Income-tax, East Bengal. 2 D.R. 300.

——**S. 2 (1)**—*Agricultural income*—Selami *received for temporary settlement of agricultural land.*

Selami received by a Zamindar from his tenants in making settlement of lands used for agricultural purposes for a temporary period or no fixed period, whether such lands are purchased holdings from defaulting tenants or *khas* lands or waste lands, come within the definition of agricultural income as given in the Bengal Agricultural Income-tax Act. 59 I.A. 206, 18 P. 805, 20 P. 699, 48 C.W.N. 59 and 53 C.W.N. 590, Dist. 49 C.W.N. 472, 48 C.W.N. 766, 53 C.W.N. 1 (D.R.), appr. (*Amiruddin Ahmad and Ibrahim, JJ.*) Prabirendra Mohan Tagore *v.* Commissioner of Agricultural Income-tax, East Bengal. 2 D.R. 225.

——**S. 2 (1)**—*"Agricultural income"—Test—Income from forest—Sale proceeds of sal trees—No cultivation of land or planting of trees but regular operation in forestry.*

Income from a virgin forest or forests of spontaneous growth is not agricultural income. Whether a particular forest is one of spontaneous growth or not has to be decided on one important consideration (*i.e.*), whether there has been "some expenditure of skill and labour upon it". To put it in another form, the introduction of human agency and the application of human efforts would be the criteria for consideration. The facts of each particular case must be considered for determining whether there has or has not been sufficient application of human efforts before it can be determined whether the income from a particular forest is agricultural or otherwise. Mere guarding the forest area from poachers or against surreptitious removal of fuel, wood or logs cannot be considered to be any case of human intervention sufficient to make the forest produce as being an agricultural one. 53 C.W.N. 590 (P.C.), rel. on. I.L.R. (1947) Mad. 466; 20 P. 699; 1919 Lah. 222; 5 L. 50; 1945 Oudh 35; 1948 A. 10; I.L.R. (1947) Nag. 425; 1945 Oudh 25; 54 M. 900; 1947 Mad. 160; I.L.R. (1947) Mad. 466, ref. to.

"Agriculture" is of much wider import than "cultivation". Utilisation of land "for regular operations in forestry" is an agricultural operation in the wider sense of the term. "Regular operations in forestry" do require expenditure of skill and labour upon the land on which the forest grows. It follows, therefore, that the sale proceeds of *sal* trees from a forest in which there is no cultivation of the land or planting of trees but a regular operation in forestry, can be treated as agricultural income within the meaning of S. 2 (1) of the Bengal Agricultural Income-tax Act. There need not always be "some measure of cultivation of the land" *and* "some expenditure of skill and labour upon it" but the proof of either would be sufficient to bring a case within either Cl. (*a*) or (*b*) of S. 2 (*i*) of the Act. (*G. N. Das and R. P. Mookerjee, JJ.*) Commissioner of Agricultural Income-tax, West Bengal *v.* Jagadish Chandra Deo. 1949 I.T. R. 426=52 C.W.N. 596.

——**S. 2 (11)**—*"Previous year"—Meaning of—Assessment year 1944-45—Assessee's accounts made up from 1st Ashar to 31st Jaishta.*

In a proceeding for assessment of income-tax for the financial year 1944-45, the period of 12 months from 1st Ashar, 1349, to 31st Jaishta, B.S., should be regarded as the "previous year" 1350 for that assessment when according to the method of accounting prevailing in the office of the assessee the period of 12 months from Ashar to following Jaishta was regarded to be the financial year. (*Amiruddin Ahmad and Ibrahim, JJ.*) Prabirendra Mohan Tagore *v.* Commissioner of Agricultural Income-tax, East Bengal. 2 D.R. 225.

——**S. 4 (b)**—*Income of property to be spent for charitable or religious purposes but no part of property set aside for such purposes—Exemption from tax.*

Where no part of the property is set aside for any charitable or religious purposes so that it could be identified as appropriated exclusively to such purposes, the income derived from the property is not exempt from income-tax under S. 4 (*b*) of the Bengal Agri. Income-tax Act although it is to be spent in addition to other purposes for charitable or religious purposes. 35 C.W.N. 36 (P.C.), rel. on. (*Amiruddin Ahmad and Ibrahim, JJ.*) Prabirendra Mohan Tagore *v.* Commissioner of Agricultural Incometax, East Bengal. 2 D.R. 225.

——**S. 6 (7)**—*Cesses—Allowance for cost of collection—Assessee, if entitled to.*

Under S. 6 (7) of the Beng. Agri. Income-tax Act, an assessee is entitled to get an allowance of 15 per cent. for costs of collection not only on the actual rent or revenue which accrued to him but on the cesses as well. (*Amiruddin Ahmad and Ibrahim, JJ.*) Prabirendra Mohan Tagore *v.* Commissioner of Agricultural Income-tax, East Bengal. 2 D.R. 225.

——**S. 6 (7)**—*Cesses—Allowance for cost of collection—Assessee, if entitled to.*

Cesses (local cess and education cess) collected by an assessee in the year of account are rent or revenue within the meaning of the Bengal Agricultural Income-tax Act, and the assessee is entitled to have allowance for costs of collection under S. 6 (7) of the Act calculated over the same. 2 D.R. 225, foll. (*Amiruddin Ahmad, J.*) Gopal Das *v.* Commissioner of Agriculrural Income-tax, East Bengal. 2 D.R. 300.

——**S. 6 (7) and (10)**—*General rate and audit rate paid by assessee for management of his property by Court of Wards—Assessee, if entitled to allowance under Cl. (7) or Cl. (10).*

Sums paid by the assessee to Government as General rate and Audit rate in connection with the management of his properties by the Court of Wards, are covered within the allowance for costs of collection given to him under S. 6 (7), and should not be separately allowed as an expenditure falling under S. 6 (10) of the Beng. Agri. Income-tax Act. (*Amiruddin Ahmad and Ibrahim, JJ.*) Prabirendra Mohan Tagore *v.* Commissioner of Agricultural Income-tax, East Bengal. 2 D.R. 225.

——**S. 6 (7)**—*Salami received in previous year—Allowance for cost of collection—Assessee, if entitled to—"Accrue"—Meaning of.*

Under S. 6 (7) of the Bengal Agricultural Income-tax Act, the assessee is entitled to an allowance for cost of collection in respect of the *salami* or premium received in the previous year. The term "accrue" in S. 6 (7) is not limited according to the ordinary dictionary meaning to a process of evolution continuing in future but it conveys the same idea as the verb "to arise". Allowance for cost of collection can, therefore, be claimed not only on rent which is paid by the tenant from year to year but also on a lump sum paid by him as *salami*. The incidence of payment of the rent and of the *salami* is in no way different, one becoming payable periodically on due dates, and the other being payable either in a lump on a fixed date or in instalments, as the case may be. Further, the total amount received as premium or *salami* is considered to be rent or revenue under the first paragraph of S. 6 of the Act as assessable to tax, and unless there be a very clear provision limiting the operation of Cl. (7) to only a portion of such "rent or revenue", the legislature must be deemed to have made no difference between the provision in the exemption clause and that of the charging clause. (*Das and Mookerjee, JJ.*) Commissioner of Agricultural Income-tax, West Bengal *v.* Tarak Nath Mukherjee. 53 C.W.N. 725.

——**S. 24 (2) and R. 11**—*Signing of declaration or return by assessee—If to be by him personally—Signature or mark by agent—Sufficient—Declaration and return signed or with mark affixed by the hand and pen of assessee's son—Validity of—Maxim,* facit per alium facit per se—*Application of.*

Per *Curiam* (*Mahajan, J., contra*): Under the Bengal Agricultural Income-tax Act and the rules made thereunder, there can be no doubt that the Legislature intended that the declaration in the form of a return submitted by an individual assessee must be signed by himself personally and not by an agent. A consideration of the Act and the rules and the forms prescribed would clearly indicate that the intention of the Legislature was to insist on the personal signature of the assessee, applicant or appellant, whenever his signature is required, and the common law rule, *qui facit per alium facit, per se* is excluded by necessary implication or intendment of the Act and the rules thereunder. The Legislature intended not to permit the signature by an agent so as to exclude the above common law rule. When the Statute requires the personal signature of the assessee, appellant or applicant, which includes a mark, the signature or mark must be that of that person himself. There must be physical contact between him and the signature or the mark on the document; the writing of the name or mark by an agent, however clearly he may have been authorised cannot be regarded as that of the principal for purposes of the Act. 24 All. 319; 54 Cal. 345; I.L.R. (1945) Mad. 167; 5 Ran. 488; 9 Ran. 323; 11 Ran. 380; 20 W.R. 375, ref.

Mahajan, J.—Though there must be physical contact between the person and the signature or mark put on the document in the case of an illiterate and ignorant person, if the signature or mark was put by the pen of his son in his presence or by the hand of his son in his presence, it must be held that there is physical contact between the person and his signature or mark.

Quaere: Whether an agent can sign or affix a mark for the principal? A.I.R. 1935 Oudh 305, ref. (*Fazl Ali, Patanjali Sastri, Mahajan, Mukherjea and Das, JJ.*) Commissioner of Agricultural Income-tax, West Bengal *v.* Sri Keshab Chandra Mandal. 1950 I.T.R. 569=5 D.L.R. (S.C.) 98=A.I.R. 1950 S.C. 265=1950 S.C.J. 364 (S.C.).

——**S. 36**—*Appeal to Appellate Tribunal—Question of allowance for costs of collection in respect of rent-in-kind dropped before Asst. Commissioner—If can be raised before Tribunal.*

A question of allowance for costs of collection in respect of rent-in-kind can be legally raised before the Appellate Tribunal after it has been dropped in the appeal before the Assistant Commissioner, if there is no dispute as to the facts and the point is raised purely as a point of law. 36 C.W.N. 677 (P.C.) and 11 I.T.R. 285, referred to; A.I.R. 1937 Lah. 830 and 12 Lah. 714, Dist. (*Amiruddin Ahmad, J.*) GOPAL DAS *v.* COMMISSIONER OF AGRICULTURAL INCOME-TAX, EAST BENGAL. 2 D.R. 300.

BENGAL AGRICULTURAL INCOME-TAX RULES (1944), R. 4 (2) (a), Proviso —*Paddy held in stock at end of year* 1350 *B.S.—Valuation.*

In view of the proviso to R. 4 (2) (*a*) ot the Beng. Agri. Income-tax Rules, paddy that was held on stock by the assessee at the end of the year 1350 B. S. should be valued for the purpose of assessment at the average price during the last four months of that year. (*Amiruddin Ahmad and Ibrahim, JJ.*) PRABIRENDRA MOHAN TAGORE *v.* COMMISSIONER OF AGRICULTURAL INCOME-TAX, EAST BENGAL. 2 D.R. 225.

———R. 11—*Form 5—Return of agricultural income for individual—Declaration signed by illiterate assessee by pen of his son—Return, if valid.*

R. 11 of the Bengal Agricultural Income-tax Rules framed under S. 57 of the Bengal Agricultural Income-tax Act, provides that the return of agricultural income for individual should be in Form 5 which requires that a declaration is to be appended to the particulars which are to be filed. In the footnote to the form it is directed that a declaration should be signed "in the case of an individual by the individual himself." The word "individual" is used here in the ordinary sense to include that person or his agent. When the word "sign" or "signature" is used by itself and unless there be a clear indication requiring the personal signature by the hand of the person concerned the provision will be satisfied by a person signing by the hand of an agent. It follows, therefore, that a declaration in the form of return signed by an illiterate assessee by the pen of his son should be treated as properly signed and a valid return. I.L.R. (1947) Mad. 167, cons.; 11 R. 380 and 54 C. 545, ref. to. (*G. N. Das and Mookerjee, JJ.*) COMMISSIONER OF AGRICULTURAL INCOME-TAX, WEST BENGAL *v.* KESHAB CHANDRA MANDAL. 53 C.W.N. 744.

BENGAL ALIENATION OF AGRICULTURAL LAND (TEMPORARY PROVISIONS) ACT (V OF 1944), S. 10—*Order of District Judge under—Revision—Jurisdiction of High Court.*

The High Court has no jurisdiction to interfere with the order of the District Judge under S. 10, proviso of the Bengal Alienation of Agricultural Land (Temporary Provisions) Act, if the subject-matter of the proceeding before the Collector was one which he was empowered to dispose of under the Act. (*Chakravartti and Ellis, JJ.*) BHOLA NATH DUTTA *v.* LAYA MAJHI. 51 C.W.N. 745=A.I.R. 1947 Cal. 451=82 C. L.J. 194.

———S. 10—*Order of District Judge under—Revision—Jurisdiction of High Court.*

The High Court has no jurisdiction to revise a decision of the District Judge given under the proviso to S. 10 of the Bengal Alienation of

Agricultural Land (Temporary Provisions) Act, at least where the matter is one which the Collector was empowered to dispose of under this Act. (*Chakravartti and Ellis, JJ.*) SAFURA BIBI *v.* ISOB BEPARE. 51 C.W.N. 748=A.I.R. 1947 Cal. 403.

———S. 10—*Order of District Judge—Revision—Jurisdiction of High Court.*

The jurisdiction of the High Court and the Civil Court having been expressly taken away by the first part of S. 10 of the Bengal Alienation of Agricultural Land Act of 1944 in respect of matters which the Collector can dispose of under the Act, the High Court can have no jurisdiction in revision. The proviso to S. 10 does not restore the jurisdiction taken away from the High Court nor even does it restore any jurisdiction to the Civil Court in the matter. The proviso merely empowers the District Judge not as a Civil Court but as a *persona designata* to revise the order of the Collector. I.L.R. (1945) 1 Cal. 506 and I.L.R. (1943) 2 Cal. 462, dist. (*Sen, J.*) KORASANNESSA BIBI *v.* HANIFA BIBI. I.L.R. (1949) 1 Cal. 50.

———S. 10—*Revision—Order of District Judge—Powers of High Court to revise—C. P. Code, S.* 115.

The effect of S. 10 of the Bengal Alienation of Land Act (1944) is clearly to deprive the High Court of any jurisdiction to revise an order passed by the District Judge in revision of an order passed by the Collector under the Act. The District Judge under the proviso to S. 10 merely revises as a *persona designata* and not as a Court and hence the High Court cannot exercise its revisional powers under S. 115, C. P. Code. (*Lodge, J.*) TOHUR SHEIK *v.* MONORANJAN ROY. 227 I.C. 194=1947 Cal. (Rul.) 41=A. I.R. 1947 Cal. 266.

BENGAL ALLUVIAL LANDS SETTLEMENT ACT (XXXI OF 1858), S. 2 and Bengal Regulation (VII of 1822), S. 9—*Scope of the Bengal Regulation VII of* 1822—*Powers of the Collector under—Effect of S.* 2 *of Bengal Alluvial Lands Settlement Act on such powers—Fixation of rent where there is already an agreement between landlord and tenant as to rent—Binding nature—Entry under S.* 9 *of the Bengal Regulation VII of* 1822—*Scope of its presumptive value—Incorrectness of entry—If can be pleaded in defence.*

Reading Bengal Regulation VII of 1822 as a whole it cannot be said that it empowers the Collector, when he finds a certain amount paid actually as rent, to fix either a higher or lower rent. His duty is merely to ascertain and not to fix any fair or equitable rent. S. 2 of the Bengal Alluvial Lands Settlement Act of 1858 does not enlarge the powers of the Collector and read as a supplement to Regulation VII of 1822 does not enlarge the powers deemed to exist in the Collector in respect of alluvial lands. Therefore, where an agreement in respect of rent as between a landlord and a tenant exists, the Collector has no power under S. 9 of Regulation VII of 1822, or under S. 2 of Act XXXI of 1858 to fix (*i.e.*, to ascertain or determine) any other rent for the lands in question. Those sections define the limits of his jurisdiction and if he does anything beyond those limits, his conclusion is not binding on the landlord or tenant.

The entry which a Collector is authorised to make under S. 9 of the Bengal Regulation VII of 1822, as a result of his enquiries, acquires a presumptive value of its correctness provided he has acted within the powers given to him by the Regulation. If he exceeds his powers and fixes a fair rent, which is not the actual rent the tenant is under a contract to pay, the entry made in excessive exercise of the Collector's powers had not the probative value given to it by the section. At best it has only a presumptive value and it would be open to either party who is aggrieved to show that the entry is incorrect and is not made in the proper exercise of the powers of the Collector. This can be done either by subsequent mutual agreement between the parties or as a result of contest in a "regular suit" which means a suit in a Court having ordinary original civil jurisdiction as opposed to a summary suit or a revenue suit. The correctness or the binding nature of such an entry could be challenged either by the plaintiff filing the "regular suit" or by the defendant therein by way of defence. The words in the section do not limit the right to challenge the entry only to the plaintiff. The effect of an entry made under Act XXXI of 1858 is not higher. It has the same probative value as an entry made under Regulation VII of 1822.

Patanjali Sastri, J.—It cannot be said that the Settlement Officer acting under S. 9 of Regulation VII of 1822 had power only to find out and record the existing rates of rent. [1946 Cal. 306, Reversed.] (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) AUCKLAND JUTE CO., LTD. *v.* TULSI CHANDRA GOSWAMI. A.I.R. 1949 F.C. 153=1949 F.L.J. 255 (F.C.).

———S. 2—*Settlement of rent—Power of Revenue Officer—Duty to take into consideration contract between parties—Remedy of aggrieved tenant—Bengal Land Revenue Settlement Regulation* (*VII of* 1822).

Under the Bengal Act XXXI of 1858 read with Regulation VII of 1822, the Revenue Officer is empowered not merely to ascertain and record the existing rights but also to settle and determine fair and equitable rent which is to be payable by the under-tenants. Such determination must be regarded as binding upon them until and unless it is altered by the Board on appeal or by the Civil Court in a regular suit. When determining the rent, the Revenue Officer should take into consideration any contract between the parties. If after taking it into consideration and not disregarding it off-hand, the Revenue Officer determines the rent payable by the tenant according to his view of what should be the fair and equitable rent, no exception can be taken to such determination. Even if he disregards the contract, his decision would be liable to be set aside in a suit in the Civil Court, but unless set aside the rent fixed by him must be regarded as the fair rent payable by the tenant. If the tenant's contention is that the contract cannot be superseded, it is for him to rely on it before the Revenue Officer. If he is aggrieved by the determination of rent by the Revenue Officer, he has the right to appeal before the Board and has also the right to raise the question by a regular suit. (*Biswas and Das, JJ.*) S. N. CHATTERJEE *v.* AUCKLAND JUTE CO., LTD. I.L.R. (1946) 1 Cal. 290=50 C.W.N. 116=A.I.R. 1946 Cal. 306.

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)—*Jurisdiction of Civil Court—Assessment of alluvial accretions—When can be challenged in Civil Court.*

An assessment made under the provisions of Bengal Act IX of 1847, can only be challenged in a Civil Court on one of two grounds, *viz.*, (1) that what has been assessed was part of a permanently settled estate, and (2) that the proceedings for assessment were fundamentally irregular. If none of the grounds are proved to exist the basis on which the amount of revenue has been settled cannot be questioned in the Civil Court; nor can any question about the reasonableness of the amount be raised or mooted in the Civil Court. 17 I.A. 40; 51 I.A. 241, ref. (*R. C. Mitter and Roxburgh, JJ.*) KHAGENDRA NATH GANGULY *v.* PROVINCE OF BENGAL. 4 D.L.R. (Cal.) 145.

———Ss. 1 and 6—Scope and effect—Alluvial accretions to revenue free estate—Assessment under Bengal Regulation II of 1819—Permissibility of between 1847 and 1935. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819), S. 3. 4 D. L. R. (Cal.) 145.

———(as amended in 1936), Ss. 1 and 6—Scope—If retrospective—Assessment proceedings ending before expiry of 1935—Effect of. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED LAWS) REGULATION (II OF 1819), S. 3. 4 D. L.R. (Cal.) 145.

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825)—*Applicability—District of Cachar.*

After the notification dated 6th July, 1929, issued by the Local Government under S. 3 (*c*) of the Scheduled Districts Act, it is not possible for a Court of Law to say that the Bengal Alluvion and Diluvion Regulation is applicable to the District of Cachar. Cachar was all along treated as a non-regulated district. It may have been tacked to one administration or another for revenue or administrative purposes, but strictly speaking, it remained outside the pale of the Acts and Regulations in force in Bengal. It cannot therefore be said that the Bengal Alluvion and Diluvion Regulation, or for the matter of that, any other law of Bengal *proprio vigore* applied to the District of Cachar. As the Bengal Alluvion and Diluvion Regulation does not in terms apply, claims to land gained by alluvion or by a dereliction of a river or the sea must be decided in accordance with custom—and if no custom is proved either one way or another—according to the principles of equity, justice and good conscience. (*Mukherjea and Blank, JJ.*) PROVINCE OF ASSAM *v.* MAHOMED RAJA. I.L.R. (1946) 1 Cal. 283=50 C.W.N. 378.

———**S. 4**—*Alluviated land claim—Basis of.*

A person whose lands adjoin alluviated lands has a better claim to a settlement of the alluviated lands than one who has no land close to the disputed land though he might have asserted his possession. (*Swanzy.*) MANSINGH MAHTON *v.* AMBIKA SINGH. 12 B.R. 106.

———**S. 4**—*"Gradual"—Meaning of.*

The word "gradual" in S. 4, Bengal Alluvion and Diluvion Regulation, does not mean that the accretion must necessarily be slow and imperceptible. (*Fazl Ali, C.J. and Ray, J.*) BISHUNDEO *v.* HEMNARAIN. 25 Pat. 423=A.I.R. 1947 Pat. 193=231 I.C. 249=13 B.R. 515.

———**S. 4**—*River-bed belonging to landlord—Part of it emerging from water—Whether an accretion to neighbouring tenure.*

Land forming part of a river-bed that belongs to the landlord when submerged remains his property when it emerges from the water and does not form an accretion to the neighbouring tenure. (*Pollock, J.*) JAIRAM GOVINDA *v.* ANANDRAO. I.L.R. (1947) Nag. 302=228 I.C. 550=1947 Nag. (Rul.) 60=A.I.R. 1948 Nag. 31=1947 N.L.J. 81.

———**S. 4 (1)**—*Applicability—Accretion of land from bed of river owned by private individual.*

Cl. (1) of S. 4 of the Bengal Alluvion and Diluvion Regulation applies to the case of an accretion of land from the bed of a river which is owned by a private individual. I.L.R. 2 Pat. 18, foll. (*Malik, C.J. and Wali Ullah, J.*) RAM RAJ GIR *v.* JAGANNATH PRASAD. 1950 A.L.J. 356.

———**S. 4 (1)**—*Applicability—Private rivers—Accretion by gradual process—Right to—"Gained"—Meaning of.*

S. 4 (1) of the Bengal Regulation XI of 1825 is not inapplicable to the case of a river which is the private property of an individual and not of the Crown. The section deals with rivers of all classes and is subject to no words of limitation or restriction. S. 4 (1) is therefore applicable to cases of acquisition by gradual accession from private rivers, when it can be employed without confiscating an already existing title. The word "gained" in S. 4 does not extend to land washed away and afterwards re-formed upon the old site. Previous ownership, if ascertainable, of the lands newly formed after diluviation should not be allowed to be destroyed merely on account of the fact that those very lands re-appearing on the old ascertained site become accretions by slow and gradual process of the river to another man's land. At the same time, lands can be gained by the process of gradual accretion without involving confiscation of the old owner's property. In the case of a landlord tenant, for example, the lands are gained to the tenancy by process of gradual accretion but not lost to the proprietor on whose bed they are formed, because his proprietary right to receive rent is recognised by law. Where the river is small and shallow, S. 4 (4) would apply. Where the rivers are neither small nor shallow, but the beds belong to a private proprietor, they are governed either by Cl. (1) of S. 4, subject to the limitation that it does not work confiscation of one's property in favour of another in any case, or by Cl. (5) of S. 4. (*Fazl Ali, C.J. and Ray, J.*) BISHUNDEO *v.* HEMNARAIN. 25 Pat. 423=A.I.R. 1947 Pat. 193=231 I.C. 249=13 B.R. 515.

BENGAL CESS ACT (IX OF 1880) (as amended in 1936)—*Cess levied on and paid by lessor on royalty payable to him under agreement of 1919—Royalty in arrear from 1937—Cess paid by lessor—Right to recover same from lessee.*

A lease of 200 bighas of coal lands was granted in 1919 on the stipulation, *inter alia,* that the lessee will pay royalty and cess on the amount received if assessed on the proprietor on the royalties received. The royalty in respect of a portion of the lands fell into arrears. The proprietor had to pay cess on the royalty. In a suit filed in 1940, the lessor claimed the arrears of royalty and the cess which ought to have been paid by the lessee. The latter pleaded that after the amendment of the Cess Act in 1936, the assessment of cess on the lessor was illegal and therefore the payment by him was voluntary and that the lessee was therefore not liable to pay the amount of cess.

Held, that if the Collector had realised direct from the owner cesses proportionate in amount to the royalties received by him and from the occupier proportionate to the absence of net profits left in his hands after payment of the royalties, such realisation, though slightly irregular, was not illegal. The amendment of the Cess Act in 1936, did not make any difference and the lessor could therefore recover cess paid by him from the lessee. (*Manohar Lall and Mukherji, JJ.*) KAMAKSHYA N. SINGH *v.* BURNETT. 26 Pat. 312=A.I.R. 1948 Pat. 313.

———**Ss. 4 and 93**—*Scope and effect of—Tenancy created by patta—Rent at fixed rate per bigha and varying year by year according to area cultivated—Tenant if cultivating raiyat or tenure-holder—Description as tenure-holder in Cess Re-valuation Schedule—Effect—Plea of cultivating raiyat—Bar of.*

S. 4 of the Cess Act should be read with S. 41 of the Act. S. 41 (2) deals with the mode of payment of cess by the holder of a tenure. Where under the patta creating the tenancy, the rent payable is not a lump rental but at a fixed rate per bigha and was variable from year to year according to the area cultivated in the particular year, and the tenant was described as a tenure-holder in the schedule of valuation prepared by the Cess Re-valuation Officer for the purposes of the Cess Act and the tenant also pays a rent exceeding one hundred rupees, it must be held that the tenant is a tenure-holder and not a cultivating raiyat for the purposes of the Cess Act; it was not open to him to plead in the Civil Court that he was not a tenure-holder in view of S. 93 of the Act. (*Manohar Lall and Dass, JJ.*) TIRLOKNATH *v.* RAMRANBIJAY PRASAD SINGH. 25 Pat. 797=A.I.R. 1947 Pat. 420.

———**S. 6**—*Hats from which tolls are collected on basis of quality and quantity of goods sold—Assessment to cess—Validity.*

Hats were held on the plaintiff's land once a week. The plaintiff realised tolls from the vendors and hawkers who sold merchandise there on the basis of the quality and the quantity of the goods sold. These vendors and hawkers did not take any lease of any portion of the site of the hats, and could be turned out at pleasure. The amount of toll collected did not depend on the fact as to whether a particular vendor sat within or outside the few sheds that there were. The hawkers who did not sit but moved about the place selling the goods had to pay tolls and if there was no sale no toll had to be paid at all. The revenue authorities assessed cess on these hats treating the income derived from them as "annual net profits from. . . . other immovable property" under the second part of S. 6 of the Bengal Cess Act read with Chapter V of the Act.

Held, that the assessment was wholly invalid.

Per *Biswas, J.*:—The plain meaning of S. 6 of the Cess Act as worded is that in the case of lands the cess shall be assessed on their annual value, and in the case of all other immovable properties, including those specifically mentioned (mines, quarries, tramways and railways) on their annual net profits. As a hat is not excluded from the definition of land in S. 4 of the Act, it cannot be brought within the term "other immovable property" as used in S. 6, or within the words "other immovable property not included within the provisions of Chapter II," occurring in S. 72.

Per *Das, J.*:—The hats in question are neither "land" nor "other immovable property" and the collections made from the vendors and hawkers of these hats are neither rent nor compensation for the use or occupation of the land and cannot be regarded as benefits arising out of land, and they are not, therefore, assessable under either part of S. 6 of the Act. (*Biswas and Das, JJ.*) Province of Bengal *v.* Hingal Kumari. I.L.R. (1946) 1 Cal. 231=225 I.C. 130=1946 Cal. (Rul.) 308=50 C.W.N. 184=A.I.R. 1946 Cal. 217.

——**S. 6**—Incidence of cess—"Annual net profits". [*See* Q.D. 1941—1945, Vol. I, Col. 198.] Kamakshya Narain Singh *v.* Arjun. 227 I.C. 504=13 B.R. 81=1947 Pat. (Rul.) 27=A.I.R. 1946 Pat. 143.

——**(as amended by Bihar Act II of 1936), S. 6**—Scope and effect of—Levy of cess from owner and occupier in part—If illegal—Effect of amendment of 1936. [*See* Q.D. 1941—1945, Vol. I, Col. 199.] Kamakshya Narain Singh *v.* Arjun. A.I.R. 1946 Pat. 143=227 I.C. 504=13 B.R. 81=1947 Pat. (Rul.) 27.

——**S. 20**—*Cess return—Binding character—Return made by holder as trustee—If binds succeeding holder holding in personal right.*

S. 20 of the Bengal Cess Act contemplates cess returns made in respect of an estate or tenure. Whether a particular holder is holding the estate as a trustee or in his personal right is perfectly immaterial. If it is established that it is the same estate or tenure which has come down, the question whether the previous holder held it in another capacity and whether the present holder holds it in his personal right is a matter which has no bearing upon the binding character of the cess return. (*Chakravartti, J.*) Jatindra Kumar Banerjee *v.* Ajit Kumar Banerjee. 4 D.L.R. (Cal.) 201.

——**S. 20**—*Several trustees of estate—Cess return signed by one only—If binds whole estate.*

S. 20 of the Bengal Cess Act does not require that the cess return should be signed by any particular person or persons or by the total body of landlords. All that the section requires is that it must be a return in respect of an estate or tenure. A return signed by one of several trustees of an estate would bind the whole estate and not merely those who claim through such trustee. (*Chakravartti, J.*) Jatindra Kumar Banerjee *v.* Ajit Kumar Banerjee. 4 D.L.R. (Cal.) 201.

——**S. 22 and Rules 51 and 75**—*Valuation of* bakasht *and* bhaoli *lands after local inquiry and consideration of quality of soil—If to be set aside.*

Where the Cess Re-valuation Officer makes an inquiry and considers the quality of the soil on the spot before valuing the *bakasht* and *bhaoli* lands his valuation must be considered to be fair and cannot be set aside as unjustified. (*Swanzy.*) Damodar Prasad *v.* Province of Bihar. 12 B.R. 209.

——**Ss. 36 and 37**—*Mistake in valuation—If affects jurisdiction of Collector.*

The Collector's jurisdiction in the matter of valuation is not affected by the fact that he has made a mistake in valuation. A.I.R. 1922 Pat. 322, ref. (*Jha, C.J. and Reuben, J.*) Ram Ranbijaya Prasad Singh *v.* State of Bihar. A.I.R. 1950 Pat. 557.

——**S. 37**—*Claim for reduction of assessment—Person not paying rent—Tenure shown to be rent-free—Right to claim reduction.*

Where the holder of a tenure is unable to show that he or she paid rent, and the tenure appears to be rent-free, no claim can be made for a reduction of the assessment. (*Swanzy.*) Parbati Debi *v.* Province of Bihar. 12 B.R. 278.

——**S. 41**—*Jurisdiction of Collector under—Roll—Effect—Liability of proprietor to pay cess—If dependant on his right to collect from tenure-holders.*

The jurisdiction of the Revenue Authorities to determine the valuation under the Bengal Cess Act is to determine the valuation of the estates within the district and of the tenures and holdings included in those estates. Provided there is no defect in the roll affecting the proprietor's right to realise cess from the tenure-holder, the proprietor is ordinarily entitled to realise cess from the tenure-holders in accordance with the roll. There is nothing in law to make his own liability to pay cess to the Collector dependant upon his right to realise cess from the tenure-holders included his estate. (*Jha, C.J. and Reuben, J.*) Ram Ranbijaya Prasad Singh *v.* State of Bihar. A.I.R. 1950 Pat. 557.

——**S. 41 (2) and (3)**—*Applicability—Holding valued as tenure at re-valuation and cess fixed at over Rs.* 100—*Subsequent splitting into four holdings with consent of landlord and rent fixed at less than Rs.* 100 *for each—Rate of cess payable.*

Four holdings were for sometime parts of one holding of about 155 bighas for which a sum of Rs. 115-9-0 was payable as jama and a sum of Rs. 7-3-6 was payable as cess. The original holding was entered in the record of rights as a holding at a fixed rate of rent and as being in the possession of a single raiyat. In the course of re-valuation of the estate the holding was valued as a tenure at Rs. 1,629-15-0, and the cess was fixed at Rs. 101-14-0. Subsequently the holdings were split up with the consent of the landlord and with his concurrence, and the rent payable in respect of each of the holdings was less than Rs. 100.

Held, that there could be no doubt that the tenants of the holdings were cultivating raiyats for the purpose of the Bengal Cess Act, within the meaning of S. 4 of the Act, and therefore they were liable to pay cess at the rate fixed under S. 41 (3), and not under S. 41 (2), as if for a tenure. (*Fazl Ali, C.J. and Ray, J.*) KAMESHWAR SINGH *v.* JANAKIRAMANJHA. 24 Pat. 705 =A.I.R. 1946 Pat. 200=227 I.C. 612=1947 Pat. (Rul.) 45=13 B.R. 101.

———S. 44 (3)—*Scope and effect—Power of Collector to close separate accounts—Bengal Land Registration Act, Ss. 72 and 74-A.*

S. 44 (3) of the Cess Act means that where the Collector is unable to recover from the holder of a separate account the amount due in respect of that share, he is entitled to proceed against the entire estate in the manner prescribed in S. 14 of the Bengal Land Revenue Sales Act. It does not confer any authority on the Collector to close the separate accounts. Separate accounts can be closed only under Ss. 72 and 74-A of the Bengal Land Registration Act on the grounds mentioned therein. (*Biswas, J.*) SABITA SIKDAR *v.* SUDHIR KUMAR MAJUMDAR. 223 I.C. 414=1946 Cal. (Rul.) 168=50 C.W.N. 419=A.I.R. 1946 Cal. 367.

———(as amended by Bihar Act II of 1936), S. 72—*Scope—Absence of notice—Return submitted and cess assessed and paid by lessor—Right to recover from lessee under terms of lease—Plea of assessment being not lawful—Sustainability.*

Where a lessor has submitted returns to the Collector under the Cess Act and been assessed to cess on the basis of those returns, it cannot be said that the assessment to cess has not been made according to law on the ground that no notice was issued to the lessor in the prescribed form. When the lessor has paid such cess, he can recover it from the lessee who under the lease has undertaken to pay it to the lessor. The lessee cannot be heard to say that because the assessment was not lawful for want of notice, he is not liable to pay the assessed cess to the lessor. (*Chatterji and Shearer, JJ.*) KAMAKSHYA NARAIN SINGH *v.* BHURAMULL. 226 I.C. 97=1946 Pat. (Rul.) 342=12 B.R. 676=A.I.R. 1946 Pat. 154.

———S. 93—*Scope—Failure to take action under—Right to challenge assessment by Collector.*

A party aggrieved by assessment made by the Collector cannot challenge the assessment or valuation in the civil Court when he has not taken steps to have it revised by the Board of Revenue under S. 93 of the Act. (*Jha, C.J. and Reuben, J.*) RAM RANBIJIYA PRASAD SINGH *v.* STATE OF BIHAR. **A.I.R. 1950 Pat. 557.**

———S. 93—*Scope of—Tenants not questioning re-valuation but claiming status as cultivating raiyats liable to pay reduced rate of cess—Bar under S. 93—If arises.*

Where the tenants of holdings in an estate do not question the valuation fixed at a re-valuation, but merely claim that by reason of the splitting up of the holdings held by them, their status has changed into that of cultivating raiyats and therefore they are liable to pay cess only on that basis, S. 93 of the Bengal Cess Act does not operate as a bar. (*Fazl Ali, C.J. and Ray, J.*) KAMESHWAR SINGH *v.* JANAKIRAMANJHA. 24 Pat. 705 =A.I.R. 1946 Pat. 200=227 I.C. 612=1947 Pat. (Rul.) 45=13 B.R. 101.

———S. 99, last para—*Scope and effect—Suit for rent by Collector—Maintainability—Collections sufficient to satisfy arrears of cess without prior appropriation towards Government revenue.*

The priority which is given in the last paragraph of S. 99 of the Bengal Cess Act to a revenue demand is merely intended to ensure that, if there is a sale for arrears of revenue, the purchaser will take free from all claims of the Collector by virtue of the notification under that section. Such priority will not entitle the Collector to apply the rent collections in his hands first to the payment of the revenue, and then to the payment of the arrears of cess for which the attachment is effected. In this view of the matter, a suit by the Collector for rent against the tenants is not maintainable, if on the date it is instituted the arrears of cess have been fully satisfied out of the collections in the hands of the Collector without any prior appropriation towards Government revenue. (*Biswas, J.*) DEBENDRA CHANDRA SHAHA *v.* COLLECTOR OF NOAKHALI. I.L.R. (1948) 1 Cal. 220=51 C.W.N. 738.

BENGAL (AGRA AND ASSAM) CIVIL COURTS ACT (XII OF 1887), Ss. 3, 13 and 25—*Court of the Munsif—Several Munsifs—Exercise of small cause jurisdiction by one—Sheristadar of Court working for several officers—Administration of oath in respect of affidavit in small cause matter—Competency—Penal Code, S. 199.*

Under S. 3 of the Bengal, Agra and Assam Civil Courts Act, the Court of the Munsif is one Court, though there may be more than one Munsif. Each Munsif does not constitute a separate Court, though the Munsifs posted are often called first, second or additional Munsif. All Sheristadars are *ex officio* commissioners of affidavits in respect of matters and causes arising within and subject to the jurisdiction of the respective courts in which they are employed. A Sheristadar of a Court of the Munsif and working for two officers or Munsifs, would be competent to administer oaths or solemn affirmations in respect of matters or causes before either of the officers or Munsifs. In cases where a particular Munsif, *e.g.*, an Additional Munsif, has been given jurisdiction of a Judge of a Court of Small Causes the Sheristadar continues to be the same because the Court is not a different Court and has authority to administer oath in a matter before the Additional Munsif dealing with small cause suits, and a declaration made before him is a legal declaration receivable in evidence in a Court of justice. Hence if the declaration be false to the knowledge of the deponent, he commits an offence under S. 199, I. P. Code, because he makes a declaration which a Court of justice is authorised by law to receive as evidence knowing that the declaration is false. (*Sinha and Das, JJ.*) EMPEROR *v.* BATAKRISHNA PAL. 25 Pat. 273=12 Cut.L.T. 21=228 I.C. 559=1947 Pat. (Rul.) 190=48 Cr.L.J. 258=13 B.R. 246 =A.I.R. 1947 Pat. 54.

——**S. 13**—*Distribution of business by District Judge between different munsifs—Effect on territorial jurisdiction of each—Transfer of suit by one munsif to another to whom local area is allotted—If competent.*

The source of the jurisdiction of a munsif is the order made by the Local Government under S. 13 (1) of the Bengal, Agra and Assam Civil Courts Act, and an order made by the District Judge of the station under S. 13 (2) merely distributes, as a matter of convenience, and with reference to certain local area, the civil business amongst two or more Courts each of which has jurisdiction over the whole area. In such cases neither of the Courts loses jurisdiction which it has under the Government order made under S. 13 (1) of the Act.

It follows therefore that although under the distribution of business made by the District Judge of the station the local area concerned in a suit does not stand allotted to the munsif in whose Court the suit is filed, yet there is no fundamental lack of jurisdiction and when the suit is filed in the Court of that munsif, it is not filed in a Court without jurisdiction. In such a case no question of returning the plaint arises, and it is competent for the Court of that munsif to transfer the suit to the Court of another munsif to which the local area stands allotted in anticipation of the sanction of the District Judge. 75 C.L.J. 255, foll. (*Chakravartti, J.*) JAGABANDHU NANDI *v.* SIVAPROSAD BHATTACHARJYA. 53 C.W.N. 629.

——**Ss. 23 and 24**—*Order granting probate of will by Subordinate Judge in case transferred to him by District Judge—Forum of appeal.*

An appeal against an order granting probate of a will passed by a Subordinate Judge in a case transferred to him by the District Judge under the Orders of the High Court under S. 23 of the Bengal, N. W. F. P. and Assam Civil Courts Act, lies not to the District Judge but to the High Court. (*Lodge and Das, JJ.*) JADUBALA DASI *v.* UPENDRA NATH SAHA. A. I. R. 1948 Cal. 255.

——**S. 23**—*Scope—Subordinate Judges or munsif—Power to take cognizance of proceedings under Bengal Wills and Intestacy Regulation, 1799 and order security under S. 4 of the Regulation.*

Express authority by the High Court is necessary in order to enable the Subordinate Judge or a Munsif to take cognizance of a proceeding under the Bengal Wills and Intestacy Regulation, 1799 and order security under S. 4 of the Regulation. The District Judges do not require to be authorised as they derive their authority as Judges of Zila Courts under the Regulation itself. They require authority to enable them to transfer such proceedings to a Court of a Subordinate Judge or a Munsif. The proceedings referred to in S. 23 of the Bengal, Agra and Assam Civil Courts Act do not refer only to proceedings under S. 7 of the Bengal Wills and Intestacy Regulation, 1799. (*Mukherjea and Sharpe, JJ.*) PUNYENDRA NARAYAN DEB *v.* BHAIRABENDRA NARAYAN DEB. I.L.R. (1946) 2 Cal. 322=225 I.C. 247=1946 Cal. (Rul.) 328=50 C.W.N. 776=81 C. L.J. 430=A.I.R. 1947 Cal. 124.

——**S. 37**—*Landlord and tenant—Enhancement of rent by head landlord—Agricultural land sublet by tenant to under-tenants—"Justice, equity and good conscience"—Bengal Rent Act.*

As there is no express provision in the Bengal Rent Act enabling a head landlord to take proceedings for enhancement of rent against his tenants who have sublet, the matter falls to be determined in accordance with justice, equity and good conscience under S. 37 of the Civil Courts Act. The head landlord has the same right against his tenants as the latter have against their sub-tenants. (*Lord Goddard.*) PRASANNA DEB RAIKAT *v.* TANJINA KHATUN. I.L.R. (1946) 1 Cal. 349=73 I.A. 18=223 I.C. 1=12 B.R. 345=1946 P.W.N. 90=1946 P.C. (Rul.) 121=50 C.W.N. 252=A.I.R. 1946 P.C. 46=I.L.R. (1946) Kar. (P.C.) 56 (P.C.).

BENGAL CO-OPERATIVE SOCIETIES ACT (XXI OF 1940), S. 2 (j)—*Dispute—Meaning of—Claim, if should be valid in law.*

The definition of a dispute in S. 2 (*j*) of the Bengal Co-operative Societies Act, 1940, as well as under the old Act, does not obviously contemplate only good claims or claims valid in law. Anything which can form the subject-matter of adjudication by a Civil Court comes under the definition. (*Chakravartti, J.*) CHATRA CO-OPERATIVE SOCIETY, LTD. *v.* SATKARI MUKHERJI. I.L.R. (1947) 1 Cal. 166=51 C.W.N. 280.

——**S. 4 (2)**—Award under former Act—Enforcement—Procedure. [*See* Q.D. 1941—1945, Vol. I, Col. 203.] DACCA CO-OPERATIVE TOWN BANK, LTD. *v.* JNANADA SUNDARI DEBI. I.L.R. (1945) 1 Cal. 663.

——**S. 133**—*Jurisdiction of executing Court—Validity of award.*

Under S. 133 of the Bengal Co-operative Societies Act, a dispute which requires under S. 86 to be referred to the Registrar cannot be agitated in a Civil Court in a direct and straightforward manner, nor can it be agitated indirectly in an executing Court by challenging the validity of the award there except on the ground of want of jurisdiction. The executing Court cannot grant any relief on the ground that the award has been wrongly made. (*Chakravartti, J.*) CHATRA CO-OPERATIVE SOCIETY, LTD. *v.* SATKARI MUKHER-

JEE. I.L.R. (1947) 1 Cal. 166=51 C.W.N. 280.

——**Sch. III**—"Civil Court"—Small Causes Court, if Civil Court. [*See* Q.D. 1941—1945, Vol. I, Col. 203.] DACCA CO-OPERATIVE TOWN BANK, LTD. *v.* JNANADA SUNDARI DEBI. I.L.R. (1945) 1 Cal. 663.

BENGAL COTTON CLOTH AND YARN CONTROL ORDER (1943)—Validity—Defence of India Rules, R. 81. [*See* Q.D. 1941—1945, Vol. I, Col. 203.] KHETSIDAS GIRDHARILAL *v.* PROTAPMULL RAMESWAR. A.I.R. 1946 Cal. 197.

——**Cl. 7**—Direction issued by Additional Textiles Controller to dealer to sell entire stock to specified person at specified rate—Validity—Government of India Act, S. 299 (1). [*See* Q.D. 1941—1945, Vol. I, Col. 204.] KHETSIDAS GIRDHARILAL *v.* PROTAPMULL RAMESWAR. A. I. R. 1946 Cal. 197.

——**Cl. 17**—*Contravention of—Prosecution for—Previous sanction—If necessary—Central Cotton Cloth and Yarn Control Order, Cl.* (12).

Previous sanction for a prosecution in respect of a contravention of cl. 17 (2) of the Bengal Cotton Cloth and Yarn Control Order is as much necessary as for a prosecution in respect of a contravention of cl. 12 of the Central Cotton Cloth and Yarn Control Order. (*Roxburgh and Chakravartti, JJ.*) KUNJALAL SAHA *v.* EMPEROR. 51 C.W.N. 653.

BENGAL (COURT-FEES ACT) REPEALING AND AMENDING ACT (XVI OF 1946)—*Effect of repealing Ss.* 3 *to* 15 *of the Bengal Court-Fees Amendment Act of* 1922 *and the whole of the Bengal Court-Fees Amendment Act of* 1922.

The provisions of the Bengal Repealing and Amending Act of 1946 whereby Ss. 3 to 15 of the Bengal Court-Fees Amendment Act of 1922 and the whole of the Bengal Court-Fees Amendment Act of 1922 were repealed, have not the effect of affecting the amendments incorporated by those Acts. (*Lodge and Das, JJ.*) *In the matter of* AN APPLICATION. 52 C.W.N. 374=A. I. R. 1948 Cal. 309.

BENGAL COURT OF WARDS ACT (IX OF 1879), Ss. 4, 51 and 56—*Appointment of* guardian-ad-litem—*Power of High Court—Appeal filed in High Court.*

S. 4 of the Court of Wards Act operates to prevent S. 51 of the Act depriving the High Court of the right to appoint any *guardian-ad-litem* it chooses under O. 32, R. 3, C. P. Code, even apart from S. 56 of the Act. Therefore, after the appeal in the original suit is filed in the High Court, that Court can appoint such *guardian-ad-litem* for the minor as it thinks fit. The fact that the appointment has been premature in that it was made before the suit reached the High Court, is of no significance, if thereafter the *guardian-ad-litem* acts as such in the appeal. 30 I.A. 182 and 65 I. A. 57, referred to. (*Sir John Beaumont.*) SAVITRI DEVI *v.* RAM RAN BIJOY PRASAD SINGH. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=A.I.R. 1950 P.C. 1=1950 A.L.J. 134=1950 A.W.R. 220=(1950) 1 M.L.J. 163 (P.C.).

——**S. 10-C**—*Decree for rent due in respect of putni tenure—Decree-holder relinquishing claim against co-sharer ward—Execution against other co-sharers—If barred.*

S. 10-C of the Court of Wards Act is for the protection of the minor under the Court of Wards and is not for the protection of other co-judgment-debtors. A holder of a decree for arrears of rent in respect of a putni tenure can relinquish his claim against the co-sharer whose share of the tenure is under the management of Court of Wards and proceed against the shares of the other co-sharers, and the section would be no bar to the execution proceeding. [66 C.L.J. 321, ref. to.] (*Blank and K. C. Chunder, JJ.*) RAMDAS MUKHOPADHYAY *v.* UDAY CHAND MAHATAB. A.I. R. 1949 Cal. 228.

——**S. 10-C**—*Scope and effect—Decree against ward—If inexecutable.*

S. 10-C of the Court of Wards Act does not render a decree against a ward inexecutable. All that it does is to postpone the execution of the decree for four years from the date of the assumption of the property of a ward by the Court of Wards and for a further period of seven years if interest on the decree is paid in full every year. (*Sen, J.*) NARENDRA CHANDRA *v.* PASHUPATI NATH. A.I.R. 1949 Cal. 242=4 D.L.R. (Cal.) 137.

——**S. 10-CC**—*Operation of—Release of estate or death of ex-ward.*

S. 10-CC of the Court of Wards Act does not cease to operate either on the release of the estate or on the death of the ex-ward. The term of four years is automatically added to the period of limitation, and no question of its ceasing to run can, therefore, arise. (*Henderson, J.*) SAMIRENDRA NATH SINGHA RAY *v.* BANOWARI LAL DE. I.L.R. (1945) 1 Cal. 661=A.I. R. 1949 Cal. 224.

——**Ss. 13 and 13-A**—*Possession of Court of Wards—Nature of—Court of Wards in possession of property under S. 13-A—Suit for mere declaration of title to that property—Maintainability—Injunction restraining Court of Wards from giving possession to ward—If bars suit for possession—Specific Relief Act, S.* 42.

The Court of Wards cannot retain possession of an estate under both S. 13 and S. 13-A of the Bengal Court of Wards Act. If possession of an estate is retained under S. 13, the Court of Wards would retain possession as a stakeholder. S. 13 entitles the Court of Wards to continue to manage the property and to hold it until one of the claimants to the property establishes his claim. But the Court of Wards would not be stakeholders if they continue to manage the property of a disqualified proprietor under S. 13-A. Under S. 13-A, the Court of Wards manages a disqualified proprietor's estate though for certain limited purposes. The disqualified proprietor is the owner of the property and is in possession of it. He cannot sue or be sued except through the Court of Wards and if a person makes claim to that property, he must claim possession of that property and sue the disqualified proprietor as represented by the Court of Wards. A suit for a mere declaration without claiming possession will not be maintainable by reason of S. 42, Specific Relief Act. The mere fact that in an earlier litigation an injunction had been issued restraining the Court of Wards from giving possession of the property to the ward, is no bar to a suit for possession brought against the ward as represented by the Court of Wards, because once it is established that the ward has no title and that the same is in the successful plaintiff the Court of Wards' right to manage will cease and the Court of Wards will not be acting in breach of the injunction in giving up the management. (*Harries, C.J. and Bachawat, J.*) Surendra Narayan Deb *v.* Bhairabendra Narayan Deb. 5 D.L.R. (Cal.) 92=A.I.R. 1950 Cal. 386.

———S. 15—*Order of commissioner sanctioning lease in exercise of delegated powers—Whether subject to appeal or revision.*

An order of the commissioner sanctioning a temporary lease of the wards' property by virtue of the power delegated to him under the second part of S. 15 of the Court of Wards Act and embodied in clause 67 by R. 3 of the rules framed under that Act, is a final order binding on the Court of Wards and is not subject to any appeal or revision under S. 67 or S. 68 of the Act. The sanction of the lease amounts to a proposal which, when accepted by the lessee, becomes an agreement enforceable in law. (*Mukherjea and Sharpe, JJ.*) Kumar Narendra Nath *v.* Rampal Singh. I.L.R. (1946) 2 Cal. 80=51 C.W.N. 482=A.I.R. 1947 Cal. 378.

———S. 18—*Compromise of suit proposed by Court of Wards on minor's behalf—Duty of* guardian-ad-litem.

A guardian appointed by the Civil Court must undoubtedly bring his mind to bear upon any matter in which he represents the minor. At the same time it is plain that under the Court of Wards Act it is the Court of Wards which is responsible for the control of the person and the estate of the minor, and under S. 18 of the Act the Court has power to arrange a compromise of a suit on behalf of a minor. A *guardian-ad-litem* would be bound to pay close attention to any views of the Court of Wards upon any compromise proposed for the minor. (*Sir John Beaumont.*) Savitri Devi *v.* Ram Ran Bijoy Prasad Singh. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=A.I.R. 1950 P.C. 1=1950 A.L.J. 134=1950 A.W.R. 220=(1950) 1 M.L.J. 163 (P.C.).

———S. 35—Right of Court of Wards against creditors—Property in charge of Receiver—Power of Court of Wards to apply for his discharge. [*See* Q.D. 1941—1945, Vol. I, Col. 206.] Bhabani Churn Law *v.* Tulsi Chandra. 1946 Cal. (Rul.) 16.

———Ss. 51 and 52—*Appointment of* guardian-ad-litem *other than manager—Permissibility.*

S. 51 of the Court of Wards Act cannot be construed to mean that no other *guardian-ad-litem* than the manager at the date of the suit can be appointed unless an order is made by the Court of Wards under S. 52. The manager for the time being, or if there is none the Collector for the

time being of the district in which the greater part of the property is situated, is to be the *guardian-ad-litem* and the Civil Court is bound to make the necessary appointment on evidence of a change in the holder of the office. S. 52 comes into operation when the Court of Wards nominates or substitutes any other person than the manager or Collector referred to in S. 51 to be the *guardian-ad-litem*. (*Sir John Beaumont.*) Savitri Devi *v.* Ram Ran Bijoy Prasad Singh. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=A.I.R. 1950 P.C. 1=1950 A.L.J. 134=1950 A.W.R. 220=(1950) 1 M.L.J. 163 (P.C.).

———S. 51—*Scope—Mandatory or directory—Non-compliance—Effect on proceedings—Rent Suit by "disqualified proprietor" without representation by manager of Court of Wards—Decree and rent sale—If passes holding—Sale certificate taken in name of manager—If validates proceedings.*

Having regard to the subject-matter, the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, the provisions of S. 51 of the Bengal Court of Wards Act must be held to be obligatory or imperative, and not merely directory, and, therefore, a ward or disqualified proprietor, the management of whose estate has vested in the Court of Wards, is, without being represented by the manager of the Court of Wards, incompetent to initiate an action himself. The Act prescribes a new form of proceeding and the only way to initiate a proceeding is as prescribed by the statute. The slightest departure from the language of the statute would result in the proceeding being declared void, and the legal consequence of a failure to strictly adhere to the terms of the section would be to nullify the entire proceedings.

A suit for rent against the recorded tenant of a holding by a "disqualified proprietor" after his estate has vested in the Court of Wards, and without the joinder of and without being represented by the manager of the Court, is defective and is not properly constituted; and a sale in execution of the rent decree obtained in such suit would not pass the holding to the purchaser at such sale. The entire proceedings from start to finish are entirely void and ineffective. The fact that subsequent to the sale the Court of Wards chooses to take the sale certificate in the name of the manager and that therefore it must be presumed to have ratified the act of the Ward (disqualified proprietor) does not legalise or validate the proceedings, in view of the express prohibition contained in the Court of Wards Act. 55 Cal. 712; 19 Cal. 127; I.L.R. (1941) Nag. 735, dist.; 64 I.A. 57, foll.; 62 I.A. 340; 27 Cal. 242, ref.; 17 I.A. 5; 16 Cal. 89, rel. on. (*Ray, C.J. and Panigrahi, J.*) Giridhari Dhal *v.* Hrushikesh Roy. I.L.R. (1949) Cut. 392.

———S. 56—*Scope.*

S. 56 of the Court of Wards Act cannot be restricted to suits instituted in the High Court or which were pending in the High Court at the date when the Act was passed. Normally a suit is pending between the date of its institution and of its final determination, and after the appeal is filed the original suit is pending in the High Court.

(*Sir John Beaumont.*) Savitri Devi *v.* Ram Ran Bijoy Prasad Singh. 76 I.A. 255=63 L.W. 45=54 C.W.N. 233=A.I.R. 1950 P.C. 1=1950 A.L.J. 134=1950 A.W.R. 220=(1950) 1 M.L.J. 163 (P.C.).

BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930), (as amended by Ordinance, 1949)—*Validity of—Inconsistency with provisions of Part III, Constitution of India—Constitution of India, Arts.* 13 (1), 19, 21 and 22—*Act, if revived by Preventive Detention (Extension of Duration), Order,* 1950—*Art.* 28, *Adaptation of Laws Order,* 1950—*Effect of.*

The Bengal Criminal Law Amendment Act, 1930, as amended by the Criminal Law Amendment (Amending) Ordinance (1949), does not deal with preventive detention, as it is not directed towards preventing a person from doing something which, the Legislature thinks, should not be done under Art. 21 of the Constitution, that no person can be deprived of his personal liberty except according to procedure established by law and under Art. 22 (2) of that Act every person who is arrested and detained in custody should be produced before the nearest Magistrate within a period of twenty-four hours of such arrest. An order detaining a person under the Bengal Criminal Law Amendment Act without producing him before any Magistrate within twenty-four hours of his arrest, deprives him of his personal liberty without complying with one of the most important items of procedure laid down in the Constitution Act regarding such deprivation, and in such circumstances the order of detention cannot be upheld. Assuming that the Bengal Criminal Law Amendment Act is an Act providing for preventive detention, the Act is void in whole, being inconsistent with the provisions of Part III of the Constitution Act. Under Art. 19 (1) (*d*) read with Art. 19 (5), the right of free movement of every citizen throughout the territory of India cannot be restricted unless (*a*) the restrictions are reasonable; and (*b*) the restrictions are necessary in the interests of the general public. Both conditions must co-exist. The restrictions imposed by the Bengal Criminal Law Amendment Act upon the free movement of citizens throughout the territory of India are not reasonable and are not in the interests of the general public. They are as follows:—(1) The Act which is not an emergency measure but a measure to supplement the ordinary criminal law, gives the Provincial Government, that is to say, the Deputy Secretary the power to detain persons if he forms a certain opinion and neither the Court nor any other authority is entitled to question the reasonableness or the validity of such opinion; (2) The Act renders a citizen liable to commitment to custody in jail even though he has no sinister object or motive and merely because he was at any time or is a member of an association the objects of which are not known to him; (3) The Act provides for the commitment to prison of a citizen merely because he is a subject of instigation although he may not have any inclination to do the Act instigated; (4) By the Act a person may be kept in custody for an indefinite period. The length of that period is left to the sole discretion of the Government, that is to say, of the Deputy Secretary; (5) Although the order of Government is to be submitted for opinion and report to two Judges the Government is not bound in any way to accept that opinion or report; (6) The person detained has no right to place his case before these two Judges either in person or by pleader; nor is he or any one else given the right to know anything about the proceedings before the Judges or the report furnished by them; and (7) The Act is in direct conflict with the provisions of Art. 22 (4) of the Constitution Act, as it does not provide for any Advisory Board of the nature contemplated therein. The whole Act is vitiated by the above illegalities and it is impossible to isolate those illegalities and pronounce that the rest of the Act is legal.

The Preventive Detention (Extension of Duration) Order, 1950, made by the President of the Indian Republic, can have no effect so far as the Bengal Criminal Law Amendment Act is concerned. The Constitution came into force at midnight on the 25th of January, 1950, and as soon as the Constitution came into force, the Bengal Criminal Law Amendment Act became void by reason of the provisions of Art. 13 (1) of the Constitution Act, being inconsistent with the provisions of Part III of that Act. The President did not enter upon his office until he took the oath on the 26th of January at 10-15 A.M. The Act having already become void, cannot be vivified or revived by a subsequent order of the President. Further, the Preventive Detention (Extension of Duration) Order itself is void by reason of its non-compliance with the provisions of Art. 22 (7) (*a*) and (*b*) of the Constitution Act.

Rule 28 of the "Adaptation of Laws Order", 1950, which purports to have been passed by the President of the Indian Republic in accordance with the provisions of Art. 372 (2) of the Constitution Act is contrary to those provisions. Further, the Bengal Criminal Law Amendment Act having become void from 12 midnight of the 25th January, 1950, when the Constitution came into force, even the President or the Legislature cannot make any adaptation or modification of that Act in order to bring it in accord with the provisions of the Constitution. A dead Act could not be brought back to life by modification or adaptation. (*Sen, Chunder and Lahiri, JJ.*) Sunil Kumar Bose *v.* Chief Secretary, Government of West Bengal. 54 C.W.N. 394=A.I.R. 1950 Cal. 274=51 Cr.L.J. 1110 (S.B.).

———**S. 2 (1)**—*Order of detention—Legality—Government not forming an opinion as to which category of persons detenu belongs.*

Under S. 2 (1), Bengal Criminal Law Amendment Act, the Government has to form an opinion as to whether a person sought to be detained was at any time a member of an association or whether he is at present a member of an association. If the Government forms no opinion at all on the matter and does not make up its mind as to the category to which a person it is proposing to detain belongs, it has no authority to pass an order of detention. 6 F.C.R. 1, Dist. (*Sen, Chunder and Lahiri, JJ.*) Sunil Kumar Bose *v.* Chief Secretary, Government of West Ben-

CAL. 54 C.W.N. 394 (S.B.)=A.I.R. 1950 Cal. 274=51 Cr.L.J. 1110 (S.B.).

——**S. 2 (1) and Bengal Criminal Law Amendment (Supplementary) Act, 1932, S. 4**—*Order of detention—Propriety—Jurisdiction of High Court—Cr. P. Code, S.* 491.

If an order of detention is made under S. 2 (1) of the Bengal Criminal Law Amendment Act, 1930, the High Court has no jurisdiction to consider the propriety of that order, as such jurisdiction is definitely taken away by S. 4 of the Bengal Criminal Law Amendment (Supplementary) Act, 1932. If, however, the order is *mala fide* or made in bad faith, the High Court can interfere under S. 491, Cr. P. Code.

S. 2 (1) of the Bengal Criminal Law Amendment Act admits of only one meaning. An order for detention is justified if in the opinion of the Provincial Government the person sought to be detained is a member of an association which in the honest opinion of the Government employs certain methods to obtain certain objects. The order would also be justified if in the opinion of the Provincial Government there are reasons for believing that the person sought to be detained has done an act or is likely to do an act to assist the operations of an association which the Provincial Government has reasonable grounds to believe is an association contemplated by this Act. There is nothing in the wording of the section to suggest that a Court is entitled to go into the question whether the associaion is in fact such an association as is contemplated in the section. (*Harries, C.J., Sen, Banerjee, Lahiri and J. P. Mitter, JJ.*) BHUPEN DEY *v.* CHIEF SECRETARY, GOVERNMENT OF WEST BENGAL. 53 C. W. N. 798=A.I.R. 1949 Cal. 633=51 Cr.L.J. 169.

BENGAL CRIMINAL LAW AMENDMENT ORDINANCE (1947), S. 5—*Certificate for offences committed after 30th September, 1946—Validity—Subsequent notifications extending period mentioned in proviso to S. 5—Effect of—Validity of certificate—Allegations in chalan—If test.*

S. 5 of the Bengal Ordinance No. I of 1947, permitted offences to be certified if they were committed at any time between 15th August, 1946, and 30th September, 1946. Therefore, certificates given in respect of offences which were committed subsequent to this period are clearly invalid, and cannot be validated by subsequent notifications extending the period mentioned in the proviso to S. 5 of the Ordinance made after such certificates were given.

What the section contemplates is a certificate given if the allegations in the charge-sheet or *chalan* show the offence to have been committed before 30th September, 1946. Quite obviously what has to be considered in determining whether the certificate is validly given or not is the allegation in the charge-sheet or *chalan* filed against the accused. (*Harries, C.J. and Blank, J.*) ABDUL RAHIM *v.* THE KING. I.L.R. (1949) 1 Cal. 79.

BENGAL CRIMINAL LAW (INDUSTRIAL AREAS) AMENDMENT ACT (IV OF 1942), S. 4—*Construction—Conviction under—Conditions to be satisfied.*

A person can be convicted under S. 4 of the Bengal Criminal Law (Industrial Areas) Amendment Act, 1942, only if two conditions are established: (1) it has to be established that there is reason to believe that the property found in his possession was stolen or fraudulently obtained; (2) he must fail to give an account of such possession which is satisfactory to the Magistrate. There must be not merely suspicion but reasonable belief in the mind of the Courts that the property was stolen. The section has to be construed strictly and the conditions laid should be strictly complied with, as the section departs from the ordinary law and places an accused person in a position of greater difficulty than under the Penal Code. (*Sen, J.*) BHATTA DOSAD *v.* EMPEROR. 231 I.C. 240=48 Cr.L.J. 763.

——**S. 4 (2)**—*Duty of Magistrate under—Duty to summon witnesses.*

Where it is clear from the cross-examination of prosecution witnesses by the accused that his case is that the property found in his possession was given to him by some other person, the Magistrate should take steps to summon such person and examine him under S. 4 (2) of the Bengal Criminal Law (Industrial Areas) Amendment Act, 1942, though the accused might not specifically say so in his statement. (*Sen, J.*), BHATTA DOSAD *v.* EMPEROR. 231 I.C. 240=48 Cr. L. J. 763.

BENGAL CRUELTY TO ANIMALS ACT (I OF 1920) (as amended in 1938), S. 6—*Evidence—"Phuka"—Meaning of—Note by Veterinary Adviser to Government—Admissibility.*

In the absence of any attempt in the Bengal Cruelty to Animals Act, 1920 and in the Amended Act of 1938, to define or explain the expression "operation called phuka" in S. 6 of the Act, the note by the Veterinary Adviser to the Government, dated 11th March, 1930, describing the process "phuka", must be held to be admissible in evidence, as there is admittedly no other authoritative document which could throw light on the matter. The words operation called "phuka" clearly refer to some process in which by the use of physical means to milch cows they are induced to produce more milk than they would otherwise produce, if these means were not adopted. (*Roxburgh and Blank, JJ.*) SUDAL CHANDRA KOLEY *v.* KING. 3 D.L.R. (Cal.) 68=A.I.R. 1949 Cal. 90=50 Cr.L.J. 157.

BENGAL EMBANKMENT ACT (II OF 1882), S. 76 (b)—*Proof of offence.*

Where in a prosecution for the construction of a new bund deviating from the plan of the bund in the permission granted, the only evidence on the record is the actual permission granted, and no evidence is given that the map was sent with the permission, and the bund erected is not in contravention of that permission, no offence is proved. (*Lodge and Ormond, JJ.*) METOO MANDAL *v.* EMPEROR. 223 I.C. 133=47 Cr.L.J. 365=1946 Cal. (Rul.) 158.

BENGAL ESTATES PARTITION ACT (V OF 1897)—*Creation of Raiyati before partition by some of the co-sharers—Subsequent partition under the Act—Land with reference to* *those Raiyati falling to the share of different co-sharer—Latter if bound by the Raiyati.*

Where subsequent to the creation of a Raiyati by some of the co-sharers, there is a partition under the Bengal Estates Partition Act and the land with reference to those Raiyati falls to the share of a different co-sharer, the Raiyati would be binding on the latter where the land has been valued on the basis of the rent paid in respect of them. (*Mitter and Ahmad, JJ.*) AMULYA KUMAR *v.* PURNACHANDRA. 52 C.W.N. 364.

———*Partition proceedings commenced and concluded without impleading certain co-sharers and their mortgagees in possession—Subsequent suit by usufructuary mortgagee for possession when he was dispossessed as a result of the allotment of shares in partition proceedings—Maintainability—Ss. 27 and 99—If bar.*

A mahal comprised several villages. Defendants 22 to 24 were the proprietors of village *B* among them. Defendants 1 to 20 were the proprietors of the other villages in the Mahal. Defendants 22 and 23 executed a usufructuary mortgage in favour of plaintiff and his father in respect of their eight annas share in village *B*, and plaintiff and his father were in possession of the share in the village. The owners of the other villages in the mahal commenced partition proceedings which concluded without the plaintiff or defendants 22 to 24 being parties to the partition. Persons to whom village *B* was allotted dispossessed the plaintiff who then filed a suit for possession of the eight annas share in the village *B*.

Held, the partition proceedings did not affect the rights of the plaintiff or defendants 22 to 24 and, neither S. 27 nor S. 99 of the Bengal Estates Partition Act operated as a bar to the plaintiff's suit. (*Sinha and Reuben, JJ.*) MEDNI PROSAD *v.* MATADIN PANDA. 225 I.C. 244=12 B. R. 582=1946 Pat. (Rul.) 311=A.I.R. 1947 Pat. 377.

———*Partition—Scope—Civil Court partition—Distinction—Effect on tenants of estate.*

There is a very important difference between a partition under the Bengal Estates Partition Act and a partition by the Civil Court. In the former the tenants of the sharers get notice while in the latter they do not and are not parties to the proceedings in Court and hence the tenants would not be affected by a Civil Court partition. (*Meredith and Ray, JJ.*) MAHARAJ SINGH *v.* RAI ANANTH NATH BOSE. 25 Pat. 199=13 B.R. 54=(1946) P.W.N. 52=A.I.R. 1946 Pat. 292=227 I.C. 413=1947 Pat. (Rul.) 18.

———Scope—Proceedings under C. P. Code—Applicability—Injunction—Jurisdiction of Estates Partition Court. *See* C. P. CODE, O. 39, R. 1. 13 B.R. 32.

———S. 5—*Partition of small estate—Principles to be followed—Partition by Collector, and approved by Collector—Confirmation by Commissioner—Revision—Interference by Board of Revenue.*

It is impossible in a partition case to give satisfaction to all the different parties, when the estate itself is small and the interests of the parties too are small. The Partition Officer can only make the best possible division in the circumstances of the case, and when he has done so and the Collector has approved the *batwara,* and the Commissioner also has gone into the matter carefully and in detail, the Board will not be justified in interfering in revision with the partition so effected and approved. (*Godbole.*) BRIJ KISHORE NARAIN SINGH *v.* JAGDISH NARAIN SINGH. 13 B.R. 304.

———S. 7 (2)—*Applicability—Suit to declare partition proceedings invalid—Failure to object to Collector before proceedings were recorded—If bar to suit.*

S. 7 (2) of Bengal Estates Partition Act has no reference at all to a suit for a declaration that the *batwara* proceedings are without jurisdiction. Such a suit is not rendered incompetent because of a failure to raise objections before the Collector before he records proceedings under S. 29 of the Act. S. 7 (2) only refers to objections before the Collector, and under it, the Collector shall not admit such an objection unless raised before he records proceedings under S. 29. S. 7 (2) does not mean that no Court shall entertain a suit for a declaration that the proceedings are without jurisdiction unless the point was taken before the Collector recorded proceedings under S. 29. (*Sen, J.*) SUSHIL KUMAR RAY *v.* HARENDRA NATH. 4 D.L.R. (Cal.) 153.

———S. 25 (b)—*Scope of—Suit for declaration that* batwara *proceedings are without jurisdiction—If barred.*

S. 25 (*b*) of the Estates Partition Act does not bar a suit for a declaration that *batwara* proceedings are without jurisdiction and invalid. All that S. 25 lays down is that the institution of such a suit shall not *ipso facto* effect a stay of the *batwara* proceedings; but it does not follow that the granting of a decree declaring the proceedings to be without jurisdiction would be completely ineffectual. (*Sen, J.*) SUSHIL KUMAR RAY *v.* HARENDRA NATH. 4 D.L.R. (Cal.) 153.

———S. 37—*Duty of partition officer in assessing costs—Private arrangement between parties—If to be taken as binding arrangement.*

The partition officer has to assess and realize costs according to the Act and the rules made thereunder. He is not bound by any private arrangement as to payment of costs which the various shareholders, mokarraridars or proprietors might come to amoung themselves. His action cannot be affected by any such arrangement. (*Godbole, J.*) BIBI ANNA *v.* VIDYA PATI KUER. 13 B.R. 298.

———S. 94—*Power of Batwara officer to change kistbandi date.*

Under S. 94 of the Bengal Est. Partition Act the Batwara officer is empowered to change the original kistbandi dates fixed for the payment of the land revenue at the time of the Permanent Settlement. (*Manohar Lall and Ramaswami, JJ.*) SHAIK ULFAT HUSSAIN *v.* KALI RAM DOKANIA. A.I.R. 1948 Pat. 422.

———S. 99—*Applicability—Cultivating lease granted to tenant by co-sharer.*

S. 99 of the Estates Partition Act should be very strictly construed, in so far as it is sought to apply its provision to the detriment of the interest of a cultivating *raiyat*. In terms it only relates to a case in which a proprietor has created a *patni* or other tenure in respect of his share of the estate or a portion of his share of the estate or has created an encumbrance in respect of such share or portion of a share. The section can, therefore, have no application to a cultivating lease granted to a tenant by a co-sharer in exclusive possession of a *mouja*. Accordingly the co-sharer to whom the *mouja* in question subsequently falls on partition cannot disregard the lease and obtain *khas* possession of the land. (*Edgley and Blank, JJ.*) Guru Charan Gope *v.* Rajendra Mohan Roy. 52 C.W.N. 8.

———**S. 99**—*Scope and effect—Mortgage charge—If automatically transferred to share allotted to mortgagor on partition.*

S. 99 of the Bengal Estates Partition Act has not got the effect of transferring the mortgage charge to the share allotted to the mortgagor on partition. The section merely lays down what the rights of an incumbrancer will be. It does not operate automatically to dispossess the incumbrancer if he does not voluntarily give up possession. (*Reuben, J.*) Siram Mahto *v.* Emperor. 229 I.C. 451=1947 Pat. (Rul.) 250=13 B.R. 378=A.I.R. 1948 Pat. 75=48 Cr.L.J. 386.

———**S. 119**—Jurisdiction of Civil Court—When ousted. [*See* Q.D. 1941-1945, Vol. I, Col. 208.] Bimalendu Roy *v.* Shebaits of Deity Gopal Deb. I.L.R. (1945) 1 Cal. 466=80 C.L.J. 252=A.I.R. 1946 Cal. 480.

———**S. 119**—Scope and effect of—Land purchased by co-sharer proprietor in execution of decree against occupancy tenant—Allotment as *bakasht* to another co-sharer proprietor—Subsequent purchaser from former co-sharer—Right to claim possession as successor to occupancy raiyat. *See* Bihar Tenancy Act, S. 22 (2). 224 I.C. 92.

———**Chap. VI**—*Entries in* barwards—*Presumption of correctness.*

Ordinarily no presumption of correctness attaches to an entry in the record prepared in a collectorate partition proceeding, though, undoubtedly, the entry in the *barward* is admissible as a piece of evidence, to be considered along with the other evidence, such as the *khatian* and the oral evidence in the case. (*Reuben, J.*) Siram Mahto *v.* Emperor. 229 I.C. 451=1947 Pat. (Rul.) 250=13 B.R. 378=A.I.R. 1948 Pat. 75=48 Cr.L.J. 386.

BENGAL FERRIES ACT (I OF 1885), Ss. 7 and 8—Ferry—Exercise of—Recognition by Government—Effect. *See* Grant—Ferry. I.L.R. (1949) Cut. 465.

———**Ss. 16 and 22**—Scope—Ferries—Nature and incidents of—Law as to. *See* Ferries—Right of. I.L.R. (1949) Cut. 465.

———**S. 17**—*Revision—Order of compensation—Jurisdiction of Board to interfere.*

The Board of Revenue will decline to interfere in revision with an order of compensation under S. 17 of the Bengal Ferries Act which is equitable, merely on the ground of defect of law.

Quaere: Whether the Board has really any power to revise orders under the Bengal Ferries Act even in cases where has been want of jurisdiction? (*Lee*) Guru Sahai Lall *v.* Raghubans Prasad Singh. 13 B.R. 344.

———**Ss. 24 and 26**—*Scope—Provision in lease for its cancellation if lessee charged higher tolls—Lessor's right to cancel lease.*

Ss. 24 and 26, Ferries Act, provide criminal liability of the lessee who breaks the conditions which make him liable to convictions under S. 24, and do not at all abrogate the rights and obligations of the parties which have been already entered into by the agreement under which the lease was granted. Where in the lease itself there is a clear stipulation that it is liable to be determined or cancelled if the lessee charges tolls higher than he is lawfully entitled to, the lessor is entitled to cancel the lease according to the terms of the lease. (*Manohar Lall and Ramaswami, JJ.*) Bansi Ram *v.* Commissioner of Daudnagar Municipality. A.I.R. 1950 Pat. 31.

BENGAL FINANCE (SALES TAX) ACT (VI OF 1941), S. 2 (h)—*"Sale price"—Whether includes sales tax realised from buyer.*

The "sale price" as defined in S. 2 (*h*) of the Bengal Finance (Sales Tax) Act, includes any amount charged and realised separately from the buyer by the dealer as sales tax. (*Harries, C.J. and Chakravartti, J.*) Bata Shoe Co., Ltd. *v.* Member, Board of Revenue, West Bengal. 53 C.W.N. 278.

———**S. 4 (1)**—*Gross turnover—If includes sales tax realised from buyer.*

Under S. 4 (1) of the Bengal Finance (Sales Tax) Act the "gross turnover" has to be ascertained by taking the aggregate of the amounts of sale prices and parts of sale prices received by the dealer with the inclusion of all amounts charged and realised as "sales-tax" by the dealer during the period in question. (*Harries, C.J. and Chakravartti, J.*) Bata Shoe Co., Ltd. *v.* Member, Board of Revenue, West Bengal. 53 C.W.N. 278.

———**Ss. 4 (5) (a) and 7**—*Applicability—Dispensing chemist—Gross turnover exceeding Rs. 10,000—Liability to take out registration certificate.*

S. 4 (5) (*a*) of the Bengal Finance (Sales Tax) Act applies to a dispensing chemist whose gross turnover exceeds Rs. 10,000 during the year preceding the commencement of the Act. Consequently he is liable to pay tax under S. 4 and, therefore, is bound to apply for and take out a registration certificate under S. 7 of the Act. (*Gentle and Das, JJ.*) North Bengal Stores, Ltd. *v.* Member, Board of Revenue, Bengal. I.L.R. (1946) 2 Cal. 425.

———**S. 6, and Sch., Item No. 16**—*Applicability—Handloom woven cloth subjected to needle work—If exempt from sales tax.*

The exception with respect to handloom-woven cloth provided for in S. 6 coupled with Item 16 of the Schedule of the Bengal Finance (Sales Tax) Act, applies only to handloom-woven cloth which is sold in the same state in which it is when finished and removed from the loom. It does not apply to that cloth where its value is increased by other work being carried upon it, whether it be by hand or machinery in the way of embroidery, tapestry or the like. (*Gentle and Das, JJ.*) Ishwardas Kapoor & Sons *v.* Member, Board of Revenue, Bengal. I.L.R. (1946) 2 Cal. 395=50 C.W.N. 622.

———**S. 20**—*Revision application to Board—Right of petitioner to be heard.*

Having regard to sub-S. (5) of S. 20 of the Bengal Finance (Sales Tax) Act, the Board of Revenue cannot reject an application for revision under that section without a hearing being granted to the petitioner although it can accede to the petition without the petitioner being given an opportunity of being heard. (*Gentle and Das, JJ.*) Ishwardas Kapoor & Sons *v.* Member, Board of Revenue, Bengal. I.L.R. (1946) 2 Cal. 395=50 C.W.N. 622.

———**S. 21**—*Application under—Limitation—Exclusion of time requisite for obtaining copy of order of Board of Revenue—Limitation Act, S. 29.*

In computing the period of limitation for an application under S. 21 of the Bengal Finance (Sales Tax) Act, to require the Board to state a case, the time requisite for obtaining a copy of the order of the Board of Revenue should be excluded as provided in S. 29 of the Limitation Act. [1929 Lah. 170, appl.] (*Chatterjee, J.*) India Ice and Cold Storage Co., Ltd. *v.* Member, Board of Revenue, West Bengal. 53 C.W.N. 191.

———**S. 21**—*High Court—Judge sitting on Original Side.*

An application for statement of case to the High Court under S. 21 of the Bengal Finance (Sales Tax) Act need not be moved on the Appellate Side. The Judge sitting on the original side to whom the Chief Justice has assigned the matter is the "High Court" and it is for him to hear the application and to order the statement of the case as contemplated by S. 21 (3) of the Act. (*Chatterjee, J.*) India Ice and Cold Storage Co., Ltd. *v.* Member, Board of Revenue, West Bengal. 53 C.W.N. 191.

———**S. 21**—*Jurisdiction of High Court—Nature of.*

The jurisdiction conferred upon the High Court by S. 21 of the Bengal Finance (Sales Tax) Act is a special jurisdiction and forms no part of the Court's Original or Appellate Jurisdiction. [52 C. 546, 50 I.A. 227, 62 C. 671, appl. 49 Bom.L.R. 893, Ref.] (*Chatterjee, J.*) India Ice and Cold Storage Co., Ltd. *v.* Member, Board of Revenue, West Bengal. 53 C.W.N. 191.

BENGAL FOOD ADULTERATION ACT, (VI OF 1919), S. 6 (1) (v)—*Scope—If governed by S. 5 (1) (b).*

S. 6 (1) (*v*) of the Bengal Food Adulteration Act is a distinct and separate section and it prohibits a person from storing or keeping for sale mustard oil unless it is derived exclusively from mustard seeds. It is not a section which is governed by S. 5 (1) (*b*) of the Act. (*Sen and Chunder, JJ.*) S. N. Roy *v.* Shyam Sunder. 85 C.L.J. 229=5 D.L.R. (Cal.) 77=4 A.I.Cr.D. 275=A.I.R. 1950 Cal. 303=51 Cr. L.J. 1149.

BENGAL FOOD GRAINS CONTROL ORDER (1945), S. 2 (c)—*Powdered rice—If "food grain"—By-product—Meaning of.*

As powdered rice is neither unhusked or husked rice nor a by-product of either of them, the commodity does not come within the definition of the word "food grain" in Cl. 2 (*c*) of the Bengal Food Grains Control Order, 1945. Powdered rice is produced by grinding grains of husked rice. It could well be described as a product of rice, but not as a by-product, (*i.e.*) as a secondary product produced in the course of the production of some other commodity which is the primary object of the process of manufacture. (*Harries, C.J. and Bose, J.*) Superintendent, Legal Affairs, West Bengal *v.* Kunja Lal. A.I.R. 1950 Cal. 573.

———**S. 3 (1)**—*Dealer charged with contravening provisions—Proof required of prosecution.*

Where a dealer is charged with contravening the provisions of S. 3 (1) of the Bengal Food Grains Control Order, the burden of proving that the accused is a person coming within the definition of a "dealer" in S. 2 (*b*) of the order is on the prosecution. That involves the further consequence that the prosecution is bound to prove not only that he deals in the purchase or sale of foodgrain or storing foodgrain for sale, but also that he is not a producer. The prosecution may succeed in showing that he is a dealer even though he is a producer by further showing that the foodgrain in which he was dealing was not the foodgrain produced by himself. (*Das Gupta and Lahiri, JJ.*) Kalipada Nandi *v.* The State. 5 D.L.R. (Cal.) 118=A.I.R. 1950 Cal. 427=4 A.I.Cr.D. 527.

———**S. 3**—*Offence under*—Mens rea *is necessary.*

Para. 3 of the Bengal Foodgrains Control Order does not impose an absolute liability and the prosecution must establish *mens rea* on the part of the accused.

Flour which is unfit for human consumption does not fall within the ambit of the Food Grains Control Order. If a dealer purchases or stores for sale flour which is declared as condemned, that is, flour unfit for human consumption, he does not commit an offence under para. 3 of the order merely because the flour on analysis is found to be genuine flour and fit for human consumption unless *mens rea* is shown. (*Harries, C.J. and Blank, J.*) Md. Azam Khan *v.* The King. 52 C.W.N. 617=A.I.R. 1948 Cal. 287=49 Cr.L.J. 509.

BENGAL GENERAL CLAUSES ACT (I OF 1899), S. 28—*Service of notice by registered post—Endorsement of refusal neither signed nor supported by evidence—Presumption of service—If arises—C. P. Code, S.* 115.

No hard and fast rule can be laid down as to when the Court can accept service of a notice as sufficient, where the notice sent by registered post is returned unserved, but each case must depend on its own facts and circumstances. The presumption to be drawn from S. 28, Bengal General Clauses Act, is a rebuttable presumption, and where there is a specific denial of service, and the endorsement of refusal is neither signed nor supported by any evidence, it cannot be said that the Court acted in the exercise of its jurisdiction illegally or with material irregularity in declining to hold that the notice was actually served. (*Sharpe, J.*) Sarat Chandra Haldar *v.* Kagendra Nath Haldar. 5 D.L.R. (Cal.) 35.

BENGAL HOUSE RENT CONTROL ORDER (1942), Para. 10 (1) and (4)—*"To the full extent allowable by the order"—Meaning of—Rent not enhanced by contract after 1st December,* 1941, *nor settled by Rent Controller—Rent payable by tenant.*

The phrase "to the full extent allowable by the order" used in sub-paras. (1) and (4) of para. 10 of the Bengal House Rent Control Order means that the tenant is to pay only the rent which was being paid on 1st December, 1941, plus twenty per cent. and not more in the case where, under a contract between him and the landlord entered into after 1st December, 1941, he had agreed to pay rent at a rate which exceeds twenty per cent. of the rent which was being plaid on 1st December 1941. Under para. 10, he is not required to pay the excess over the said twenty per cent. in order to get the statutory protection from eviction. The effect is that the tenant must pay the rent settled by the Rent Controller or, the rent which he was to pay according to contract as the case may be, but in the last mentioned case, subject to the qualification that where, by a contract entered into after 1st December, 1941, he had undertaken to pay at a rate which is higher than twenty per cent. over the rent that was being paid on 1st December 1941, he need not pay what is in excess of the said twenty per cent. in order to get the benefit of the Bengal House Rent Control Order. Where there is no contract after 1st December, 1941, by which rent has been enhanced nor an order of the Rent Controller by which rent has been settled, in order to get the statutory protection from eviction, the tenant has only to pay at the rate which he was paying just before the notice to quit. (*Mitter and Akram, JJ.*) Nanda Lal Roy *v.* Suresh Chandra. I.L.R. (1946) 1 Cal. 211=222 I.C. 3=50 C.W.N. 171=1946 Cal. (Rul.) 69=A.I.R. 1946 Cal. 113.

——**Para. 10 (1), Proviso (c)**—*"Cause which may be deemed satisfactory by the Court"—Meaning of.*

When proviso (*c*) to para. 10 (1) of the Bengal House Rent Control Order speaks of "any cause which may be deemed satisfactory by the Court", it does not speak of grounds for ejectment as such, but merely of reasons by which the Court might be persuaded to pass a decree in spite of the order. (*Chakravartti, J.*) Tarak Chandra De *v.* Asoke Prasanna Bal. 226 I.C. 53=1946 Cal. (Rul.) 330=A.I.R. 1947 Cal. 185=50 C.W.N. 750.

——**Paras. 10 (4) and 10-C**—*Application for rescinding ejectment decree—Tenant, if entitled to period of grace for paying rent.*

A tenant who applies under para. 10-C of the Bengal House Rent Control Order for rescission of a decree for ejectment passed against him before that section came into force, is entitled to

the period of grace of three months under para. 10 (4) of that order for payment of arrears of rent. (*Mitter and Akram, JJ.*) Nanda Lal Roy *v.* Suresh Chandra. I.L.R. (1946) 1 Cal. 211=222 I.C. 3=1946 Cal. (Rul.) 69=50 C.W.N. 171=A.I.R. 1946 Cal. 113.

——**Para. 10 (a)**—*Application for permission to proceed with pending ejectment suit—Delay by Rent Controller—Permission given by District Judge—Plaintiff's right to proceed with suit.*

The plaintiff in a pending ejectment suit applied to the Rent Controller for permission to proceed with the suit under para. 10-A of the Bengal House Rent Control Order. As there was considerable delay by the Rent Controller in delivering judgment, the plaintiff moved the District Judge who proceeded to decide the case in order to prevent further delay. In other words, he constituted himself a Court of first instance and gave permission for the suit to proceed.

Held, that when a complaint of delay was made to the District Judge as an Appellate Court it did not entitle him to take the case out of the hands of the Court of first instance and decide it himself. The District Judge could only give or refuse permission on an appeal from a decision of the Rent Controller, but he could not do it as a Court of first instance. A decision given by the District Judge in place of the Rent Controller was no decision at all. That being so, there was no decision of the Rent Controller which would entitle the plaintiff to proceed with the suit. (*Harries, C.J.*) Manasha Charran Guha *v.* Bejoy Sankar Ghose. 52 C. W. N. 17.

——**Para. 10-A (2)**—*Applicability—Decree for ejectment passed before 6th July,* 1944, *against tenant of shop room.*

Para. 10-A (2) of the Bengal House Rent Control Order does not apply to a decree for ejectment passed before 6th July, 1944, against a tenant of shop room. "House" as defined in the order as it stood before that date did not include a shop room and the order itself did not refer in any way to any suit for ejectment. Not only does para. 10-A (2) not apply to the above case, but it cannot possibly apply to any case whatever. Under the sub-paragraph, the decree must be one passed on or before the 6th July, 1944 and it must be on any of the grounds specified in proviso (*c*) to para. 10 (1). As paras. 10 and 10-A have been enacted simultaneously and have come into force on the same day, that is the 6th July, 1944, there could not possibly be any decree on the grounds specified in para. 10 (1), proviso (*c*), except in the wholly unlikely case where the decree was passed on the 6th July, 1944, and before it was actually passed, the Court was apprised of the fact that the new provision, contained in para. 10, had come into force on that very date. Para. 10-A (2) is, therefore, a wholly purposeless enactment. (*Chakravartti, J.*) Tarak Chandra De *v.* Asoke Prasanna Bal. 226 I.C. 53=A.I.R. 1947 Cal. 185=1946 Cal. (Rul.) 330=50 C.W.N. 750.

——**Para. 10-A (2)**—*"Grounds"—Meaning of.*

The word "grounds" in para. 10-A (2) of the Bengal House Rent Control Order must be understood simply to mean the reasons for which the Court may have passed a decree in spite of the order, and not grounds for ejectment, strictly so called. (*Chakravartti, J.*) TARAK CHANDRA DE *v.* ASOKE PRASANNA BAL. 226 I.C. 53=1946 Cal. (Rul.) 330=A.I.R. 1947 Cal. 185=50 C.W.N. 750.

———**Para. 10-A (2)**—*Grounds of decree for ejectment—Ascertainment—Reference to plaint—Permissibility.*

Para. 10-A (2) of the Bengal House Rent Control Order speaks of "a decree or order made on any of the grounds specified in cl. (*c*) of the proviso to paragraph 10 (1)." What is to be ascertained is the ground on which the Court passed the decree and not the ground on which the plaintiff claimed ejectment. Reference must, therefore, be made, if at all, to the judgment and decree and not to the plaint in the suit. (*Chakravartti, J.*) TARAK CHANDRA DE *v.* ASOKE PRASANNA BAL. 226 I.C. 53=1946 Cal. (Rul.) 330=A.I.R. 1947 Cal. 185=50 C.W.N. 750.

———**(as amended in 1946), Cl. 10-AA**—*Applicability—Suit for eviction after notice to quit of tenant from month to month.*

Cl. 10-AA of the Bengal House Rent Control Order has no application to a suit for ejectment of a lessee holding under a tenancy from month to month after a valid notice to quit. The clause applies to a suit or proceeding by a landlord for eviction on the ground of non-compliance with the provisions of the order with regard to the payment or deposit of rent. (*Ellis, J.*) SABITRI SUNDARI *v.* JALEKHA BIA. 227 I.C. 202=1946 Cal. (Rul.) 437=52 C.W.N. 13=A.I.R. 1947 Cal. 244.

———**Cl. 10-AA**—*Benefit under—Claim to in second appeal—Sustainability.*

A tenant cannot claim the benefit of Cl. 10-AA of the Bengal House Rent Control Order in second appeal. (*Ellis, J.*) SABITRI SUNDARI *v.* JALEKHA BIA. 227 I.C. 202=1946 Cal. (Rul.) 437=52 C.W.N. 13=A.I.R. 1947 Cal. 244.

———**Para. 10-C**—*"Order for recovery of possession"—If means original order or order passed in execution.*

The phrase "order for recovery of possession" used in para. 10-C of the Bengal House Rent Control Order, means an original order for recovery of possession—an order in the nature of a decree passed in a suit for ejectment. It cannot include an order directing delivery of possession made by the executing Court in execution of a decree for possession. (*Mitter and Akram, JJ.*) NANDA LAL ROY *v.* SURESH CHANDRA. I.L.R. (1946) 1 Cal. 211=222 I.C. 3=50 C.W.N. 171=1946 Cal. (Rul.) 69=A.I.R. 1946 Cal. 113.

———**Para. 10-C**—*Scope of enquiry—Landlord, if tied down to his plaint.*

It would be unreasonable to tie down the landlord to his plaint in an enquiry to be made by the Court on an application by the tenant for rescinding an ejectment decree under para. 10-C of the Bengal House Rent Control Order. In that enquiry the landlord can show that conditions mentioned in any one of the three provisos to para. 10 (1) were, in fact, present; though he had not pleaded them in his plaint, because at the time when the suit for ejectment was instituted, none of those pleas would have been relevant. The language employed in the concluding portion of para. 10 (*c*) is wide enough to enable him to raise the pleas mentioned in the provisos, and justice also requires that he should be offered the opportunity to raise those pleas and to substantiate them by evidence. (*Mitter and Akram, JJ.*) NANDA LAL ROY *v.* SURESH CHANDRA. I.L.R. (1946) 1 Cal. 211=222 I.C. 3=1946 Cal. (Rul.) 69=50 C.W.N. 171=A.I.R. 1946 Cal. 113.

———**Para. 10-C**—*Relief under—Application, if necessary.*

Para. 10-C of the Bengal House Rent Control Order requires a substantive application in the suit itself before the Court can grant relief on the basis of that paragraph. That paragraph cannot be set up as a bar under S. 47, C. P. Code, in execution proceedings. (*Chakravartti, J.*) TARAK CHANDRA DE *v.* ASOKE PRASANNA BAL. 226 I.C. 53=1946 Cal. (Rul.) 330=A.I.R. 1947 Cal. 185=50 C.W.N. 750.

BENGAL IRRIGATION ACT (III OF 1876), S. 3 (2)—*'Village channel'—Canal water finding its way into channel by its own momentum.*

Obiter:—The use of the word "led" in the definition of "village channel" in S. 3 (2) of the Bengal Irrigation Act, seems to suggest that there should be a defined channel by and through which water is taken out from the canal to be passed on to the fields concerned. If therefore the land slopes down towards the channel and the overflow water of the canal finds its way into the channel by its own momentum, the channel cannot be said to be a village channel within the definition. (*Blank and Chakravartti, JJ.*) KISHORI RANJAN NANDI *v.* PROVINCE OF BENGAL. 51 C.W.N. 458.

———**S. 79**—*Assessment under—Validity—Conditions—Basis on which assessing authorities acted—If material.*

The opening paragraph of S. 79 of the Bengal Irrigation Act lays down two conditions both of which must be satisfied before the assessing authority can proceed to impose a rate under the section. The two conditions are: (1) that the water must be water supplied through a village channel and used in an unauthorised manner; and (2) that it should not be possible to identify the person whose act or neglect had made the unauthorised use possible. The section does not cover a case where the person, by whose act or whose neglect, the unauthorised use had occurred, can be identified.

The validity or otherwise of the assessment must be judged by what the assessing authorities thought and the basis on which they acted at the time of imposing the assessment. If they thought that the person whose act or whose negligence had made the unauthorised use of water possible could be identified, the assessment made under S. 79 of the Act is *ultra vires* and without jurisdiction. (*Blank and Chakravartti, JJ.*) KISHORI RANJAN NANDI *v.* PROVINCE OF BENGAL. 51 C.W.N. 458.

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869), Ss. 66 and 59—*Sale of patni tenure—Effect of*—Darpatni *interest—If automatically annulled.*

The effect of a sale of a patni tenure under S. 59 of Act VIII of 1869 is not to wipe off automatically the *darpatni* interest. By S. 66 of the said Act, the auction-purchaser acquires only the power to avoid the *darpatni* tenure, and that power he has to exercise by an overt act, if he wishes to wipe it off. 9 C. 683, foll. 58 I.A. 440, Disc. (*Mitter and Ahmad, JJ.*) PROVASH CHANDRA MALLIK *v.* LOKESWAR SINGHA. I.L.R. (1948) 1 Cal. 501.

BENGAL LAND REGISTRATION ACT (VII OF 1876), S. 42—*Application for mutation in regard to Zamindari*—Locus standi *of patnidar to contest.*

A patnidar has got no *locus standi* to contest an application for mutation of names in regard to a Zemindari property. (*Mukherjea and Ellis, JJ.*) JAGATPAT SINGH *v.* KRISHNA KAMINI. I.L.R. (1945) 1 Cal. 629=A.I.R. 1949 Cal. 373.

———**Ss. 42 and 47**—*Scope—Property left by will to one of two sons of testator—Probate taken out by legatee—Claim by other to half share on the ground that will is invalid—Procedure to be adopted by land registration officer.*

A grant of probate of a will to one of two sons to whom the property is devised by the testator is not conclusive of the fact that the property belonged to him; it does not in any way prejudice the rights of persons entitled to the property; nor is it conclusive on the question of inheritance. All that the person holding the probate can claim is to have him recorded as the executor-manager of his own share in the estate. If he wants to turn out his brother who impeaches the will and claims a share in it from his possession, he will have to go to the Civil Court and establish his title. (*Lee.*) GHANSHYAM MISHRA *v.* GANESH MISHRA. 12 B.R. 758.

———**S. 44**—*Person obtaining possession as simple mortgagee—Name of—If can be registered.*

Where possession of the claimant is only possession of the interest of a simple mortgagee, mutation of his name cannot be effected, even as the possessor of a simple mortgagee. (*Godbole.*) RAMLAGAN RAY *v.* KAILASH PRASAD SINGH. 12 B.R. 716.

———**S. 44**—Scope and effect—Mortgagee in possession registered as such—Effect on right of mortgagor—Owner to realize rent—Plea of payment to mortgagor by tenant—Validity of as defence to suit by mortgagee. *See* BIHAR TENANCY ACT, S. 60. 27 Pat. 521.

———**S. 51**—*Sale of whole estate in execution of decree against half-sharer—Delivery of possession and mutation without notice to the other sharer—Effect—Right of other to restoration of registration of half share.*

Where a whole *tauzi* is sold wrongly in execution of a decree against the owner of a half share only and possession delivered to the purchaser of the whole estate and mutation effected with regard to the whole in the name of the purchaser without notice to the other half-sharer the proceedings are not binding on him. An application by the latter for restoration of his share to him and for registation of his name must be allowed. (*Lee.*) MAHOMED ZAINUL ABDIN *v.* SECRETARY OF STATE. 12 B.R. 388.

———**S. 52**—*Joint land owned by two brothers —Sales by both to different vendees—Shares not specified—Absence of satisfactory evidence of shares or possession—Mutation—Proper order.*

Where each of two brothers had sold the common land to different persons without specifying the extent of the shares they owned and sold to their vendees, and there is no satisfactory evidence as to the shares or possession, the only practical course is to record the names of both vendees or sets of vendees in place of their respective vendors. (*Lee.*) RAJKUMAR SINGH *v.* EKRAMUL HAQUE. 12 B.R. 648.

———**S. 52**—*Scope of inquiry—Question of succession to post of* mutawali *and possession—Summary and* ex parte *inquiry—Propriety.*

In cases of land registration which involve complicated questions about succession to the post of *mutawalli* and possession, it is not proper to dispose of the matter in a summary and *ex parte* way. (*Houlton.*) ALI ASGHAR *v.* MAHOMED MEHDI. 13 B.R. 328.

———**Ss. 52 and 55**—*Scope—Question of title —Property surrendered by widow and possession surrendered—Widow supporting same—Claim to ownership by husband's brother under compromise —If can be gone into.*

Where in mutation proceedings a widow, who has surrendered possession of the properties to the opposite party supports the surrender and the possession of the opposite party, the matter is concluded so far as the Revenue Court is concerned. Her husband's brother who claims to have acquired title to the property under a compromise as owner, cannot get relief in mutation proceedings but must go to the Civil Court to get his title vindicated. (*Godbole.*) BINDHYACHAL PANDE *v.* BABUI SHEOKUMARI DEVI. 12 B.R. 634.

———**S. 55**—*Applicability—Disputed title and possession—Reference to Civil Court—Necessity.*

When there is no satisfactory evidence of possession in favour of either party, each of whom claims title to the property, and the case is not one in which the Land Registration Deputy Collector can suitably give a summary decision as to the right to possession, it is his duty to refer the matter to the Civil Court for determination under S. 55 of the Land Registration Act. (*Lee.*) RAMLAGAN PANDEY *v.* RAMRUCH SINGH. 12 B.R. 57.

———**Ss. 55 and 62**—*Decision of Civil Court on reference—Revision.*

The High Court should not ordinarily interfere under S. 115, C. P. Code, with the decision of the Civil Court in a reference made to it under S. 55 of the Land Registration Act. (*Mukherjea and Ellis, JJ.*) JAGATPAT SINGH *v.* KRISHNA KAMINI. I.L.R. (1945) 1 Cal. 629=A.I.R. 1949 Cal. 373.

———**S. 55**—*Duty of Collector—Rival claimants—Title of both doubtful—Possession held by one—Reference to Civil Court—Propriety—Procedure.*

Where the title of two rival claimants is doubtful, but it is found that one of them is in possession, the duty of the Collector is to enter the name of the claimant who has possession. He has no jurisdiction to refer the matter to the Civil Court in such a case. (*Swanzy.*) DHANUSHDHARI PURI *v.* RAM SWARUP PURI. 12 B.R. 743.

———**S. 55**—*Person in possession refusing to give up possession to persons entitled to shares—Remedy is to get share defined in Civil Court before applying for mutation.*

Where petitioners want to have their name recorded along with the name of the opposite party in respect of their shares, and the opposite party denies both their title and possession the remedy of the petitioners is to go to the Civil Courts to get their shares defined and get delivery of possession. Then they will be able to approach the Land Registration Court for mutation. (*Lee.*) HARINANDAN PRASAD SINGH *v.* RANGRAJ BAHADUR SINGH. 12 B.R. 630.

———**S. . 55**—*Reference under—Scope of enquiry by civil Court.*

Under S. 55 read with S. 59 of the Land Registration Act the civil Court to which a reference has been made has to determine the right to possession and the scope of the enquiry by it is much wider than an enquiry into the factum of possession. It may be that, as under the law all possession is an index of title, the person in possession may prove his title by the fact of his possession. But sometimes it may be that a trespasser is in possession, or it may be that there has been a scramble for possession after the death of the propositus or the limited owner. In that case the civil Court may have to determine the question as to the right of possession with reference to the title to the property. If the civil Court refuses to determine that question, the High Court may interfere in revision. (*Sinha and Mukharji, JJ.*) AJHOLA KUAR *v.* BAL KUAR. 26 Pat. 526=A.I.R. 1948 Pat. 382.

———**S. 74-A**—*Applicability—Closure of separate account—Condition precedent to.*

Action should not be taken under S. 74-A to close a separate account unless there is adequate reason to suppose that the separate account does not represent the existing facts. (*Lee.*) GONAR SAHI *v.* SATYADEO THAKUR. 12 B.R. 750.

———**S. 78**—Object and scope—Vendee of proprietary rights not getting himself registered as owner—Suit for rent—Maintainability—Right of registered proprietor to sue for rent after parting with interest. *See* BIHAR TENANCY ACT, S. 60. 26 Pat. 369.

———**S. 85**—*Interference—Grounds for—Applicant guilty of fraud and dishonesty—Respondent agreeing to interference—Another interested party not impleaded—Effect.*

Where the applicant has acted fraudulently and with dishonest motives, the Board of Revenue will not interfere in revision even if the respondent agrees, where another party interested in the proceedings has not been made a party to the proceedings. (*Lee.*) MATHURA PRASAD SAHU *v.* NITYA KUMARI. 12 B.R. 93.

———**S. 85**—*Jurisdiction of High Court—Order by Commissioner in appeal against Collector's order—Interference by Board—Appeal—Revision—Grounds of interference.*

There can be no appeal to the Board from a decision of the Commissioner passed in appeal against the decision of a Collector in a Land Registration case. The Board can, however, revise the Commissioner's order, if it is one without jurisdiction, or perverse or contains a material irregularity. (*Godbole.*) SHAMLAL SINGH *v.* BHUP RAI. 13 B.R. 503.

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819), S. 3—*Applicability—Accretions by alluvion to revenue free estates—Assessment of after* 1847 *and before* 1935—*Legality—Bengal Act IX of* 1847.

Alluvial accretions to a revenue free estate, which are outside the limits of such estate, cannot in law be assessed to revenue under the provisions of Bengal Regulation II of 1819 after the enactment of Bengal Act IX of 1847 by recourse to Ss. 1 and 6 of Act IX of 1847; and when the assessment proceedings came to an end before the expiry of the year 1935, the amendment of Act IX in 1936 cannot be availed of for the purpose of such assessment the amendment not being retrospective. [64 I.A. 281, dist.] (*R. C. Mitter and Roxburgh, JJ.*) KHAGENDRA NATH GANGULY *v.* PROVINCE OF BENGAL. 4 D.L.R. (Cal.) 145.

BENGAL LAND REVENUE SALES ACT (XI OF 1859)—*Construction and scope—Arrear of revenue—Duty of Collector to give information* suo motu—*Failure to note arrear on chalan—If ground for setting aside sale.*

The Bengal Land Revenue Sales Act is very stringent in its provisions and cannot and should not be liberalised, as it forms part of one whole Land Revenue system.

There is no obligation on the Collector under the Act to give an applicant any information about arrears of revenue *suo motu.* The failure on the part of the Tauzi Muharrir to note the fact of the arrear on a certain *chalan* does not give an applicant any claim to have a revenue sale set aside on that ground; different considerations would, however, arise if the applicant had asked for information and the Muharrir had not given it or had given any wrong information. (*Godbole.*) UDIT CHOUDHURY *v.* SRI KUMAR. (1947) P.W.N. 23.

———Revenue sale—Both co-sharers in default—Co-sharer purchasing at sale—Whether can be directed to re-convey to other co-sharer his share. *See* TRUST ACT, S. 90. 1 D.R. 3.

———*What passes at sale.*

At a revenue sale under the Bengal Revenue Sale Law, the interest that passes is not the interest of the defaulting proprietor, but the interest of the Crown subject to the payment of Govt. assessment. 54 I.A. 218; 18 C.W.N. 1281, ref. (*Reuben and Narayan, JJ.*) SAILAJANAN-

DA PANDEY *v.* LAKHICHAND SAO. 30 P.L.T. 388.

——**Ss. 2 and 3**—*Revenue sale—Suit to set aside on ground that estate was not in arrears—Onus—Words "due," "kisht" and "instalment" in Collector's account—Meaning of.*

In a suit to set aside a revenue sale on the ground that the estate was not in arrears, the onus is on the plaintiff to establish that the Collector's revenue account is wrong. The words "due", "kisht" and "instalment" used in the Collector's account, have no reference to the original *Kishtbandi.* The word "due" here means due as "arrears" (within the definition of S. 2 of Act XI of 1859), and the word "kisht" or "instalment" means an instalment fixed for payment of what has already become an "arrear" in the statutory sense. For facility of payment and convenience of accounting, the instalments are either one, two, or four in a year according as the annual revenue payable is less than Rs. 10 or less than Rs. 50 or more. Accordingly, the year stands divided into two or four parts, and the *kisht* day or the latest day for payment of arrears fixed under S. 8 of the Act is the day with which the above division of the year expircs. When any instalment of arrear remains unpaid on the said last day, the Collector in his accounts shows the estate in arrear, not in the sense that the unpaid amount becomes an arrear on and from the day following the latest date, but because the grace period allowed under the section for payment of what had become arrears had expired. (*Meredith and Ray, JJ.*) KARU SINGH *v.* NATHUNI LAL. 12 B.R. 412=223 I.C. 442=1946 Pat. (Rul.) 202=A.I.R: 1946 Pat. 459.

——**Ss. 5 and 6**—"Notification" under—If notice under S. 8, Land Revenue Sales Act, 1868. [*See* Q.D. 1941-1945, Vol. I, Col. 218.] BADRINARAIN *v.* BENIMADHO. 18 R.P. 153.

——**S. 6**—*Contents of Notification—Sale of share of estate—Revenue of entire estate—If must be stated in notification.*

Where the entire estate is not advertised for sale but only a share of an estate, it is not incumbent on the Collector to state in the notification issued under S. 6 of the Bengal Land Revenue Sales Act the revenue of the entire estate. The form of the Notification for sale given in the Revenue Sale Manual is a combined form for the sale of entire estates and also of shares. All the columns need not be filled up, but only those that may be appropriate to the case. Moreover, the form has no statutory force. All that S. 6 requires is a correct specification of the share to be sold. [I.L.R. (1942) 1 Cal. 310, rel. on.] (*Mitter and Blank, JJ.*) RAMESH CHANDRA RAY *v.* HEMENDRA KUMAR RAY. I.L.R. (1945) 2 Cal. 489 =A.I.R. 1949 Cal. 519.

——**Ss. 6 and 33**—*Object of notification—Incorrect specification of details—Power of Civil Court to set aside sale.*

Incorrect specification of some of the details in the notification under S. 6, Bengal Land Revenue Sales Act, is not *per se* such a misdescription as would entitle the Civil Court to set aside a sale under S. 33 of that Act. The object of a notification under S. 6 is obviously to appraise likely purchasers of exactly what is going to be sold and to ensure thereby reasonable competition amongst bidders in order that the defaulter may have a fair value for the property which is sought to be sold. The rules and forms which have been prescribed by the Board of Revenue in this behalf have no statutory force but are in the nature of administrative behests and mere non-compliance with them is not sufficient to vitiate the sale. Whether the misdescription is such as would render the sale liable to be set aside depends on the particular facts of each case, the test being whether the specification of the property put up for sale is sufficiently definite for the purposes already mentioned. The Court has to see if the particulars given are sufficient to identify the property and give prospective bidders information as to what they were going to bid for. 42 I.A. 79 and 46 C.W.N. 73, rel. on. (*G. N. Das, J.*) NRISINHA KUMAR SINHA *v.* SHYAM SUNDAR. A.I.R. 1950 Cal. 196.

——**S. 6**—*Scope—Non-compliance—Sale before expiry of 30 days after affixture of notification—If null and void.*

Under S. 6 of the Bengal Revenue Sale Law, thirty clear days must elapse between the date of affixing the notification in the office of the Collector and the date of the sale. In computing the period of 30 days, the date on which the notice is affixed and the date of the sale have to be excluded. But the fact that the sale is held before the expiry of 30 clear days as required by S. 6, does not render the sale a nullity. It is an irregularity to which S. 33 of the Act applies, rendering the sale liable to be set aside on grounds mentioned in S. 33. (*Mitter and Chunder, JJ.*) ANANGA MOHAN ROY *v.* KALIDAS ROY. 226 I.C. 393=1946 Cal. (Rul.) 375=A.I.R. 1947 Cal. 283.

——**S. 13**—Advance payment of revenue by co-sharer of separate account—Appropriation towards default made by another co-sharer—Power of Collector. *See* CONTRACT ACT, Ss. 59 AND 60. 54 C.W.N. 946.

——**Ss. 13, 14 and 33**—*Sale of entire estate without first putting up to sale separate account in arrears—Validity.*

A sale of the entire estate for the arrears due in respect of a separate account cannot be impeached as a sale without jurisdiction, merely because the defaulting share had not been first put up to sale as required by Ss. 13 and 14 of the Bengal Land Revenue Sales Act. Such a sale is, no doubt, illegal, but it is open to challenge only in the manner laid down in S. 33 of the Act. (*Biswas, J.*) SABITA SIKDAR *v.* SUDHIR KUMAR MAJUMDAR. 223 I.C. 414=1946 Cal. (Rul.) 168=50 C.W.N. 419=A.I.R. 1946 Cal. 367.

——**S. 14**—*Closure of separate accounts—Practice—Contemplated sale not taking place—Effect on such closure.*

There is no express provision in the Bengal Land Revenue Sales Act for the closure of all separate accounts. This is done in the Collectorate for the purposes of convenience, with a view to find out whether tne estate as a whole is in default or not. S. 14 of the Act merely directs that the Collector will declare that the entire estate will be brought to sale if the co-sharers do not pay up the arrears in respect of the defaulting sharers. If in point of fact, the contemplated sale does not take place or is set aside in a competent proceeding, the effect of the declaration made by the Collector loses all its force and the parties are restored to the position which they occupied before the declaration was made by the Collector. Assuming there is a statutory justification for the closing of the separate accounts, such closure ceases to be effective if the contemplated sale never takes place. 44 C.W.N. 38, referred to. (*Das and Das Gupta, JJ.*) Rameswar Das *v.* Byomkesh Samanta. A.I.R. 1950 Cal. 186.

———**S. 14**—*Phrase "amount of arrears due thereupon to the date of sale"—Interpretation.*

Act XI of 1859 proceeds upon the basis that revenue is a first charge on the estate itself and the best way of realising it is by sale of the estate itself. There are, therefore, two considerations when the estate belongs to two or more proprietors: (*i*) that the proprietors, who had opened separate accounts, should not suffer for the default of their co-sharers and (*ii*) that the security for Government demand on the estate, for which all the proprietors were jointly and severally liable according to their engagement in spite of the opening of separate accounts, should not be prejudiced. The equitable adjustment of these two is made by Ss. 13 and 14 of the Act. Ss. 13 and 14 must therefore be regarded as complementary to each other. So the word "due" in both those sections must be given the same meaning.

As a separate account can be sold by the Collector under S. 13 only when that account is in arrears in terms of S. 3, that is only when it remains in arrear at the *kist* date fixed under that section, the phrase "amount of arrears that may be due" occurring in that section must, therefore, have reference to the *kist* date notified under S. 3. The word "due" must mean therefore "due at the *kist* date mentioned in a notification issued by the Board of Revenue under S. 3". For the reasons given above, the word "due" occurring in the first paragraph of S. 14 must have the same meaning, and so the phrase "amount of arrears due thereupon to the date of sale" in that section is equivalent to the phrase "amount of arrears due thereupon to the date of sale *for which a sale under the Act could be held on that date.*"

The word "due" in S. 14 cannot therefore be interpreted in the sense of "due according to the '*dowl kistibandi*' of the Permanent Settlement of interpreted by S. 2 of the Act." Even if this is the correct interpretation of that phrase, it would not be a case of an absence of jurisdiction on the part of the Collector, but it would be one of substantial irregularity in the exercise of his jurisdiction, if he did not stop the sale when the bid covered the amount of arrear mentioned in the notification issued under S. 6 but did not cover the further amount that fell due in terms of the *dowl kist* up *to the date* when the sale was actually held by the Collector. (*Mitter and Blank, JJ.*) Ramesh Chandra Ray *v.* Hemendra Kumar Ray. I.L.R. (1945) 2 Cal. 489=A.I.R. 1949 Cal. 519.

———**Ss. 14 and 53**—*Rights of purchaser of an entire revenue paying estate who himself is a defaulter.*

The purchaser of an entire revenue paying estate in a sale under the provisions of S. 14 of the Bengal Land Revenue Sales Act, who himself is a defaulter, but who had opened a separate account, does not acquire the estate free from encumbrances and has no right to avoid under-tenures. (*Mitter and Sharpe, JJ.*) Jahar Lal Das *v.* Jitendra Nath. 52 C.W.N. 466=A.I.R. 1948 Cal. 296.

———**S. 26**—*Gross carelessness of proprietor resulting in mistake—Sale—If can be set aside.*

It is no doubt true that the Board frequently orders the setting aside of sales caused by the mistakes of proprietors or their agents, *e.g.*, mistakes in chalans, or money order forms, etc., mentioning the wrong tauzi number or wrong amount, when such mistakes are not through gross carelessness. But when the proprietors, all males, have been guilty of gross carelessness and there is no question of any Government servant being concerned and there is no extenuating circumstance, it is not fair to the bidders at the land revenue sale to set aside the same when it has been caused by the gross carelessness of the proprietor himself. (*Lee.*) Rampari Kuer *v.* Dalu Ram. 13 B.R. 303.

———**S. 26**—*Hardship—Setting aside sale on ground of—Party not guilty of negligence—Property sold for inadequate price.*

When there has been no negligence on the part of the applicant, and when the property is found to have been sold for an inadequate price, the sale can be set aside on the ground of hardship, especially, when the applicant has been regular in the payment of revenue and the non-payment in time which gave rise to the sale was due to illness. (*Swanzy.*) Hoor Bibi *v.* Peari Mohan Prasad. 12 B.R. 741.

———**S. 28 and Sch. A**—*Title of auction-purchaser—Date of vesting—Lease granted by proprietor after default and before sale—If binds him—Good faith—Onus of proof—Purchaser, if can recover* nazarana *paid to proprietor.*

Under S. 28 of the Bengal Land Revenue Sales Act read with Sch. A, the title of the purchaser of an estate at a revenue sale relates back to the date when default is made by the proprietor. A lease granted by the proprietor after the date of default and before the sale does not, therefore, bind the purchaser. Assuming that a *bona fide* lessee would be protected, the burden of proof is on the lessee to prove good faith both in himself and the lessor. The purchaser is not entitled to recover the *nazarana* paid to the proprietor for granting the lease. (*Henderson, J.*) Surendra Narayan Sinha *v.* Pankoj Kumar Das. 50 C.W.N. 96=A.I.R. 1946 Cal. 258.

———**S. 33**—*Applicability—Revenue sale held without jurisdiction.*

S. 33 of Act XI of 1859, applies only to cases where a sale has been "made contrary to the provisions of this Act," which presupposes that the Act applied, but certain of its provisions had not been complied with. The section has no application to a case where there was no jurisdiction to hold a revenue sale at all. (*Blank and Chakravartti, JJ.*) Birendra Nath Raha *v.* Mir Mahbubar Rahaman. 51 C.W.N. 466=A. I. R. 1947 Cal. 332.

———**S. 33**—Bengal Land Revenue Sales Act (1868), S. 8—Relative scope and combined effect. [*See* Q.D. 1941—1945, Vol. I, Col. 227.] Badrinarain *v.* Benimadho. 18 R.P. 153.

———**S. 33**—*"Ground"—If includes reasons for ground of objection.*

The expression "unless such ground has been declared and specified" in S. 33 of the Bengal Revenue Sale Law do not include the reasons for the ground. The ground must be same in the appeal to the Commissioner and in the Civil Court; but the reasons given to sustain the ground of objection may be different. (*Mitter and Chunder, JJ.*) Ananga Mohan Roy *v.* Kalidas Roy. 226 I.C. 393=1946 Cal. (Rul.) 375=A. I. R. 1947 Cal. 283.

———**S. 33**—*Substantial injury—When justifies setting aside of sale.*

In order that a sale may be set aside on the ground of substantial injury under S. 33, Bengal Land Revenue Sales Act, it must be established, first, that there was substantial injury, and, secondly, that the substantial injury was due to the irregularity complained of. (*Mitter and Chunder, JJ.*) Ananga Mohan Roy *v.* Kalidas Roy. 226 I.C. 393=1946 Cal. (Rul.) 375=A. I. R. 1947 Cal. 283.

———**S. 33**—*Suit to set aside sale of estate—Estate not in arrears—Jurisdiction of Civil Court.*

A suit to set aside a revenue sale upon the allegation that the sale was without jurisdiction as there was no arrear in fact for which the sale was held, is not excluded from the cognizance of the Civil Court by reason of this particular objection not having been taken under S. 33 of the Bengal Land Revenue Sales Act in the appeal before the Commissioner. (*Manohar Lall and Ramaswami, JJ.*) Shaik Ulfat Hussain *v.* Kali Ram Dokania. A.I.R. 1948 Pat. 422.

———**S. 37**—*Annulment of intermediate tenure by purchaser—Suit by him for rent against under-tenants—Intermediate tenure-holder—If necessary party.*

The purchaser at a revenue sale cannot claim rent from the under-tenants until he exercises the option of annulling the intermediate tenure. Such option when exercised brings him face to face with the under-tenants and he becomes entitled to recover rent from the latter which fell due since the date of annulment. The intermediate tenure-holder whose interest has ceased by annulment need not be impleaded in a suit against the under-tenants for arrears of such rent. 58 I.A. 440, 37 C.W.N. 866 and 50 C.W.N. 37, relied on; 43 C.W.N. 469, referred to; 8 C. 238, 41 C.L.J. 841 and 58 C.L.J. 415, Dist. (*Das, J.*) Najerali *v.* Baitulla Mondal. 53 C. W. N. 214=A.I.R. 1948 Cal. 174.

———**S. 37**—*Annulment of tenure—Institution of certificate proceedings against under-tenant—If amounts to.*

When the purchaser of a superior interest becomes entitled to annul an intermediate tenure, a demand of rent directly from an under-tenant in the presence of the tenure-holder by way of a certificate proceeding constitutes an effective election to annul the tenure. (*Chakravartti, J.*) Jitendra Nath Mondal *v.* Jahar Lal Das. 50 C.W.N. 37.

———**S. 37**—*Annulment of under-tenure by revenue-sale-purchaser—Land in possession of Receiver appointed by Court—Leave of Court—If necessary.*

No person with paramount title, whether a party or a stranger to an action in which a Receiver has been appointed by Court, can disturb the possession of the Receiver without the requisite leave or without an application to the Court appointing the Receiver.

Although the effect of the exercise of the option by a Revenue-sale-purchaser is to annul the under-tenures in the possession of the Receiver and to put an end to such under-tenures, the mere exercise of the option does not *per se* disturb or interfere with the possession of the Receiver. No question of taking leave of the Court appointing the Receiver arises at that stage. It may be that when the purchaser after exercising his option is brought face to face with the under-tenants and wants to realize rent from them, the leave of the Court appointing the Receiver may have to be taken.

Even if the leave of the Court is necessary to exercise the option by the Revenue-sale purchaser, the absence of such leave does not affect the jurisdiction of the Court to entertain a suit although the leave of the Court has to be taken before the suit is brought to a hearing. 10 C. 1014 and 18 C.W.N. 289, dist. 46 C. 352, ref. (*Das, J.*) Najerali *v.* Baitulla Mondal. 53 C.W.N. 214=A.I.R. 1948 Cal. 174.

———**S. 37**—*Position of purchaser—Annulment of under-tenure by him—Under-tenure in possession of Receiver—Leave of Court—If necessary—Suit by purchaser for rent—Intermediate tenure-holders—If necessary parties.*

Under S. 37 of Act XI of 1859, the purchaser acquires the estate free from all incumbrances and becomes entitled to avoid and annul all under-tenures with certain exceptions specified therein. Such a purchaser acquires a paramount title to the estate that is sold. In order to annul an under-tenure, all that is necessary for the purchaser is to notify to the tenure-holder by an unequivocal act the intention to annul the tenure.

Where the under-tenure is in possession of a Receiver appointed by Court, the mere exercise of the option to annul the under-tenure by the purchaser does not *per se* disturb or interfere with the possession of the receiver. No question of taking leave of the Court appointing the receiver therefore arises at that stage. It may be that when the purchaser, after exercising his option, is brought face to face with the under-tenants and wants to realise rent from them, the leave of the Court appointing the receiver may have to be taken. Assuming that the leave of the Court is necessary even to exercise the option to annul the under-tenure, the exercise of such an option without the leave of the Court is not wholly ineffective to determine the tenure held by the receiver, as there is no statute law requiring such leave and it is a matter of procedure and is intended to maintain the dignity of the Court by which the receiver was appointed.

The purchaser at a revenue-sale cannot claim rent from the tenants until he exercises the option of annulling the intermediate tenure. Such option when exercised brings him face to face with the tenants and he becomes entitled to recover rent from the latter which fell due since the date of annulment. In a suit for rent by the purchaser, the intermediate tenure-holders whose interests have ceased need not be impleaded. (*Das, J.*) Najer Ali Mandal *v.* Baitulla Mandal. I.L.R. (1948) 1 Cal. 286.

———S. 37—*Purchaser at revenue sale—Position of* vis-a-vis *the intermediate tenure-holder—Right to rent—Date.*

In the case of a revenue sale, the intermediate tenures do not automatically fall through, but the purchaser has to exercise his option to annul the under-tenures and this can be done by notifying it to the intermediate tenure-holders. The purchaser can claim rent from the tenants holding under the tenure-holders only after the date he annuls the intermediate tenures. (*Das, J.*) Bharat Mandal *v.* Dabiruddin Sardar. 52 C.W.N. 360.

———S. 37—*Scope—If subject to S. 53—Proprietor re-purchasing estate sold at revenue sale—What passes to him.*

S. 37 of the Bengal Land Revenue Sales Act is subject to S. 53 of that Act; in the case of a re-purchase by a prior proprietor of an estate from the purchaser at a revenue sale, the previous proprietor who so repurchases from a purchaser at the revenue sale does not acquire it free from all incumbrances, but only acquires it subject to all the incumbrances existing at the time of the sale and he does not acquire any rights in respect to under-tenants or raiyats which were not possessed by him at the time of the sale of the estate. (*Reuben and Narayan, JJ.*) Sailajananda Pandey *v.* Lakhichand Sao. 30 P.L.T. 388.

———**S. 37, Exception (2)**—*'Settlement'—If refers to the permanent settlement.*

The word 'settlement' in the words "at the time of the settlement" used in exception 2 to S. 37 of the Bengal Land Revenue Sales Act, does not refer to the permanent settlement of Bengal but refers to the particular settlement or contract with the Government by which revenue was assessed upon the estate whenever that might have been made. In the case of a temporarily settled estate, if the continuity of the estate had been maintained all through, the date of the settlement would be the date when the revenue was first assessed upon the temporarily settled estate. (*Das, J.*) Bharat Mandal *v.* Dabiruddin Sardar. 52 C.W.N. 360.

———**S. 37, Excep. (4)**—*Tank in existence before creation of taluk—If protected.*

A tank which was in existence long before the *taluk* in question was created, is not protected by the 4th Exception to S. 37 of Act XI of 1859. 41 I.C. 1, referred to. (*Akram, C.J. and Amin Ahmed, J.*) Khairel Basar *v.* Badiar Rahman. 2 D.R. 239.

———**Ss. 53 and 37**—*Co-sharer purchaser holding separate account—Power to annul encumbrance—Sale caused by his own default.*

Under S. 53 of the Revenue Sales Act, read with S. 37 as it must be, a co-sharer of an estate holding a separate account opened under S. 10 or 11, if he purchases the entire estate at a sale on account of its own arrears, whether a sale directed under S. 14 or a sale otherwise held, would acquire the estate free from all encumbrances and with power to annul under-tenures as provided for by S. 37, although the sale may have been caused by his own default. (*Chakravartti, J.*) Jitendra Nath Mondal *v.* Jahar Lal Das. 50 C.W.N. 37.

———**(VII OF 1868), S. 1**—*Proprietor of tenure—If proprietor of an estate.*

Under the interpretation S. 1 of Act VII of 1868, the word "proprietor" includes any tenant by whom any estate or tenure is held directly under the Government. Therefore there is no question that technically the owner of the tenure is to be called a proprietor for the purposes of revenue sale. This does not mean that the proprietor of a tenure is the same as the proprietor of an estate. The mere fact that a person is recorded as a proprietor or the dues are spoken of as revenue, would not go to show that the tenure has to be taken, for the purpose of land revenue sale, to be an estate. (*Mookerjee and Chunder, JJ.*) Kamdeb Das *v.* Manindra Nath Dinda. A.I.R. 1949 Cal. 652.

———**S. 1**—*"Tenure"—If includes raiyati holding.*

The definition of "tenure" in the Bengal Act VII of 1868 is wide enough to include a raiyati holding. (*Ellis and Amin Ahmed, JJ.*) Mamina Bibi *v.* Fajleh Ahamad. 1 D.R. 65.

———**S. 1**—*'Tenure'—Korfa interest held under raiyat.*

A *korfa* interest held under a raiyat is not a tenure within the meaning of Act VII of 1868 and as such a revenue sale of such interest is not possible under the Act. (*Blank and Chakravartti, JJ.*) Birendra Nath Raha *v.* Mir Mahabubar Rahaman. 51 C.W.N. 466=A.I.R. 1947 Cal. 332.

———**Ss. 6, 7 and 33**—*Misdescription in notices—Sale, if liable to be set aside.*

A revenue sale is liable to be set aside if the misdescription in the notices under Ss. 6 and 7 of the Bengal Land Revenue Sales Act is such as to mislead intending purchasers as to what is going to be sold, and the misdescription prevents a sufficient number of intending purchasers from bidding at the sale and causes substantial injury to the plaintiff. (*Ellis and Amin Ahmed, JJ.*) Mahomed Chand Mia *v.* Mahomed Ali Mia. 1 D.R. 75.

———**S. 11**—*Occupancy* jote *held under Government if saleable.*

An occupancy *jote* held directly under the Government is a tenure within the meaning of Act VII of 1868 and is, therefore, saleable under S. 11 of that Act by the revenue sale procedure.

(*Blank and Chakravartti, JJ.*) APARNACHARAN MAHAJAN *v.* ELAHABUX. I.L.R. (1947) 1 Cal. 567=51 C.W.N. 292.

——**S. 12**—*Applicability—Under-tenures.*

The words "which have been imposed after its creation, or after the time of settlement, whichever may have last occurred" in the main provision of S. 12 of Act VII of 1868, have reference not to under-tenures but only to encumbrances and encumbrances falling outside the description constitute exceptions to encumbrances which are extinguished upon a revenue sale. As regards under-tenures, exceptions are only those which come under one or other of the four exception clauses. S. 14, which protects raiyati interests of a certain class, constitutes a kind of exception to both. (*Chakravartti and Ellis, JJ.*) PRODYOT KUMAR SEN GUPTA *v.* NAGENDRA KUMAR. 52 C.W.N. 72.

——**Ss. 12 and 14**—*Scope and effect—Purchaser's right of ejectment—Persons holding under-tenure sold.*

The scheme of S. 12 read with S. 14 of Act VII of 1868, appears to be that the purchaser has first to annul under-tenures and thereupon he can eject all under-tenants, *i.e.,* persons holding under the under-tenure annulled or other under-tenures held under that under-tenure. But if a person is a *raiyat* of the kind contemplated by S. 14, he cannot be ejected. If, however, the *raiyati* is held immediately under the under-tenure annulled, it comes also under Exception *Thirdly,* if it does not come exclusively there. (*Chakravartti and Ellis, JJ.*) PRODYOT KUMAR SEN GUPTA *v.* NAGENDRA KUMAR. 52 C.W.N. 72.

——**S. 12**—*Suit by purchaser for possession without annulling tenure—Maintainability.*

It is true that a purchaser at a revenue sale cannot eject persons found on the land unless he first annuls the tenure on the basis of which or under which they are there. But the purchaser can sue for possession joining both the persons holding immediately under the tenure sold and persons holding under them. The institution of such a suit would be an effective election to annul the tenure. (*Chakravartti and Ellis, JJ.*) PRODYOT KUMAR SEN GUPTA *v.* NAGENDRA KUMAR. 52 C.W.N. 72.

——**S. 12, Exception Thirdly**—*Protected interest—Conditions.*

In order that an *etman* or under-tenure right in land may be protected under the third exception to S. 12 of Act VII of 1868, it is not mere recognition that is sufficient but the recognition must be as a tenure bearing rent which is fixed for the period of settlement. The most important criterion of a tenure according to that Act is that it must be "transferable by grant creating the same or by the custom of the country". From the mere fact that a portion of land has been transferred it is impossible to hold that either by the original grant creating the tenure or by custom the tenure is transferable. An entry in the Record of Rights with regard to an *etman* that the rent is "liable to be enhanced" shows that the rent could be enhanced during the

currency of the present settlement. It cannot, therefore, be said to have been fixed for the period of settlement. (*Amiruddin Ahmed, J.*) MANINDRA NATH *v.* MD. JANEALAM SADAGAR. 1 D.R. 32.

——**S. 12, Exception Thirdly**—*Requirements—Under-tenure, when protected.*

Under S. 12, Excep. 3 of the Bengal Land Revenue Sales Act, recognition of the under-tenure must be found from the records of the last temporary settlement then current and rent must be fixed under Chapter X, Bengal Tenancy Act. Where the notes made in the settlement proceedings of the current settlement as regards an under-tenure clearly show that, except for the purposes of S. 193, Bengal Tenancy Act, the Government recognised the under-tenure valid for all other purposes which would include the protection of the same on a revenue sale and further that the Revenue Officer, fixed rent for the currency of the said settlement, the under-tenure is protected under S. 12, Excep. 3 and cannot, therefore, be avoided and annulled. 47 C.W.N. 241, overruled. (*Mookerjee and Chunder, JJ.*) KAMDEB DAS *v.* MANINDRA NATH DINDA. A.I.R. 1949 Cal. 652.

——**S. 12, Exception Fourthly**—*Tenant taking lease with improvements—If protected.*

The fourth exception to S. 12 of Act VII of 1868 does not give protection to tenants who made no improvements themselves, but took a lease with tanks or buildings already existing. (*Chakravartti and Ellis, JJ.*) PRODYOT KUMAR SEN GUPTA *v.* NAGENDRA KUMAR. 52 C.W.N. 72.

——**Ss. 13 and 37**—*Estate distributed into two shares held by defaulting proprietor as separate entities—Purchaser at single sale—Rights of.*

A purchaser who purchases the only two shares of an estate, which were separate entities in the hands of the defaulting proprietor, upon the issue of a single notice under S. 6 of the Revenue Sale Law and at a single sale, does not purchase the whole estate as a single entity, and does not, therefore, become entitled to the rights provided for by S. 37 of the Revenue Sale Law. What was offered for sale and what was in fact sold was not the whole estate as a single entity but two separate shares which cannot by the sale merge into a single estate.

There is no provision at all in the Revenue Sale Law which authorises the Collector to bring several defaulting shares to sale all at once, without following the procedure laid down in S. 13. In a case where there are separate accounts, the Collector must close the separate accounts before putting up to sale the estate as a whole and separate accounts, once created can disappear only when they have been so closed up. 46 C.W.N. 73 and 46 C.W.N. 540, ref. to. (*Harries, C.J. and Chakravartti, J.*) GUNENDRA NATH MITRA *v.* BIMAL KUMAR HUI. 53 C.W.N. 428.

——**S. 17**—*Service of notice under S. 7 of Public Demands Recovery Act—If operates as attachment.*

The service of a notice upon a certificate debtor under S. 7 of the Public Demands Recovery Act operates as an attachment of the property in question as contemplated by S. 17 of the Bengal Land Revenue Sales Act. A sale of that property while such attachment is subsisting is without jurisdiction and is, therefore, void and inoperative. (*Ellis and Amin Ahmed, JJ.*) MAHOMED ESMILE *v.* RAHAMALI RAJ. 1 D.R. 1.

———**S. 30**—*Procedure for sale—Old and present Act.*

As S. 30 of Act VII of 1868 enacts that Act VII is to be read with and taken as part of Act XI of 1859 as modified by Act III of 1862, no distinction can be drawn between the provisions of Act XI of 1859 and those of Act VII of 1868 with reference to the procedure for sale and with reference to what constitutes arrears. (*Mookerjee and Chunder, JJ.*) KAMDEB DAS *v.* MANINDRA NATH DINDA. A.I.R. 1949 Cal. 652.

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1882)—Scope of—Powers of the Collector under—Effect of S. 2 of Bengal Alluvial Land Settlement Act on such powers. *See* BENGAL ALLUVIAL LANDS SETTLEMENT ACT (XXXI OF 1858), S. 2 AND BENGAL REGULATION (VII OF 1822), S. 9. 1949 F.L.J. 255.

———**S. 9**—*Entries in* chitta—*Evidentiary value.*

A *chitta* prepared in proceedings held under Regulation (VII of 1822) is certainly evidence of title and must be presumed to be correct at the date of its preparation. If the position indicated by the entries in the *chitta* can legally change, a subsequent entry is not necessarily wrong. (*Chakravartti and Ellis, JJ.*) PRODYOT KUMAR SEN GUPTA *v.* NAGENDRA KUMAR. 52 C.W.N. 72.

———**S. 9**—Entry under—Scope of its presumptive value—Incorrectness of entry—If can be pleaded in defence. *See* BENGAL ALLUVIAL LANDS SETTLEMENT ACT (XXXI OF 1858), S. 2 AND BENGAL REGULATION (VII OF 1822), S. 9. 1949 F.L.J. 255.

———**Ss. 10, 3 and 5**—*Accreted land—Refusal by proprietors to take settlement—Government taking khas possession for certain period—If bound to offer fresh settlement on expiry of that period.*

It is clear from the provisions of Ss. 3 and 5, Bengal Land Revenue Settlement Regulation, that the fact that the land is let out in farm or the fact that the land is taken in khas possession by the Government on the ground of the refusal of the proprietors to accept the jama fixed by Government does not take away the proprietary interest of the owners of the Asli land in the accreted land. That interest remains and all that the letting out in farm or the taking of khas possession by the government amounts to is that the land is managed by government on behalf of the proprietors. The fact that Malikana is paid to proprietors would make it quite clear that the proprietors of the Asli land have a proprietary interest in the accreted land which would render them liable to be called upon to accept or refuse a fresh settlement at the termination of the period during which the land is held either in farm or in khas. (*Sen and Chunder, JJ.*) SATYA KISHORE BANERJEE *v.* PROVINCE OF BENGAL. A.I.R. 1950 Cal. 467.

———**S. 10 (5)**—*Government revenue—Personal liability of proprietor—Beng. Public Demands Recovery Act, S. 3 (6) and Sch. I.*

There is nothing in S. 10 (5) of the Beng. Land Revenue Settlement Regulation to justify the view that the method therein mentioned is the only method open to government to realise its dues. The sub-section imposes a liability on the 'interest and estate' for the revenue but it does not say that this is the only liability. Further the arrears due constitute government revenue and they constitute 'a public demand' as defined in S. 3 (6), Beng. Public Demands Recovery Act read with Sch. I of the Act. A certificate under the last mentioned Act may be issued by the Collector for the recovery of such arrears and it may be executed in any of the ways mentioned in S. 14, (*i.e.*), by attachment or sale of any property of the certificate debtor by his arrest or by the other methods mentioned therein. There is therefore no substance in the contention that the certificate debtor is not personally liable for the arrears of government revenue. (*Sen and Chunder, JJ.*) SATYA KISHORE BANERJEE *v.* PROVINCE OF BENGAL. A.I.R. 1950 Cal. 467.

———**S. 10 (5)**—*One person appearing and accepting jama offered by Collector—If binds others—'Majority'—Meaning of.*

One person appearing and accepting the jama offered by the Collector binds the others by reason of the provisions of S. 10 (5) of the Beng. Land Revenue Settlement Regulation. The word 'majority' in S. 10 (5) includes unanimity. If one person appears, the decision is unanimous and therefore it binds the others. 47 C.W.N. 730, foll. (*Sen and Chunder, JJ.*) SATYA KISHORE BANERJEE *v.* PROVINCE OF BENGAL. A.I.R. 1950 Cal. 467.

———**S. 14 (3)**—*Jurisdiction of Civil Court—Temporary settled estate—Accreted lands—Manner of assessment.*

Under S. 14 (3) of Regulation VII of 1822, the Civil Court is not competent to interfere with the determination of revenue by the revenue authorities or even to dispute the area found by them to be assessable to revenue. But where there is already a contract between the Government and the proprietors, or a grant by the Crown in favour of the proprietors, and the question that is raised by the plaintiff is whether, on the construction of that contract or grant, the proprietors are entitled to have revenue assessed on the accreted lands exactly in the same manner as in the case of *asli* lands, there is nothing in the Regulation which prevents the Civil Court from adjudicating on this point. (*Mukherjea and Sharpe, JJ.*) NALINI KRISHNA RAY *v.* PROVINCE OF BENGAL. I.L.R. (1946) 2 Cal. 14.

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 20 and R. 103—Power of Board to contract—Contract not executed in manner provided by rule—Enforceability. [*See* Q.D. 1941-1945, Vol. I, Col. 233.] BARASAT BASIRHAT LIGHT RAILWAY CO., LTD. *v.* DISTRICT BOARD, 24 PARGANAS. 225 I.C. 52=1946 Cal. (Rul.) 287=A.I.R. 1946 Cal. 23.

——**S. 35-A**—*Provident Fund Rules, R. 5-A—Payment of additional Provident Fund—Discretion of District Board.*

Under R. 5-A of the Provident Fund Rules, the payment of additional amount of Provident Fund is absolutely at the discretion of the District Board and the amount mentioned in the rule is not imperative if the District Board chooses to exercise the discretion. The Rule only fixes a maximum that could be paid. 47 C.W.N. 323, ref. to. (*Lahiri and Guha, JJ.*) Bhujagendra Bhusan *v.* District Board of 24 Parganas. A.I.R. 1950 Cal. 366.

——**S. 79**—Scope—If must be read with S. 20. [*See* Q.D. 1941-1945, Vol. I, Col. 235.] Barasat Basirhat Light Railway Co., Ltd. *v.* District Board, 24 Parganas. 225 I.C. 22=1946 Cal. (Rul.) 287=A.I.R. 1946 Cal. 23.

——**S. 82**—Guarantee to increase trading profit or to convert trading loss into trading profit—If authorised—Enforceability—Guarantee not sanctioned by specified authority—If enforcible against Board. [*See* Q.D. 1941-1945, Vol. I, Col. 235.] Barasat Basirhat Light Railway Co., Ltd. *v.* District Board, 24 Parganas. 225 I.C. 52=1946 Cal. (Rul.) 287=A.I.R. 1946 Cal. 23.

——**S. 138**—*Rules applicable to all District Boards—Power of Local Government to frame.*

Under S. 138 of the Bengal Local Self-Government Act, the Local Government may make rules applicable to all District Boards. The section does not contemplate rules being made for every District Board. (*Harries, C.J. and Mitter, J.*) Chairman of the District Board, Hooghly *v.* Bagala Kumar Chatterjee. A.I.R. 1949 Cal. 658=51 Cr.L.J. 33.

——**S. 138 (p)**—*Rules for melas other than for agricultural purposes—Power of Local Government to frame.*

Under S. 138 (*p*) of the Bengal Local Self-Government Act, the Local Government has power to make rules for the granting of licenses for melas or fairs other than agricultural fairs. (*Harries, C.J. and Mitter, J.*) Chairman of the Dt. Board, Hooghly *v.* Bagala Kumar Chatterjee. A.I.R. 1949 Cal. 658=51 Cr.L. J. 33.

BENGAL MONEY-LENDERS ACT (VII OF 1933), Ss. 30 and 36—Effect of Act being in some measure invalid. [*See* Q.D. 1941-1945, Vol. I, Col. 247.] Bank of Commerce, Khulna *v.* Nripendra Nath Datta. 221 I.C. 449=1946 F.C. (Rul.) 6=12 B.R. 208 (F.C.).

——**Ss. 30 and 33**—*"Principal of the loan"—Meaning of—Capitalists' commission—If to be deducted.*

The definition given in the Bengal Money-Lenders Act of the words "principal of the loan" is the "amount actually advanced". Therefore in determining the principal of a loan for the purpose of S. 30 of the Act, the amount held back by the lender or paid to him by the borrower on account of capitalists' commission is to be deducted from the amount mentioned as principal in the document.

Although S. 33 of the Act has no retrospective operation, the borrower has not to invoke the aid of that section for asking the Court to disallow capitalists' commission. (*Mitter and Ahmad, JJ.*) Nanilal Roy *v.* Raja Gopal Lal Roy. 52 C.W.N. 116=A.I.R. 1948 Cal. 154.

——**S. 30**—*"Principal of the original loan"—Meaning of—Case where transaction cannot be re-opened by reason of S. 36 (1), proviso (1).*

The word "principal" in relation to a loan has been defined in S. 2 (16) of the Bengal Money-Lenders Act. It means the amount actually advanced, unless repugnant to the subject. In the case, however, where a transaction cannot be re-opened by reason of proviso (1) to S. 36 (1) of the Act the principal of the loan must be taken to be what is stated to be or treated as the principal in the document embodying the transaction which cannot be re-opened, and so "the principal of the original loan" for the purposes of S. 30 of the Act must be taken to be that amount, though it may be that it represents the total of what had been actually advanced *plus* arrears of interest due thereon calculated in terms of the previous transaction then closed. (*Mitter and Akram, JJ.*) Pramatha Nath Roy *v.* Raja Prativa Nath Roy. I.L.R. (1946) 1 Cal. 305 =81 C.L.J. 147=230 I.C. 191=1947 Cal. (Rul.) 194=A.I.R. 1947 Cal. 134.

——**S. 30**—*"Principal of the loan"—Meaning of—Transaction not liable to be re-opened by reason of S. 36 (1), proviso (1).*

If a mortgage transaction cannot be re-opened by reason of the provisions of proviso (*i*) to S. 36 (1) of the Bengal Money-Lenders Act, the principal of the loan must, for the purposes of S. 30 of the Act, be taken to be what has been treated as the principal of the loan in the instrument embodying that transaction. (*Mitter and Akram, JJ.*) Madhusudan Pal *v.* Jnanendra Nath Guha. 224 I.C. 575=1946 Cal. (Rul.) 270=50 C.W.N. 726=A.I.R. 1946 Cal. 441.

——**Ss. 30 and 36 (1), Proviso**—*Principal of the loan—Meaning of.*

S. 30 must be read in appropriate cases with S. 36 of the Bengal Money-Lenders Act and where proviso (1) to S. 36 (1) comes into operation, the principal of the loan for all purposes will be the principal as stated in the agreement which cannot be re-opened. The word principal in S. 30 is to be ordinarily taken to mean the money actually advanced but when in a case where proviso (1) to S. 36 (1), protects an agreement the amount stated or treated as principal therein is to be taken as the principal. In this connection no distinction can be made between a suit by a lender and a suit or an application by a borrower. (*Mitter and Chunder, JJ.*) Durga Sankar Sukul *v.* Prafulla Chandra Nag. I.L.R. (1947) 1 Cal. 101=51 C.W.N. 355=A.I.R. 1947 Cal. 294.

——**Ss. 30, 36 and 38**—Validity so far as they effect claims on promissory notes—Government of India Act, S. 100 and Sch. VII, List I, Entry 28; List II, Entry 27. [*See* Q.D. 1941-1945, Vol. I, Col. 249.] Bank of Commerce, Ltd., Khulna *v.* Kunja Behari Kar. 221 I.C. 351 =1946 F.C. (Rul.) 1 (F.C.).

———**S. 36 (1)**—*Suit under—Maintainability—Loan subsisting on 1st January, 1939, but satisfied on date of suit.*

The word "borrower" is descriptive. If the relationship of the lender and borrower subsisted on the 1st of January, 1939, or thereafter, the fact that at the date of the suit under S. 36 (1) of the Bengal Money-Lenders Act the loan had already been satisfied would not make the suit not maintainable, if it is otherwise maintainable. (*Mitter and Akram, JJ.*) SASHIKUMAR BANERJEE *v.* D. J. HILL. 50 C.W.N. 375.

———**S. 36 (1) (c) and (d)**—*Relief without re-opening transaction—Power of Court to grant.*

S. 36 of the Bengal Money-Lenders Act does not deal only with the re-opening of transactions. Even when the case is one which does not require re-opening of any transaction, the Court can grant relief under S. 36 (1) (*c*) and (*d*). (*Mitter and Akram, JJ.*) SASHIKUMAR BANERJEE *v.* D. J. HILL. 50 C.W.N. 375.

———**S. 36 (1), Proviso (1)**—*Applicability—Consent decree.*

S. 36 (1), proviso (i) of the Bengal Money-Lenders Act is not applicable to a consent decree. Such a decree can, therefore, be re-opened although passed beyond 12 years of the institution of the suit under the section. (*Mitter and Sharpe, JJ.*) SURENDRA NATH GHOSE *v.* MOTI LALL SEN. 52 C.W.N. 112.

———**(X OF 1940)**—*If* ultra vires.

The Bengal Money-Lenders Act is *intra vires* the Provincial Legislature, in relation to all loans, save and except loans on promissory notes. (*Mitter and Akram, JJ.*) SASHIKUMAR BANERJEE *v.* D. J. HILL. 50 C.W.N. 375.

———*If* ultra vires—*Loan on mortgage.*

In the case of a loan on a mortgage, the provisions of the Bengal Money-Lenders Act are not *ultra vires,* the Bengal Legislature, as money-lending, except on promissory notes is a Provincial subject (Item No. 27 of List II of the Government of India Act). (*Mitter and Akram, JJ.*) PRAMATHA NATH ROY *v.* PRATIVA NATH ROY. I.L.R. (1946) 1 Cal. 305=230 I.C. 191=A.I.R. 1947 Cal. 134=1947 Cal. (Rul.) 194=81 C.L.J. 147.

———Validity of. *See* GOVERNMENT OF INDIA ACT, Ss. 99 AND 100 AND SEVENTH SCHEDULE LISTS AND BENGAL MONEY-LENDERS ACT. 1947 F.L.J. 34 (P.C.).

———Validity of the enactment. *See* GOVERNMENT OF INDIA ACT, SEVENTH SCHEDULE, LIST II, ITEM 27. (1947) 2 M.L.J. 14 (P.C.).

———**S. 2 (4)**—*"Commercial loan".*

Quaere: Whether a loan taken by two persons to finance a business owned by one of them is a commercial loan. (*Das and Mookerjee, JJ.*) AMAR KRISHNA ADDY *v.* HRISHIKESH BANERJEE. 4 D.L.R. (Cal.) 257.

———**S. 2 (4)**—Commercial loan—Decision—Considerations. *See* C. P. CODE (V OF 1908), S. 109. (1949) 2 M.L.J. 6 (P.C.).

———**S. 2 (4)**—*"Commercial loan"—Loan incurred when business is continuing for repaying debts.*

If at the time when the business is continuing a loan is incurred solely to be used for repayment of prior business loans or debts, the former loan would be regarded as a commercial loan within the meaning of the definition as given in the Bengal Money-Lenders Act. (*Mitter and Akram, JJ.*) NANI PADA SAHA *v.* NILIMA PROVA NANDI. 228 I.C. 503=1947 Cal. (Rul.) 103=51 C.W.N. 23=A.I.R. 1947 Cal. 19.

———**S. 2 (12) (d) (ii)**—*Loan advanced by Co-operative Society assigned to non-member—Nature of loan—If altered.*

A loan advanced by a Co-operative Society is excluded from the definition of loan given in the Bengal Money-Lenders Act. The nature of the loan is not altered by reason of the fact that the Society assigns its rights for the recovery of the loan to a non-member. The debt is transferred to him together with its attribute. (*Sen and Das, JJ.*) PANCHANAN BANERJEE *v.* NIRMAL CHANDRA LAHIRI. 50 C.W.N. 7.

———**S. 2 (12)**—*"Loan"—Unpaid purchase-money left with vendee for payment of perpetual annuity to vendor and his successors.*

A transaction by which a portion of the purchase money is left with the purchaser not for investment but for payment of a perpetual annuity to the vendor and his successors, cannot be said to be a loan as defined in S. 2 (12), Beng. M. L. Act. (*G. N. Das, J.*) BHUPATI BHUSAN TRIBEDI *v.* BIRENDRA MOHAN SINGHA. I.L.R. (1948) 1 Cal. 492.

———**S. 2 (12)**—Transaction in form a lease—Whether in reality a loan. *See* I.L.R. (1945) 2 Cal. 217.

———**S. 2 (13)**—*"money-lender"—Who is—Person lending money or paddy if taking bond therefor.*

Before a person who lends money can be held to be a "money-lender" as defined by S. 2 (13) of the Bengal Money-Lenders Act, it must be shown that his business is that of money-lending. The mere fact that he lends money or paddy to another or that he takes a bond for what he lends does not make him, or indicate that he is, a money-lender. (*A. N. Sen, J.*) MANINDRA NATH LAYEK *v.* NANI GOPAL. 4 D.L.R. (Cal.) 269.

———**Ss. 2 (22) and 36**—*Applicability—"Suit to which this Act applies"—"Proceeding"—"Pending"—Meaning of—Mortgage suit—Compromise—Composite decree with provision for instalments—Effect—Suit if pending thereafter—Applications for withdrawal of amount and for return of documents—Effect of.*

Where in a mortgage suit a composite decree is made in pursuance of a compromise entered into by the parties and recorded by the Court, which contains in itself a preliminary, final and supplemental decree, the suit ends on the date of such decree; the fact that there is a provision for payment in instalments and that the payments directed by the decree go beyond the date of the passing of the decree does not keep the suit pending till the date fixed for full payment of the amount decreed. Thereafter there can be "no suit to which this Act applies" within the meaning of S. 2 (22) of the Bengal Money-Lenders Act which can be regarded as pending for purposes of that Act.

O. 34, R. 5, C. P. Code, has no application to such a decree. Neither an application by the mortgagee to withdraw the amounts deposited in Court by the mortgagor in terms of the decree nor an application by the mortgagor for return of the title deeds can be considered to be "proceedings" within the meaning of S. 2 (22), and it cannot be said that by reason of such applications and the orders made thereon the suit is "pending" and that there is "a suit to which this Act applies," for purposes of S. 36 of the Bengal Money-Lenders Act. 52 All. 363; 33 C.W.N. 300; 49 C.W.N. 638; A.I.R. 1947 Cal. 270, dist.; A.I.R. 1943 All. 321; 50 Cal. 650; 43 Bom.L.R. 90; 50 C.W.N. 102; 48 C.L.J. 357; 56 C.L.J. 187, ref.; 48 C.W.N. 85; 48 C.W.N. 406; I.L.R. (1945) Nag. 643; A.I.R. 1944 Oudh 111; 14 Pat. 488, rel. on. (*Das and Mookerjee, JJ.*) AMAR KRISHNA ADDY *v.* HRISHIKESH BANERJEE. 4 D.L.R. (Cal.) 257.

———**S. 2 (22)**—Suit "pending" within the meaning of—Existence of right to obtain personal decree in mortgage suit on 1st January, 1939. *See* C. P. CODE (V OF 1908), S. 109. (1949) 2 M.L. J. 6 (P.C.).

———**Ss. 2 (22) and 36**—Suit to which Act applies—Application filed after 1st January, 1939, for review of order under S. 83, T. P. Act, passed before that date—If revives earlier proceeding. [*See* Q.D. 1941—1945, Vol. I, Col. 244.] BHUPENDRA NATH RAY *v.* SUSHIL SHANDRA. I.L.R. (1945) 2 Cal. 666.

———**S. 2 (22)**—*Suit to which Act applies—Application under O. 21, R. 90, C. P. Code—If such suit—Application, if revives execution case—Compromise petition filed during pendency of application—Proceeding based upon that petition pending on 1st January,* 1939—*Such proceeding, if suit to which Act applies.*

An application under O. 21, R. 90, C. P. Code, cannot be a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Boney Lenders Act and it cannot have, if it is successful, the effect of making the execution case to which it relates such a suit when that execution case has terminated before the 1st January, 1939. An application by a judgment-debtor for setting aside a sale cannot be said to be either a proceeding for the recovery of a loan or for the enforcement of any agreement or security or for redemption of any security within S. 2 (22) of the Act. Where after the confirmation of the sale an application under O. 21, R. 90, C. P. Code, was made by the judgment-debtor and when that application was pending a petition of compromise was filed in December, 1938, the terms of which were that if the judgment-debtor paid a certain sum by the 15th March, 1939, the sale would be set aside, and the miscellaneous case started on the application under O. 1, R. 90 was adjourned to 16th March, 1939.

Held, that even assuming that some proceeding based upon the petition of compromise, apart from the main proceeding under O. 21, R. 90 was pending before the Court on 1st January, 1939, it could not be a proceeding for the enforcement of any agreement or for the redemption of any security, and it could not, therefore, be a suit to which the Act applies within the meaning of S. 2 (22) of Bengal Money Lenders Act. (*Chakravartti, J.*) KALISH CHANDRA SAHA *v.* BEMOLA SUNDARY DASYA. 50 C.W.N. 359.

———**Ss. 2 (22) and 36**—*Suit to which Act applies—Execution proceedings completed before 1st January,* 1939—*Decree unsatisfied on that date—Decree-holder obtaining rateable distribution for balance in another execution case pending on that date—Decree, if may be reopened.*

Where the execution proceedings in respect of a decree which was not fully satisfied on 1st January, 1939, were completed before that date and no part of them was pending on that date, the mere fact that the decree-holder obtained rateable distribution for the balance in respect of his decree in another execution case which was pending on that date and to which he was not a party, does not make the suit in which he obtained his decree one to which the Bengal Money-Lenders Act applies within the meaning of S. 2 (22) of the Act, and the decree cannot therefore be re-opened under S. 36 of the Act although it was unsatisfied on 1st January, 1939. (*Ormond, J.*) SAILESH NATH *v.* J. CHAUDURI. I.L.R. (1947) 1 Cal. 478=51 C.W.N. 309.

———**Ss. 2 (22) and 36 (1), proviso (ii)**—*"Suit to which the Act applies"—Mortgage suit—Decrees made before* 1—1—1939—*Application for execution dismissed before that date but attachment kept alive—Application for withdrawing attachment and for recording adjustment of decree after* 1—1—1939—*Effect of.*

A mortgage suit which had terminated in decrees passed before 1—1—1939, would be "a suit to which the Act applies" within the meaning of S. 36 (1), Proviso (ii) of the Bengal Money-Lenders Act only if a "proceeding in execution" for the recovery of the mortgage loan or a proceeding for enforcement of any execution, whether by way of settlement, or any account, or otherwise was instituted after, or was pending on 1—1—1939.

Where, before 1—1—1939, an application for execution of the final decree was dismissed for non-prosecution, but the attachment was maintained by a separate order in terms of the last paragraph of O. 21, r. 57, C. P. Code, it must be held that there is no proceeding for execution pending on 1—1—1939. A subsequent application made for withdrawing the attachment (presented after 1—1—1939) cannot be regarded as an application for enforcing an agreement under S. 36 (1), proviso (ii) nor would the receipt of money or anything by way of accord and satisfaction of the decree out of Court amount to execution. An execution application dismissed on a particular date cannot be said to be pending after that date, although the attachment is kept pending. An attachment, is no doubt a *process* in execution, but after the dismissal of the execution case in which the attachment was effected, that by itself would afford no means to the decree-holder to realise his decretal amount in that proceeding. The application made after 1—1—1939 for withdrawing the attachment and for entering up satisfaction of the mortgage decree cannot be held to be a proceeding to enforce an agreement within the meaning of S. 2 (22) (*b*) of the Bengal Money-Lenders Act and therefore the mortgage suit which had ended in decrees long before that date is not "a suit to which the Act applies," so as to attract the operation of proviso (*ii*) to S. 36 (1) of the Act. 49 All. 276; 63 Cal. 57; 32 I.A. 103; 66 I.A. 84, referred to. (*R. C. Mitter and Kamal Chunder, JJ.*) PASUPATINATH MALIA *v.* DEVAPROSANNA MUKERJEE. 53 C.W.N. 359=A.I.R. 1949 Cal. 266=4 D.L.R. (Cal.) 57.

———S. 2 (22)—*"Suit to which the Act applies"—Proceedings before Board under Bengal Agricultural Debtors Act.*

A proceeding before a Debt Settlement Board under the Bengal Agricultural Debtors Act, whether instituted by the borrower or by the creditor, is a "suit to which the Act applies", within the meaning of S. 2 (22) of the Bengal Moneylenders Act. 48 C.W.N. 85 referred to. (*Ormond, J.*) JAMINI KUMAR *v.* RAJ KUMAR. A. I.R. 1949 Dacca 3=1 D.R. 155.

———S. 2 (22)—*Suit to which Act applies—Proceeding before Board started by debtor—Creditor not filing statement—Proceeding, if one for recovery of loan.*

Where in a proceeding before the Board started by the debtor, the creditor does not file any statement and the applicant debtor himself admits his liability, the proceeding is one for settling the debt and not for recovery of the loan and therefore, not a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Money-Lenders Act. 48 C.W.N. 85, dist. (*Shahabuddin, J.*) MAHIRUDDIN AHAMED *v.* HARIKANTA. 2 D.R. 185.

———S. 2 (22)—*"Suit to which the Act applies"—Suit terminating in final decree before 1st January, 1939—Proceeding before Board under Beng. Agri. Debtors Act relating to same loan started after that date—If can bring that suit within the scope of Act.*

S. 2 (22) of the Bengal Money-lenders Act means that a *particular suit* would still be considered to be a suit to which the Act would apply, though it had terminated in a final decree before 1st January, 1939, if any proceeding in *connection with that suit*, was pending on 1st January, 1939, or had been instituted since then. An independent proceeding pending on or instituted after that date—that is to say a proceeding entirely unconnected with that particular suit, (*e.g.*), a proceeding before a Board under the Bengal Agricultural Debtors Act—would not bring that suit within the scope of the Bengal Money-lenders Act, though that independent proceeding may relate to the same loan which was the subject-matter of that suit. [48 C. W. N. 85, ref. to.] (*Ormond, J.*) JAMINI KUMAR *v.* RAJ KUMAR. A.I.R. 1949 Dacca 3=1 D.R. 155.

———Ss. 2 (22) and 36—*Suit to which Acts applies—Title suit for possession by decree-holder purchaser in execution of mortgage decree, pending after 1st January, 1939—Mortgage decree, if can be reopened.*

A title suit brought against the judgment-debtor by the decree-holder auction purchaser for the recovery of possession of part of the mortgaged properties sold in execution of a mortgage decree, is not a suit to which the Act applies within the meaning of S. 2 (22) of the Bengal Money-Lenders Act. Consequently the mortgage-decree cannot be reopened under S. 36 of the Act on the basis that such suit was pending after the 1st January, 1939. (*Chakravartti, J.*) KESHAB CHANDRA MONDAL *v.* NAGENDRA NATH. 50 C. W.N. 405=A.I.R. 1946 Cal. 323=227 I. C. 494=1947 Cal. (Rul.) 24.

———Ss. 2 (22) (c) and 30—*Applicability—Suit to redeem mortgage.*

A suit for redemption of a mortgage is covered by S. 2 (22) (*c*) of the Bengal Money-Lenders Act, and the provisions of S. 30 of the Act apply to the suit; the mortgagee is not therefore entitled to get any amount in excess of twice the original principal amount. (*Rama Prosad Mookerjee, J.*) SARAT CHANDRA *v.* PALAN CHANDRA. 4 D.L.R. (Cal.) 41=A.I.R. 1949 Cal. 683.

———Ss. 5 (3) and 36 (1)—Decision of Small Cause Court, Calcutta, in suit under S. 36 (1)—Right of appeal. [*See* Q.D. 1941—1945, Vol. I, Col. 246.] GOWRI BALA DASI *v.* JNANENDRA NATH. I.L.R. (1945) 1 Cal. 489=A.I.R. 1949 Cal. 298.

———Ss. 28 and 29—Applicability—Assignment of decrees. [*See* Q.D. 1941—1945, Vol. I, Col. 246.] RENULA BOSE *v.* MANMATHA NATH BOSE. I.L.R. (1945) 2 Cal. 449=I.L.R. (1945) Kar. (P.C.) 250=222 I.C. 1=12 B.R. 256=1946 P. C. (Rul.) 92 (P.C.).

———Ss. 30 and 36 (6) (a) (ii)—Dismissal of application under as loan was a "commercial loan"—Revision under S. 115 (*b*), C. P. Code, when High Court takes view that the loan is not a commercial loan. *See* C. P. CODE (V OF 1908), S. 109. (1949) 2 M.L.J. 6 (P.C.).

———Ss. 30 and 36—*Loan merged in decree—Remedy of borrower—Relief in execution proceedings—Whether can be claimed—C. P. Code, S. 47.*

The relief under S. 30 of the Bengal Money-lender. The effect of S. 30, therefore, is that borrower and not to the judgment-debtor. A distinction has got to be drawn between a loan which still remains in the domain of contract, and one which is already merged in the decree. In the latter case, the relationship between the parties is that of judgment-debtor and judgment-creditor and no longer that of borrower and lender. The effect of S. 30, therefore, is that it affords a defence to the borrower as to the amount for which he is liable when a suit is brought against him. It does not by itself affect any decree already passed. If a decree has already been made, the judgment-debtor remains bound by it so long as it is not re-opened; and the way in which it could be re-opened is laid down in S. 36 of the Act itself. It is in exercise of its power under S. 36 of the Act that the Court can release the borrower of all liability in excess of the limits specified in S. 30 (1) and (2). The position, therefore, is that, as soon as the decree is re-opened, the parties are relegated to the old position of borrower and lender and in calculating the final amount for which the borrower is liable and for which a new decree is to be passed, the amount paid by the borrower or included in the decree which is re-opened is to be taken into account.

The remedy provided by S. 36 of the Act being the only remedy available to a borrower where a loan has already merged in a decree, no relief can be claimed by the borrower in execution proceedings under S. 47, C. P. Code. It is beyond the competence of the executing Court to go behind the decree. It must execute the decree as it stands. [71 I.A. 156, ref. to.] (*Mukherjea and Sharpe, JJ.*) · DWIJESH CHANDRA MUKHERJI *v.* MOHANLAL DAYA SANKAR. I.L.R. (1946) 1 Cal. 117.

——**Ss. 30 and 36**—*Scope—Power of Court—Mortgage suit—Decree awarding interest* at 12 *per cent.* pendente lite——*If entitles borrower to re-open decree.*

The bare fact that the Court in a mortgage suit awarded interest on the mortgage amount at 12 per cent. per annum for the period in suit (*pendente lite*) would not entitle the borrower mortgagor to reopen the mortgage decree. When in that suit no interest was claimed on the sums claimed as being due on the mortgage, and the total sum awarded and decreed together with interest already paid did not contravene the provisions of S. 30, Bengal Money-Lenders Act, and was less than the sum which would be due as interest if interest was calculated on the principal sums advanced at the statutory rate of 8 per cent. per annum, the fact that the decree provided for interest *pendente lite* at 12 per cent. per annum, is not sufficient to entitle the borrower to re-open the decree. 48 C.W.N. 771, dist.; 46 C.W.N. 159, cons. and expl.; 45 C.W.N. 772, foll.; 63 I.A. 114; 44 C.W.N. (F.C.) 21; 53 C.W.N. (F.C.) 12, ref. (*G. N. Das and B. K. Guha, JJ.*) ASGARALI *v.* DINANATH KUMAR. 5 D.L.R. (Cal.) 14=A.I.R. 1950 Cal. 135.

——**Ss. 30 (1), 31 and 32**—*Decree providing for interest post-decree—Interest not in contravention of S.* 30 (1)—*Power of Court to re-open decree.*

Merely because a mortgage decree provides for interest after decree, the decree is not on that account liable to be re-opened under S. 31, Bengal Money-Lenders Act. If the interest due up to the date of the decree does not contravene S. 30 (1) of the Act, the fact that the decree provides for post-decree interest is not material. S. 36 does not give power to a Court to re-open a transaction or a decree simply because the provisions of S. 31 had been contravened. 48 C.W.N. 200, foll. (*G. N. Das and B. K. Guha, JJ.*) ASGARALI *v.* DINANATH KUMAR. 5 D.L.R. (Cal.) 14=A.I.R. 1950 Cal. 135.

——**S. 30 (1) (a)**—Applicability—Reopening of pre-Act decree. [*See* Q.D. 1941—1945, Vol. I, Col. 250.] AJARADDI *v.* SONAI BIBI. 224 I. C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

——**S. 30 (1) (a)**—*Scope—Principal of the original loan—Promissory note renewed by later note for principal and balance, interest capitalised—Suit more than* 12 *years after renewal—"Original loan"—Power to reopen transaction—S.* 36—*Effect of.*

S. 30 (1) (*a*) of the Bengal Money-Lenders Act has to be read with S. 36 of the Act, and in view of the terms of the proviso (i) to S. 36 (i), the Court cannot reopen a transaction entered into beyond twelve years of the suit. Where a promissory note executed in renewal of a prior one, for the original principal and the balance of accumulated interest capitalised, purports to close the previous transaction, it cannot be reopened in a suit instituted more than 12 years of such renewal. The principal of the "original loan" for purposes of S. 30 must, in such a case, be, therefore, taken to be the amount shown as principal in the promissory note taken in renewal of the prior note and not the amount actually advanced under the original note which was closed and superseded. The question would no doubt depend upon the intention of the parties as to the closing of the old dealings and to the creation of a new obligation under the later transaction, but for the purpose of finding out the intention of the parties the promissory note and that alone has to be looked into unless there is any ambiguity. (*R. C. Mitter and Amiruddin Ahmed, JJ.*) KUMAR KHALI BANKING CORPORATION, LTD. *v.* BIBHUTI BHUSAN. 2 D.L.R. 129=A.I.R. 1948 Cal. 65.

——**S. 30**—Scope and effect—If affects decree already obtained. [*See* Q.D. 1941—1945, Vol. I, Col. 248.] RENULA BOSE *v.* MANMATHANATH BOSE. I.L.R. (1945) 2 Cal. 449=I.L.R. (1945) Kar. (P.C.) 250=222 I.C. 1=12 B.R. 256=1946 P.C. (Rul.) 92 (P.C.).

——**S. 30 (1) (a)**—*Whether affects post decretal interest.*

The scheme of the Bengal Money-Lenders Act is to cut down the contract rate of interest and post decretal interest awarded by the Court cannot be taken into account in making the calculation. 63 I.A. 114 and 48 C.W.N. 200, Foll. (*Shahabuddin and Amin Ahmed, JJ.*) SACHINDRA NATH MUKHERJEE *v.* KHITI MOHAN DAS. 2 D.R. 137.

——**S. 30 (1) (c) (ii)**—*Scope—Interest at lower rate than statutory rate provided for in contract—Creditor's right to statutory rate.*

Where the agreement between the creditor and debtor provides for the payment of interest at 7 per cent. per annum only the creditor cannot claim that he should get interest at the rate of 8 per cent. as provided in S. 30 (1) (*c*) (*ii*). There is nothing in the Act to support such a claim. The Act does not contemplate or provide for the lender getting interest at a higher rate than what is contracted for, though it overrides stipulations in contracts for higher rates of interest. (*Kania, C.J., Fazl Ali, Patanjali Sastri, M.C. Mahajan and Mukherjea, JJ.*) PRAMATHA NATH ROY *v.* SANAT KUMAR MUKHERJI. 1948 F.C.R. 228=83 C.L.J. 268=53 C.W.N. (F.R.) 12=4 D.L.R. (F.C.) 16=A.I.R. 1949 F.C. 60=1949 F. L.J. 73 (F.C.).

——**Ss. 30 (2) and 36 (1)**—*Scope and effect of—Payments by debtor—Appropriation—Rule—Re-opening of payments and appropriations made before Act—Mode of taking accounts.*

When an account is taken as contemplated by the Bengal Money-Lenders Act, the rule of appropriation under the general law has to be applied, namely, that payments made by a debtor towards the debt should first be applied in reduction of the interest then remaining due, and, if any surplus is left over, it should go in reduction of the principal outstanding. There is nothing in the Act which excludes the operation of this ordinary rule.

The combined effect of S. 30 (2) and 36 (1) of the Act is that an account should be taken between the parties on the basis of re-opening and adjusting payments made and appropriated before the Act came into force so as to allocate the excess sums paid to a reduction of the principal outstanding at the time of each payment. It is not correct to say that this mode of taking account between the parties would confer an additional benefit on the borrower not contemplated by the Act. The Act, having provided for a re-opening of previous appropriations and for taking of a fresh account by the Court, must be taken to have contemplated the application of the usual rule as to allocation of the excess sums paid by the borrower as the logical consequence of the retrospective reduction of the borrower's liability to the limits specified in S. 30, notwithstanding that payments might have been made by the debtor for interest as such. [44 Mad. 570, ref.] *(Kania, C.J., Fazl Ali, Patanjali Sastri, M. C. Mahajan and Mukherjea, JJ.)* PRAMATHA NATH ROY *v.* SANAT KUMAR MUKHERJI. 1948 F.C.R. 228=83 C.L.J. 268=53 C.W.N. (F.R.) 12=A.I.R. 1949 F.C. 60=4 D.L.R. (F.C.) 16=1949 F.L.J. 73 (F.C.).

———**S. 31 (a)**—*Pre-Act mortgage loan—Award of interest on decretal amount—Power of Court.*

S. 31 (a), Bengal Money-Lenders Act, precludes the Court from passing a decree for interest during the period from the date of the mortgage decree up to the date of redemption, where the loan to which the decree relates was advanced before the commencement of the Act. 46 C.W.N. 153, Dist.; 47 C.W.N. 466, Diss. from.; 48 C.W.N. 736, foll. *(Amiruddin Ahmad and Ibrahim, JJ.)* BINOY KUMAR ROY *v.* CHARUSILA DEVI. 2 D.R. 273.

———**Ss. 31 (a) and 34 (1) (a)**—Pre-Act mortgage loan—Mortgagor agreeing to pay interest until realisation—Instalments granted by decree under S. 34 (1) *(a)*—Interest thereon—If can be allowed. [*See* Q.D. 1941-1945, Vol. I, Col. 253.] NEMAI CHAND SEN *v.* RAM KEWAL SHA. I.L.R. (1945) 1 Cal. 210=A.I.R. 1949 Cal. 414.

———**Ss. 33 and 2 (16)**—*Capitalist commission—Nature of.*

Capitalist commission is a commission taken by the capitalist for lending his own money to the borrower. In effect it is a device to bring back to him a part of the principal and that under a name. The definition of principal as given in S. 2 (16) of the Bengal Money-Lenders Act clearly states that the principal of a loan is the

amount actually advanced to the borrower. The amount which is held over from the borrower by the device of a capitalist commission is an amount which is not actually advanced to him. Therefore, capitalist commission is not such an incidental charge as is referred to in S. 33 of the Act, but is really a part of the principal and therefore, it is the duty of a Court to re-open the whole transaction and to disallow the amount which was not advanced under the name of capitalist commission. *(Mitter and Chunder, JJ.)* PRAMATHA NATH RAY *v.* PASHUPATI NATH MALIA. I.L.R. (1946) 2 Cal. 413.

———**S. 33**—Scope—Fees paid to lender's lawyers and *tohorie* to lender's officers—If can be deducted. [*See* Q.D. 1941-1945, Vol. I, Col. 254.] RAJANI KANTA PAL *v.* HRISHI KESH DAS. I.L.R. (1945) 1 Cal. 381.

———**Ss. 34 and 36**—*Form of preliminary mortgage decree—Decree providing for accounts to be taken by Commissioner and for new decree to be drawn up on his report—Decretal dues if any found due, made payable in instalments—Preliminary decree—If in proper form—Appeal.*

A mortgage decree was re-opened under S. 36 of the Bengal Money-Lenders Act and a new preliminary decree was passed providing for the appointment of a Commissioner to take accounts in accordance with certain directions incorporated in the decree. It was also provided that on receipt of the commissioner's report a new preliminary decree would be drawn up under S. 34 (1) *(a)* of the Act and the judgment-debtor would be entitled to pay the decretal dues, if any were found due, in five annual instalments.

Held, that the decree was in complete conformity with O. 34, R. 2 *(a)*, C. P. Code, and also with the relative prescribed form, namely Form No. 5, and therefore in complete conformity with S. 34 (1) *(a)* of the Bengal Money-Lenders Act, and that the decree being a proper preliminary decree, an appeal was competent. *(Chakravartti, J.)* KESHAB CHANDRA MONDAL *v.* NAGENDRA NATH. 50 C.W.N. 405=A.I.R. 1946 Cal. 323=227 I.C. 494=1947 Cal. (Rul.) 24.

———**S. 34**—*Grant of relief—Appeal to High Court against preliminary mortgage decree—Final decree passed pending appeal—Power of High Court to grant relief.*

Although pending an appeal to the High Court against a preliminary mortgage decree, there has been a final decree and sale in execution thereof and the mortgaged property has been purchased by a third party in the execution sale, the High Court can set aside the preliminary decree and pass a decree in accordance with the provisions of S. 34 of the Bengal Money-Lenders Act *(Sen and Das, JJ.)* KUNTA BALA DEBI *v.* SURENDRA NATH MUKHERJI. I.L.R. (1946) 1 Cal. 100.

———**S. 34**—*Right of mortgagor to relief—Sale of mortgaged property in execution of money decree pending suit on mortgage.*

The fact that the mortgaged property has been sold in execution of a money decree while the suit on the mortgage is pending, does not deprive the mortgagor of the right which S. 34 of the

Bengal Money-Lenders Act confers upon him, and the Court is, therefore, bound to grant him such right while passing a preliminary decree. (*Sen and Das, JJ.*) Kunta Bala Debi *v.* Surendra Nath Mukherji. I.L.R. (1946) 1 Cal. 100.

——**S. 34 (1) (a) (ii)**—*Appeal filed against preliminary decree directing payment by instalments—Application for final decree on ground of default in instalments subsequently made after giving notice—Appellate Court dismissing appeal slightly varying trial Court's decree—Final decree, if can be passed without fresh notice and application.*

Under S. 34 of the Bengal Money-Lenders Act, a mortgage decree was re-opened, and a new preliminary decree was passed directing the payment of the costs allowed within a certain time and the balance of the decretal amount in certain instalments. The preliminary decree further directed that in default of any one of the instalments and in case any of the mortgaged properties was exposed to sale for non-payment of revenue or rent, the decree-holder would be entitled to apply for a final decree. An appeal was filed to the High Court against the preliminary decree, and the High Court changed this "and" between the two conditions into "or" and dismissed the appeal subject to this variation in the decree. While that appeal was pending the decree-holder applied for a final decree on the ground of default in payment of instalments after giving notice as provided in S. 34 (1) (*a*) (*ii*) of the Act. The application came on for hearing after the disposal of the appeal by the High Court.

Held, that the decree-holder was entitled to a final decree without fresh application and service of fresh notice under S. 34 (1) (*a*) (*ii*) of the Act. (*Akram and Chakravartti, JJ.*) Chandra Das *v.* Kali Mohan Saha. 50 C.W.N. 217.

——**S. 34 (1) (a) and (b)**—*Applicability—Mortgage loan—Suit to recover money and not to enforce security—Grant of instalments.*

In S. 34 (1) (*a*) of the Bengal Money-Lenders Act, the expression "to which the provisions of O. 34 of the First Schedule to the Code of Civil Procedure, 1908, apply" qualifies "suits". This interpretation would enable the debtor to have relief by way of instalments in all cases of mortgage loans irrespective of the question whether the mortgagee is seeking to enforce his security or not. The Bengal Money-Lenders Act was intended to give relief to debtors. A liberal construction of S. 34 should, therefore, be put upon the expression referred to above.

The conclusion, therefore, follows that although the loan is on a mortgage and the mortgagee does not enforce his security but sues for recovery of loan in the ordinary way and not by resort to the provisions of O. 34 the borrower may claim relief under S. 34 (1) (*b*), (i) where the claim has not been decreed; or (ii) where the claim has been decreed provided the loan was a Pre-Act loan. (*Das and Das Gupta, JJ.*) Esrail Molla *v.* Adhir Kumar Saha. 54 C.W.N. 489=A.I.R. 1950 Cal. 502.

——**S. 34 (1) (a) (i)**—*Application by mortgagor for instalments subsequent to preliminary decree—Maintainability.*

Under S. 34 (1) (*a*) (*i*), Bengal Money-Lenders Act, an application by the mortgagor for payment by instalments should be heard and disposed of at the time of the passing of the preliminary decree in the mortgage suit. Such an application made at a subsequent date cannot, therefore, be entertained. (*Harries, C.J. and Mukherjea, J.*) Syam Sundar De *v.* Sailabala Dasi. I.L.R. (1948) 2 Cal. 293.

——**S. 34 (1) (a) (ii), Proviso**—*Scope and effect—Instalment in default—Extension of time or its payment—Power of Court.*

Under the first proviso to S. 34 (1) (*a*) (*ii*) of the Bengal Money-Lenders Act the Court has no power to grant an extension of time in respect of a particular instalment in default. The first proviso only empowers the Court to allow extension of time for payment of the whole amount which on such default becomes payable by the operation of S. 34 (1) (*a*) (*ii*) of the Act. On such default occurring, the decree-holder becomes immediately entitled to apply for a final decree, but the second proviso allows the judgment-debtor to prevent the passing of such decree by paying into Court only the instalment in default. (*Mukherjea and Ormond, JJ.*) Debabrata Mukherjee *v.* Satish Chandra Banerjee. 52 C.W.N. 97=A.I.R. 1949 Cal. 304=82 C.L.J. 290.

——**S. 34 (1) (b)**—*Discretion of Court—Imposition of conditions—If obligatory.*

The words "subject to such conditions as the Court may impose" in S. 34 (1) (*b*) of the Bengal Money-Lenders Act, mean that it is as much in the discretion of the Court to decide whether any conditions should be imposed at all, as it is within its discretion to specify the conditions, where it chooses to impose any. The Court is, therefore, not required to impose conditions in each and every case. (*Biswas and Chakravartti, JJ.*) Berhampore Bank, Ltd. *v.* Animesh Chandra Mukherjee. 50 C.W.N. 620.

——**S. 34 (1) (b) (ii)**—*"Amount of decree"—Meaning of.*

The expression "amount of the decree" in S. 34 (1) (*b*) (ii), Bengal Money-Lenders Act, means the amount which is due and payable under the decree at the time the Judge is considering the matter for the purpose of giving relief. It is not simply the amount for which the decree was passed. (*Derbyshire, C.J. and Lodge, J.*) Haran Chandra Chakrabarti *v.* Jyoti Prasad Mallik. I.L.R. (1947) 1 Cal. 380.

——**S. 34 (1) (b) (ii)**—*Proceeding by judgment-debtor for relief—If may be continued by his legal representative—C. P. Code, S.* 146.

S. 146, C. P. Code, applies to an application under S. 34 (1) (*b*) (*ii*) of the Bengal Money-Lenders Act and enables the legal representative of the judgment-debtor to be brought on record and carry on pending proceedings for relief under that section. By reason of S. 34 (1) (*b*) (*ii*), the judgment-debtor can apply, and by reason of S. 146, C. P. Code, the representative of the person entitled by S. 34 (1) (*b*) (*ii*) to apply can take his place; and this he can do as well after the proceedings in question have commenced as before their inception. (*Clough, J.*) SUDHANSHU DEB MALLIK *v.* RAMCHANDRA BASAK. I.L.R. (1946) 1 Cal. 428.

———**S. 34 (2)**—*Applicability—Instalment decree under S. 36 (2)—If subject to S. 34 (2).*

S. 34 (2) of the Bengal Money-Lenders Act does not apply to instalments directed by a new decree passed under S. 36 (2) of the Act; the instalments contemplated by S. 34 (2) are instalments referred to in S. 34 (1) (*b*), and are not instalments directed by a new decree passed under S. 36 (2). But if the Court passing the decree under S. 36 (2) incorporates S. 34 (2) in terms, by making the payment subject to S. 34 (2), the decree attracts the provisions of S. 34 (2) and the decree-holder has to accept that position. *Chakravartti, J.*) SAIBALINI GUPTA *v.* UMA SUNDARI. 1946 Cal. (Rul.) 415=277 I.C. 106=A.I.R. 1947 Cal. 275.

———**S. 34 (2)**—*Scope—Notice—Application for restoration of property under S. 36 (2)—If execution for instalment—Notice—Necessity.*

The execution contemplated by S. 34 (2) of the Bengal Money-Lenders Act is only execution for the recovery of the instalment in respect of which a default has been committed. An application for restoration of property under S. 36 (2) is not within the scope of contemplation of S. 34 (2), and therefore the provision as to previous notice will not apply. (*Chakravartti, J.*) SAIBALINI GUPTA *v.* UMA SUNDARI. 1946 Cal. (Rul.) 415=227 I.C. 106=A.I.R. 1947 Cal. 275.

———**S. 35**—*Applicability—Valid sale proclamation issued before Act coming into force.*

S. 35 of the Bengal Money-Lenders Act does not apply to a case where a valid sale proclamation had been issued before that Act had come into force. The section does not enunciate a mere rule of procedure. It creates a valuable right in the debtor, but at the same time the right so created takes away a valuable right which the decree-holder who had obtained a decree on a loan, had before the said enactment. The section can therefore have prospective operation only as the Legislature has not given it retrospective operation either by express words or by necessary implication. (*Mitter and Sharpe, JJ.*) JATINDRA MOHAN SARKAR *v.* MAHIPAL NAYEK. I. L. R. (1948) 2 Cal. 278=83 C.L.J. 115=A.I.R. 1948 Cal. 203.

———**S. 35**—*Bid for specified property falling short of specified price—Decree-holder not foregoing deficiency—Sale of larger property—Legality.*

Per *Chakravartti, J.*—Under S. 35 of the Bengal Money-Lenders Act, if the highest bid for the specified property falls short of the specified price and the decree-holder does not forego the deficiency, no sale can be held at all and a sale of any further or larger property inclusive or exclusive of the property specified, would be entirely illegal. (*Akram and Chakravartti, JJ.*) MANINDRA CHANDRA ROY *v.* JAGADISH CHANDRA. 50 C.W.N. 266.

———**S. 35**—*Omission to specify sufficient property—Legality of sale.*

Per *Chakravartti, J.*—The omission to specify a sufficient quantity of the property in the sale proclamation as required by S. 35 of the Bengal Money-Lenders Act, would not make a sale *per se* illegal. The section is only supplementary to O. 21, R. 66, C. P. Code, and in effect amends one of the provisions of that rule. It follows that any illegality in regard to an entry directed by S. 35 of the Bengal Money-Lenders Act can have no graver consequence than a similar illegality in regard to an entry directed by O. 21, R. 66, C. P. Code. (*Akram and Chakravartti, JJ.*) MANINDRA CHANDRA ROY *v.* JAGADISH CHANDRA. 50 C.W. N. 266.

———**S. 36**—Agreement remitting certain amount and settling principal at certain sum—Re-opening. [*See* Q.D. 1941—1945, Vol. I, Col. 260.] RAJANI KANTA PAL *v.* HRISHIKESH DAS. I.L.R. (1945) 1 Cal. 381.

———**S. 36**—*Applicability—Mortgagee in possession as purchaser in execution of certificate—Liability to account—Right of mortgagor to restoration of possession.*

Where a mortgagee is in possession not as mortgagee but under an independent title, as purchaser in execution of a certificate, the mortgagor cannot seek or get restoration of possession and no question arises under S. 36, Ben. Money-Lenders Act. 48 C.W.N. 105; 53 C.W.N. 562, foll. (*G. N. Das and B. N. Guha, JJ.*) ASGARALI *v.* DINANATH KUMAR. 5 D.L.R. (Cal.) 14=A.I.R. 1950 Cal. 135.

———**S. 36**—*Applicability—"Pending suit"—Mortgage suit—Preliminary and final decrees made—Application for personal decree not made—Suit, if pending—Re-opening decree.*

The granting of a personal decree in a mortgage suit is not a mere automatic act; an application is necessary therefore, and the Court must make an order authorising the plaintiff to proceed with the execution of the decree against other assets of the judgment-debtor, after deciding that the plaintiff is entitled to it. Therefore, a mortgage in which a preliminary decree and a final decree had been passed must still be considered to be a "pending suit" for purposes of S. 36 of the Bengal Money-Lenders Act so long as an application for a personal decree is neither made nor barred by limitation. (*Sharpe, J.*) MAHOMED KAZIM ALI *v.* RAMESH CHANDRA SIL. 227 I.C. 236=1946 Cal. (Rul.) 441=A.I.R. 1947 Cal. 270.

———**S. 36**—*Applicability—Preliminary decree sought to be reopened barred by limitation.*

S. 36 of the Bengal Money Lenders Act is not attracted to a case where a preliminary decree in a redemption suit which is sought to be reopened is barred by limitation and no proceeding in relation to the mortgage is pending within the meaning of S. 2 (22) on the date of the application for relief. (*Akram, C.J. and Amiruddin Ahmed, J.*) SWARNAMOYEE DASSI *v.* REKHAL MONDAL. 1 D.R. 59.

———**S. 36**—*Consent decree dismissing mortgage suit—Conveyance by mortgagor in favour* *of mortgagee of some of the mortgaged properties in full satisfaction—Whether can be re-opened.*

The parties to a mortgage suit entered into a compromise under which the mortgagor executed in favour of the mortgagee a conveyance of some of the items of the mortgaged property in full satisfaction of the mortgage. The suit was dismissed by a consent decree in terms of the compromise. In a subsequent suit filed by the mortgagor under S. 36 of the Bengal Agricultural Debtors Act.

Held, that the transaction represented by the conveyance could not be re-opened, as the mortgagor's properties were not purchased by the mortgagee in execution of the mortgage decree, but the mortgagor made a voluntary conveyance of them. [1949 F.C. 15, foll.] (*Mitter and Mitra, JJ.*) Shib Krishna Dass *v.* Krishna Chandra Ganguly. 4 D.L.R. (Cal.) 230=A.I.R. 1949 Cal. 627.

——**S. 36**—*Decree passed after 1st January, 1939, but before Act coming into force—If can be re-opened.*

Under S. 36 of the Bengal Money-Lenders Act a suit for the re-opening of a decree passed after 1st January, 1939 and before the Act came into force, is maintainable. (*Mitter and Akram, JJ.*) D. J. Hill *v.* Ramtaran Banerji. 50 C.W.N. 47.

——**S. 36**—*Decree passed after 1st January, 1939—If can be re-opened under S. 36—Scope of Proviso* (ii) *to sub-S.* (1) *of S.* 36.

A decree passed after 1st January, 1939, can be re-opened under S. 36 of the Bengal Money-Lenders' Act and relief given to the judgment-debtor in respect of excess interest included in it against the provisions of the Act.

In a suit filed on 21st June, 1939, on mortgages of 1933, a final decree was passed on 12th April, 1940, and the property was sold on 19th July, 1940, and the balance after satisfying the decree amount was deposited in Court to the credit of the judgment-debtor. The sale was confirmed on 21st August, 1940, and possession was delivered to the auction-purchaser on 24th August, 1940. The amount deposited in Court was withdrawn by the judgment-debtor and her creditors on 3rd September, 1940, and the execution case was dismissed as finally satisfied on the 9th September, 1940. On 30th August, 1941, the judgment-debtor filed a suit for relief against excess interest included in the final decree in contravention of the provisions of the Act. It was contended that inasmuch as the decree was passed only after 1st January, 1939 it could not be re-opened.

Held, negativing the contention that the reliefs allowed by S. 36 were available to the plaintiff in the case.

Mahajan, J.—The language of proviso (*ii*) to sub-S. (1) of S. 36 in plain terms means, (1) that there is no jurisdiction to reopen decrees passed in suits to which this Act does not apply, and (2) that decrees passed in suits to which this Act applies can be re-opened.

Mukherjea, J.—Proviso (ii) to sub-section (1) of S. 36 puts a limitation upon the powers or re-opening transactions which the Court can exercise under sub-S. (1) and it seems the intention of the Legislature is to keep decrees of Court beyond the pale of these ameliorative provisions unless they come within the purview of the exception which the proviso lays down. Thus before a decree could be touched or affected, two conditions would have to be satisfied. First it must be a decree in a suit to which this Act applies and secondly, it must not have been fully satisfied by the 1st of January, 1939. (*Kania, C. J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) Ram Taran Banerjee *v.* D. J. Hill. 4 D.L.R. (F.C.) 76=A.I.R. 1949 F.C. 135=1949 F.L.J. 144.

——**S. 36**—Form of decree—Declaratory decree absolving judgment-debtor of all liability—If can be passed. [*See* Q.D. 1941—1945, Vol. I, Col. 261.] Ajaraddi *v.* Sonai Bibi. 224 I.C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

——**S. 36**—Form of relief—Declaratory decree without re-opening decree—If can be granted. [*See* Q.D. 1941—1945, Vol. I, Col. 261.] Renula Basu *v.* Manmatha Nath Basu. I.L.R. (1945) 2 Cal. 449=I.L.R. (1945) Kar. (P. C.) 250=222 I.C. 1=12 B.R. 256=1946 P.C. (Rul.) 92 (P.C.).

——**S. 36**—*Grant of instalments—Determination of amount and number—Consideration.*

The most important consideration for the determination of the amount and number of instalments is the ability of the borrower to pay. (*Mitter and Akram, JJ.*) Madhusudan Pal *v.* Jnanendra Nath Guha. 224 I.C. 575=1946 Cal. (Rul.) 270=50 C.W.N. 726=A.I.R. 1946 Cal. 441.

——**S. 36**—Grant of relief—Decrees and loans for which no decree have been passed—Subsistence of liability on 1st January, 1939—If sufficient. [*See* Q.D. 1941—1945, Vol. I, Col. 261.] Ajaraddi *v.* Sonai Bibi. 224 I.C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

——**S. 36 (1)**—Loan fully satisfied by amicable settlement before 1st January, 1939—Relief, if cannot be granted. [*See* Q.D. 1941—1945, Vol. I, Col. 271.] Bhupendra Nath *v.* Manoranjan Bhuia. A.I.R. 1946 Cal. 243.

——**S. 36 (1)**—Grant of relief—Loan fully satisfied before Act—Mortgage amount deposited by mortgagor under S. 83, T. P. Act and withdrawn by mortgagee before Act—Mortgage debt, if extinguished. [*See* Q.D. 1941—1945, Vol. I, Col. 271.] Bhupendra Nath Ray *v.* Sushil Chandra. I.L.R. (1945) 2 Cal. 666.

——**Ss. 36 and 38**—*Power of Court—Grant of instalment decree and* pendente lite *interest.*

An instalment decree and *pendente lite* interest are not reliefs which can be granted by the Court under S. 36 (1) or S. 38 of the Bengal Money-Lenders Act. (*Chunder, J.*) Bejoy Krishna Roy *v.* Pasupati Karmakar. 53 C. W.N. 627.

——**S. 36**—*Proceedings under—Decree-holder purchaser spending money on property purchased—Right to reimbursement.*

In a proceeding under S. 36 of the Bengal Money-Lenders Act, the decree-holder who has spent money on the property purchased by him cannot claim that sum by way of reimbursement. He must seek his remedy, if any, in other proceedings. (*Mitter and Akram, JJ.*) D. J. Hill *v.* Ramtaran Banerji. 50 C.W.N. 47.

———**S. 36**—*Relief apart from section—Whether can be granted.*

The legislature intended that the measure of relief afforded to borrowers, in respect of loans and decrees passed in respect of loans, should be limited by the restrictions imposed by S. 36 of the Bengal Money-Lenders Act, which only permits the re-opening of transactions or decrees in respect of loans or the release of the borrower from further liability under the express conditions mentioned in that section. The Bengal Money-Lenders Act is a general Act for the purpose of regulating money-lending transactions in Bengal and it is only reasonable to suppose that in an Act of this nature, where a procedure for obtaining relief has been provided in the Act itself, it must have been intended that a borrower who wishes to obtain relief from his contractual obligations in respect of a loan should have recourse only to the procedure provided in the Act itself, and that the opening words of S. 36 "notwithstanding anything contained in any law for the time being in force" must, in this respect, have the effect of excluding the operation of such general statutes as the C. P. Code or the Specific Relief Act in so far as these statutes might be construed as providing remedies unfettered by the restrictions of S. 36 of the Bengal Money-Lenders Act. (*Edgley, J.*) Nawab Bahadur of Murshidabad *v.* Rameswarlal Ganeriwalla. I.L.R. (1945) 2 Cal. 217=A.I.R. 1949 Cal. 323.

———**S. 36**—*Re-opening of decree—Condition requiring judgment-debtor to pay up another time-barred decree—If can be imposed.*

Where a judgment-debtor applies for the re-opening of the decree, a condition which has the effect of asking him to pay up another decree the execution of which has become time-barred cannot be imposed on him. (*Mitter and Akram, JJ.*) Upendra Narayan *v.* Sudhirchandra. 230 I.C. 476=51 C.W.N. 17=A.I.R. 1947 Cal. 172.

———**Ss. 36 and 2 (22)**—Re-opening of decree—Execution proceedings completed before 1st January, 1939—Decree unsatisfied on that date—Decree-holder obtaining rateable distribution for balance in another execution case pending on that date—Suit, if one to which Act applies. *See* Bengal Money-Lenders Act, Ss. 2 (22) and 36. 51 C.W.N. 309.

———**S. 36**—*Re-opening of mortgage decree—Finding in mortgage suit as to amount of consideration for mortgage bond—If conclusive.*

In a proceeding for re-opening a mortgage decree under S. 36 of the Bengal Money-Lenders Act, an adjudication in the mortgage suit as to the amount of the consideration for the mortgage bond which is an original and not a renewed bond is conclusive between the parties and cannot be re-opened. (*Mitter and Akram, JJ.*) Indra Sekhar Chakravarty *v.* Ratikanta Haldar. I.L.R. (1946) 2 Cal. 24=50 C.W.N. 703=A.I.R. 1947 Cal. 447=82 C.L.J. 53.

———**S. 36**—Re-opening decree—Power of Court—Decree by consent. [*See* Q.D. 1941-1945, Vol. I, Col. 267.] Renula Basu *v.* Manmatha Nath Basu. I.L.R. (1945) 2 Cal. 449=I.L.R. (1945) Kar. (P.C.) 250=222 I.C. 1=12 B.R. 256=1946 P.C. (Rul.) 92 (P.C.).

———**S. 36**—*Re-opening of mortgage decree—Power of Court to impose conditions for preservation of mortgaged property.*

The Court has power in passing a decree under the Bengal Money-Lenders Act to impose suitable conditions for the preservation of the mortgaged property pending the payment of instalments directed by the new decree. (*Mitter and Waight, JJ.*) Promode Kumar Roy *v.* Nikhil Bhusan. 50 C.W.N. 407=A.I.R. 1946 Cal. 370=227 I.C. 600=1947 Cal. (Rul.) 37.

———**S. 36**—Re-opening of decree—Profits realised by decree-holder purchaser—If can be taken into account towards payment of debt. [*See* Q.D. 1941-1945, Vol. I, Col. 267.] Ajaraddi *v.* Sonai Bibi. 224 I.C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

———**S. 36**—*Re-opening transaction—Rent due from lender as tenant set-off against debt—Borrower wrongly realising portion of such rent by sale of tenure—Amount so realised, whether can be deducted from amount already set-off.*

Where by an arrangement between the lender and the borrower the rent due by the lender as patnidar was set-off in part satisfaction of the debt due but the borrower wrongly realised a portion of such rent by sale of the tenure.

Held, that the payment made by set-off could not be re-opened and that the amount wrongly realised by the borrower as landlord could not be deducted from the amount already allowed as set-off. The amount did not represent a transaction between the borrower and the lender, but it was a transaction between the landlord and his tenant. (*Mitter and Sharpe, JJ.*) Jessore Loan Co., Ltd. *v.* Sital Bala Debi. 51 C.W.N. 370.

———**S. 36** — *Scope—Restitution—Considerations.*

S. 36 of the Bengal Money-Lenders Act, provides rights and remedies *sui generis* and considerations relating to restitution under the C. P. Code are not illustrative. (*Edgley and Blank, JJ.*) Satish Chandra Nath *v.* Barada Prosad Mondal. 51 C.W.N. 112=A.I.R. 1947 Cal. 325.

———**S. 36**—Scope and effect of—If controls S. 30—Power to re-open old transactions—Limits to. *See* Bengal Money-Lenders Act, S. 30 (1) (*a*). 2 D.L.R. 129.

———**S. 36 (1) (a)**—*Applicability and scope—"Transaction"—Sale by debtor to creditor—Re-opening of—Object of Act—If to wipe out all transactions.*

A sale by a borrower to the lender in full or partial satisfaction of the loan may be a "transaction" in the ordinary sense generally, but the *transactions* that can be re-opened under S. 36 (1) (*a*) of the Bengal Money-Lenders Act must be deemed to be limited in their scope by the express object and policy of the Act and the nature of the relief which it is designed to afford to borrowers. What the Act aims at is not to wipe out all transactions between the lender and the borrower and the rights flowing therefrom, but to re-open those transactions only which are necessary for adjusting and moulding the rights of the parties in accordance with the provisions of the Act and to substitute a statutory method of accounting in place of that based on contract between the parties. A transaction which does not affect or impede the borrower's right to the relief provided for in the Act is not therefore liable to be re-opened under S. 36 (1) (*a*). (*Kania, C.J., Fazl Ali, Patanjali, Sastri, Mehr Chand Mahajan and Mukherjea, JJ.*) PADMAKAMINI DEBI *v.* NABA KUMAR SINGH. 53 C.W.N. (F.R.) 18=A.I.R. 1949 F.C. 15=83 C.L.J. 261=4 D.L.R. (F.C.) 1=1949 F.L.J. 63 (F.C.).

———**S. 36 (1) (a)**—*Scope—Power of Court—Restoration of possession—Extent of—Voluntary sale by debtor to creditor in liquidation of whole or part of debt—Liability to be re-opened.*

It is clear from the different provisions of S. 36 of the Bengal Money-Lenders Act that the Act does not contemplate restoration of possession to a borrower of property voluntary alienated by him in favour of the lender, in course of re-opening of a 'transaction.' The power of re-opening a transaction (and of restoration of possession) extends only to the re-opening of a decree and the restoring of possession parted with under an involuntary sale by the Court in execution of such decree, and not to any private or voluntary sale effected by the judgment-debtor in favour of the decree-holder with a view to liquidate his debt either wholly or in part. A sale by private treaty during the pendency of execution proceedings cannot therefore be re-opened on the ground that the sale became necessary because of the pendency of execution proceedings. 72 I.A. 156, ref. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) PADMA KAMINI DEBI *v.* NABA KUMAR SINGH. 53 C.W.N. (F.R.) 18=A.I.R. 1949 F.C. 15=83 C.L.J. 261=4 D.L.R. (F.C.) 1=1949 F.L.J. 63 (F.C.).

———**S. 36** — *Scope—"Transaction"—Meaning—Sale of mortgaged properties to lenders in discharge of debt—If "transaction" which can be re-opened or set aside.*

For interpreting the word "transaction" in the Bengal Money-Lenders Act the interpretation of that expression used in the Usurious Loans Act, S. 3 or the English Money-Lender's Act as the "transaction of loan" is not a safe guide. A sale by the borrower to the lender in full or part satisfaction of a loan would ordinarily be covered by the word "transaction" in Bengal Money-Lenders Act, S. 36. But it would not be regarded as a "transaction" if it has not the effect impeding or obstructing the relief or reliefs to which the borrower is entitled under the provisions of the Act. A transaction which is in essence a transaction of payment would not impede or obstruct the relief conferred on the borrower by the provisions of S. 30, but on the other hand would act in aid of that relief. Where the conveyance was executed before 1st January, 1939, the transaction cannot be re-opened. If the conveyance had been made after that date and if the lender got in substance payment in excess of what he would have been entitled to on account being taken in terms of S. 30 of the Act the transaction may have to be re-opened for ascertaining the balance due. But the sales cannot be set aside. (*Mitter and Akram, JJ.*) JNANENDRA NARAYAN CHOUDHURY *v.* NABA KUMAR SINGHA DUDHORIA. **I.L.R. (1946) 2 Cal. 179=A.I.R. 1947 Cal. 141=225 I.C. 270=50 C.W.N. 790.**

———**S. 36**—*Suit by judgment-debtor for relief—Property purchased by decree-holder at price exceeding decretal amount—Surplus amount withdrawn by judgment-debtor and her creditors—Judgment-debtor, if should be required to deposit that amount.*

Where the property of the judgment-debtor was purchased by the decree-holder in execution at an amount much above the decretal amount, with the result that after setting off the decretal dues against the price at which he had purchased he had to deposit in Court a certain sum a portion of which was withdrawn by the creditors of the judgment-debtor and the balance by the judgment-debtor herself, and the judgment-debtor filed a suit under S. 36 of the Bengal Money-Lenders Act for relief,

Held, that the judgment-debtor must deposit in Court the surplus amount withdrawn by herself and her creditors before she could be allowed to proceed further with her suit. (*Mitter and Akram, JJ.*) D. J. HILL *v.* RAMTARAN BANERJI. 50 C.W.N. 47.

———**S. 36**—*Suit for obtaining relief—Small Causes Courts—Jurisdiction—Provincial Small Causes Courts Act, Sch. II, Arts.* 4, 11, 21 *and* 23.

A suit for obtaining relief under S. 36 of the Bengal Money-Lenders Act is not a suit which is exempt from the cognisance of a Small Causes Court under Arts. 4, 11, 21 and 23 of Sch. II to the Provincial Small Causes Courts Act. Re-opening of a decree under S. 36 of the Bengal Money-Lenders Act is a new species of relief which has been introduced by that Act. The entire procedure is regulated by the provisions of that Act itself and there is nothing in that Act which lends countenance to the view that Small Causes Court Judges are not competent to exercise powers given by the Act. There is nothing in the Provincial Small Causes Courts Act to prevent a Small Causes Court Judge from passing an order for restoration of immovable property consequential on the reopening of the decree. (*Mukherjea and McSharpe, JJ.*) NONI LAL CHOWDHURY *v.* LALIT MOHAN MUKHERJEE. 80 C.L.J. 290=229 I.C. 419=1947 Cal. (Rul.) 157=A.I.R. 1947 Cal. 97.

———**Ss. 36 and 2 (22)**—*"Suit to which this Act applies"—Proceeding before Board in respect of money decree pending on* 1*st January,* 1939—*Such proceeding started after dismissal of last execution case—Decree, if can be re-opened.*

A proceeding instituted by a debtor before the Debt Settlement Board in respect of an amount due under a decree passed in a money suit, may itself constitute a proceeding within the definition of S. 2 (22) of the Bengal Money Lenders Act so as to make for the purposes of the Act the application before the Board "a suit to which this Act applies" within the meaning of S. 2 (22). Such a proceeding started after the dismissal of the last execution case in respect of money decree and pending on 1st January, 1939, cannot be treated as a proceeding in the suit or so closely connected with it as to entitle the borrower to reopen the decree in the suit. [48 C.W.N. 85, ref. to.] (*Ormond, J.*) JAMINI KUMAR DEY *v.* RAJ KUMAR KAR. 1 D.R. 155=A.I.R. 1949 Dacca 3.

———**Ss. 36 (1) and 38**—*Proper procedure—Suit or application—Taking of accounts.*

S. 36 (1) of the Bengal Money-Lenders Act mentions a suit and an application. An application will be a proper procedure where execution proceedings are going on, and the suit will be the proper procedure where a decree has to be reopened. But for merely taking accounts, the proper procedure is an application under S. 38 of the Act. (*Chunder, J.*) BEJOY KRISHNA ROY *v.* PASUPATI KARMAKAR. 53 C.W.N. 627.

———**S. 36 (1) and Appendix B, Arts. 8 & 9**—*Suit substantially under—Memo. of appeal—Court-fee payable—Court-Fees Act, Sch. I, Art. 1.*

Where the plaint is substantially one under S. 36 (1) of the Bengal Money Lenders Act, a court-fee of Re. 1 is payable on the plaint under Art. 8 of Appendix B of the Act. But court-fees are payable on a memorandum of appeal filed against an order passed under the Bengal Money Lenders Act not in terms of Art. 8 or 9, Appendix B, but under Sch. I, Art. 1 of the Court-Fees Act on the value of the subject-matter of the appeal. (*Das, J.*) SUDHIR KUMAR CHATTERJEE *v.* MOHADEB CHAKRABARTY. 52 C.W.N. 684=I.L.R. (1948) 2 Cal. 149=83 C.L.J. 247.

———**S. 36 (1), provisos**—*"Adjustment or agreement"—If includes consent decree.*

A consent decree cannot be construed to be an "adjustment or agreement" between the parties either within the meaning of S. 36 (1) (*b*) or proviso (1) to that sub-section. No doubt an agreement between the parties is the foundation on which a consent decree rests, but after all a consent decree is a decree of the Court. The proviso which deals with decrees, whether the decree be on adjudication or by consent, is proviso (2) and not proviso (1) to S. 36 of the Bengal Money-Lenders Act. (*Mitter and Akram, JJ.*) MAHENDRA NATH SARDAR *v.* BIRESWAR BAIRAGI. I.L.R. (1946) 2 Cal. 302=52 C.W.N. 314.

———**S. 36 (1), Proviso**—*Applicability—Test—Renewed promissory note—Whether creates new obligation.*

The proper test for the application of proviso (1) of S. 36 (1) of the Bengal Money Lenders Act is whether the obligations expressly undertaken by the borrower have been completely substituted by other express obligations undertaken, and intention of the parties as gathered from the document itself and in case of ambiguity, from external circumstances and the conduct of the parties or their actings will have to be considered in this connection.

Where all the dues of all the earlier promissory notes including the arrears of interest due were consolidated and one new promissory note was executed and further the old notes were all returned to the borrowers, it can be inferred from these facts that the parties intended to give a go-by to the earlier promissory notes. Under the circumstances, proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act would apply to the case, previous dealings being closed and a new obligation being substituted. (*Mitter and Chunder, JJ.*) DURGA SANKAR SUKUL *v.* PRAFULLA CHANDRA NAG. I.L.R. (1947) 1 Cal. 101=51 C.W.N. 355=A.I.R. 1947 Cal. 294.

———**S. 36 (1), Proviso**—Scope of. *See* BENGAL MONEY-LENDERS ACT (X OF 1940), S. 36. 1949 F.L.J. 144.

———**S. 36 (1), Proviso (i)**—Agreement "purporting to create new obligation"—Meaning of—Agreement keeping alive original obligation and modifying some of its terms—If amounts to. [*See* Q.D. 1941—1945, Vol. I, Col. 273.] JADU NATH *v.* JAGAT PRASSANNA MUKHERJEE. 1946 Cal. (Rul.) 2.

———**S. 36 (1), Proviso (1)**—*Applicability—Conditions—Creation of new obligation after closing previous dealings.*

An adjustment of accounts agreed upon by both the lender and the borrower may in a sense be taken to close previous dealings between the parties but that is not enough to attract proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act, for that by itself does not create a new obligation. The subsequent alteration of any one of the terms of the original bond on which the loan was advanced in a sense may be taken to create a new obligation, for the contract so altered would certainly be different from the original one. But that by itself is not sufficient to attract the proviso. The proviso lays down two conditions, namely (1) the closing of previous dealings between the lender and the borrower and (2) creation of a new obligation and both those conditions must be the result of the transactions in order that it may be protected against reopening by the force of that proviso. That proviso, however, does not mean that the transaction must be an independent one, an absolutely new one unconnected with a prior transaction, for as the proviso creates an exception to the power of reopening there must in every case be some connection between that transaction and the prior transaction to which the Court will have to fall back if the former is reopened. As the transaction which is to be protected against reopening must fulfil both the requirements, it must have the effect of completely substituting the prior obligation to which the borrower desires to fall back upon by means of the reopening. (*Mitter and Akram, JJ.*) MADHUSUDAN PAL *v.* JNANENDRA NATH GUHA. 224 I.C. 575=1946 Cal. (Rul.) 270=50 C.W.N. 726=A.I.R. 1946 Cal. 441.

———**S. 36 (1), Proviso (1)**—*Applicability—Proceedings under S. 38—Period of 12 years—Calculation—Relevant date.*

S. 36 including proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act applies to proceedings under S. 38 of the Act and the relevant date for calculating the period of twelve years mentioned in that proviso is the date of the filing of the application under S. 38. (*Mitter and Akram, JJ.*) Pramatha Narh Roy *v.* Prativa Nath Roy. I.L.R. (1946) 1 Cal. 305=81 C. L. J. 147=A.I.R. 1947 Cal. 134=230 I.C. 191=1947 Cal. (Rul.) 194.

——**S. 36 (1), Proviso**—*Applicability—Renewed promissory note—Whether creates new obligation.*

The defendants borrowed a sum of Rs. 2,000 from *T* and executed a promissory note in his favour for that sum. Subsequently they borrowed a sum of Rs. 1,000 from *H*, the mother of *T* and executed a promissory note for that sum in favour of *H*. Later, the defendants executed a promissory note in favour of *H* for Rs. 3,370, which was the amount due on the two previous promissory notes. Some time later, they executed the promissory note in suit in favour of *H* for Rs. 4,000 which represented the amount due for principal and interest on the promissory note for Rs. 3,370. *H* assigned this promissory note to the plaintiff.

Held, that the promissory note in suit closed previous dealings and created a new obligation and that being so, the first proviso to S. 36 (1) of the Bengal Money-Lenders Act applied and the transaction represented by that note could not be re-opened as the note was executed more than 12 years prior to the suit. (*Sen and Das, JJ.*) Bibhuti Bhusan Pal *v.* Mani Bala. 51 C.W. N. 347.

——**S. 36 (1), proviso (1)**—*Applicability—Renewed mortgage bond—If creates new obligation—Intention of parties—Inference from circumstances.*

Proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act is only an exception to the general rule that is embodied in the section and must be construed strictly. It undoubtedly contemplates a case where the adjustment or agreement extinguishes the previous obligation and replaces it by another or substituted obligation within the meaning of S. 62 of the Contract Act. When a renewed mortgage bond is taken the mortgagee is always presumed, unless the contrary is shown, to keep alive the original security which might be availed of against third parties. The presumption which arises in such circumstances can be put down expressly in the mortgage deed itself out of abundant caution. By itself a clause like this does not necessarily lead to the conclusion that not merely the security but the old obligation also was kept alive. But at the same time it cannot be contended that when a clause like this occurs in a mortgage bond the intention was only to keep alive the security and not the debt. The whole question is one of fact, and whether or not the original agreement was discharged by a new agreement, as is contemplated by S. 62 of the Contract Act, must be determined on a consideration of the substance of the matter and not merely the form. Where the consideration for a renewed mortgage bond was the amount due as principal and unpaid interest on the previous bond less a slight remission allowed by the mortgagee, and the date of interest remained the same but as the debt had amounted nearly to double of the original amount fresh properties were added as security, and further there was not only an express provision in the document that the first mortgage was to remain in force but the first mortgage was not cancelled or returned to the mortgagor but was kept with the mortgagee,

Held, that the parties did not intend that the original obligation should be extinguished and merged in a new obligation and that the obligation under the second instrument was not in supersession of but only in addition to, or modification of the obligation created by the first instrument, and that being the position the case was not hit by proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act. (*Mukherjea and Blank, JJ.*) Nripendra Kumar Roy *v.* Santosh Kumar Das. I.L.R. (1946) 1 Cal. 548=82 C.L.J. 116=50 C.W.N. 720.

——**S. 36 (1), Proviso**—*Applicability—Renewed promissory note—Whether creates new obligation.*

The defendants borrowed Rs. 5,000 on a promissory note in 1913. In 1917, they executed another promissory note for Rs. 6,385 which was the sum found due on account of principal and interest in respect of the previous note. In 1920 a promissory note was executed by them for Rs. 7,924 which represented the principal and interest then due and a small cash payment then made. In 1923, another promissory note was executed by them for Rs. 10,162 for the principal and interest then found due and cash then advanced. An endorsement was made by the defendants on the promissory note of 1920 to the effect that in lieu of that note they were executing a new note consolidating the principal and interest. The promissory note of 1923 referred only to the note of 1920 and no reference was made in it to the earlier transactions.

Held, that the promissory note of 1923 closed the past dealings of the parties and created a new obligation, and as it was beyond 12 years of the date of the suit, the transaction represented by it could not be re-opened in view of proviso (1) of S. 36 (1) of the Bengal Money-Lenders Act. (*Mitter and Akram, JJ.*) Nalini Mohan Roy *v.* Mukunda Chandra Das. 51 C.W.N. 350.

——**S. 36 (1), proviso (i)**—*"Date of suit"—Meaning of.*

The suit referred to in the proviso (i) means "the suit" that is spoken of in S. 36 (1) of the Bengal Money-Lenders Act. If the execution case which was pending on January 1, 1939, was finally disposed of at the time when the debtor made his application for relief under the Act, "the date of the suit" referred to in the proviso is the date of the suit out of which the execution case arose. The Court has, therefore, jurisdiction to reopen an adjustment which took place within twelve years from the date of that suit. [I.L.R. (1942) 2 Cal. 516, dist.] (*Nasim Ali and Blank, JJ.*) Mohanta Bhagaban Das *v.* Durga Das Sarkar. I.L.R. (1945) 2 Cal. 290.

——**S. 36 (1), proviso (1)**—*"Date of suit"—Suit, if includes application.*

The expression "date of suit" occurring in proviso (1) to S. 36 (1) of the Bengal Money-Lenders Act, does not refer to the date of any application by the borrower for relief under the Act. (*Mukherjea and Blank, JJ.*) Nripendra Kumar Roy *v.* Santosh Kumar Das. I.L.R. (1946) 1 Cal. 548=50 C.W.N. 720=82 C.L.J. 116.

———**S. 36 (1), Proviso (i)**—"Date of suit"—Meaning of—Review application under S. 36 (6) (*a*) (*ii*)—If such suit. [*See* Q.D. 1941—1945, Vol. I, Col. 274.] Surendra Nath Sarkar *v.* Kumarkhali Banking Corporation. I.L.R. (1945) 2 Cal. 51.

———**S. 36 (1) (a)**—*"Transaction"—Barred debt—Bond in respect of—If can be re-opened.*

S. 36 (1) (*a*) contemplates a transaction between the borrower and the lender which has reference to and is connected with the loan. Its ultimate source must be the loan in respect of which the accounts are to be taken, and there must be relationship of debtor and creditor. The fact that a debtor executes a fresh bond in respect of barred debt does not render the original relationship of debtor and creditor to cease because the debt is not extinguished because the remedy to recover it by suit is barred by time. The new promise to pay merely resuscitates the remedy to enforce payment by suit. A bond in respect of a barred debt is therefore a "transaction" falling under S. 36 (1) (*a*) and can be re-opened. (*Mitter and Akram, JJ.*) Suresh Chandra Bidyanidhi *v.* Benoy Kumar Acharjya. I.L.R. (1946) 2 Cal. 209=50 C.W.N. 796=225 I.C. 346=A.I.R. 1947 Cal. 267.

———**S. 36 (1), Proviso (ii)**—*"Effects"—Meaning of.*

The word "affects" in proviso (ii) of S. 36 (1), Bengal Money-Lenders Act, cannot be interpreted to mean "affects the creditor prejudicially". (*Akram, C.J.*) Aminulla Mia *v.* Haridas. 2 D.R. 190.

———**S. 36 (1) (a), proviso (ii)**—Sale in execution of final mortgage decree held before 1st January, 1939—Personal decree for unrealised balance not passed, but not barred by limitation on that date—Preliminary and final decrees, if can be re-opened. [*See* Q.D. 1941—1945, Vol. I, Col. 277.] Ajaraddi *v.* Sonai Bibi. 224 I.C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

———**S. 36 (1) (b) and proviso (i)**—*"Adjustment" or "agreement"—Consent decree.*

A consent decree cannot be construed to be an adjustment or agreement between the parties either within the meaning of S. 36 (1) (*b*) or proviso (i) to S. 36 (1) of the Bengal Money Lenders Act. The proviso which deals with decrees, whether the decree be on adjudication or by consent, is proviso (2) and not proviso (1) to S. 36. A consent decree passed in a suit to which the Act applies can therefore be re-opened. (*Mitter and Akram, JJ.*) Mahendra Nath Sardar *v.* Bireswar Bairagi. I.L.R. (1946) 2 Cal. 302=52 C.W.N. 314.

———**S. 36 (1), Proviso (ii)**—*Re-opening of prior mortgage decree—If would affect subsequent mortgage decree.*

The re-opening of a prior mortgage decree would not require a modification of the terms of a subsequent mortgage decree, where the rights of the decree-holder under the latter mortgage decree are to proceed against such of the mortgaged properties as may not be required for the satisfaction of the prior mortgage decree and to take surplus proceeds, if any, if all the mortgaged properties had been sold in execution of the prior mortgage decree. Consequently, S. 36 (1), proviso (*ii*) of the Bengal Money-Lenders Act would not operate as a bar to the re-opening of such a prior mortgage decree. (*Mitter and Akram, JJ.*) Upendra Narayan *v.* Sudirchandra. 230 I.C. 476=51 C.W.N. 17=A.I.R. 1947 Cal. 172.

———**S. 36 (1), Proviso (ii) and (2) (c)**—*Scope—Conflict between—Proper procedure—Relief to debtor.*

The provisions of S. 36 (2) (*c*) are no doubt mandatory; but the provisions of the proviso (*ii*) to sub-S. (1) of S. 36 are equally mandatory. Where there is a conflict between the two provisions the only course is to give effect to so much as will best secure the object of the section, *i.e.*, to re-open the decree and give relief to the debtor so far as the circumstances of the case will permit. (*Sharpe, J.*) Mahomed Kazim Ali *v.* Rameshchandra Sil. 227 I.C. 236=1946 Cal. (Rul.) 441=A.I.R. 1947 Cal. 270.

———**S. 36 (1), Proviso (ii)**—*Scope and object of—Decree passed after 1st January, 1939—If excluded from purview of S. 36—Re-opening of such decree.*

A decree passed after 1st January, 1939, can be re-opened under S. 36 of the Bengal Money-Lenders Act, and relief given to the judgment-debtor in respect of excess interest included in it against the provisions of the Act. The object of the legislature in inserting proviso (ii) to S. 36 is not to exclude decrees passed after 1st January, 1939, from the benefit of S. 36, but only to lay down an additional requirement which has to be fulfilled in cases where the decree, though passed before that date could still be deemed to be made in a suit to which the Act applies, as defined in S. 2 (22) [72 I.A. 156; 46 C.W.N. 875, ref.] (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) Ram Taran Banerjee *v.* D. J. Hill. 4 D.L.R. (F.C.) 76=A.I.R. 1949 F.C. 135=1949 F. L.J. 144.

———**S. 36 (1), Proviso (ii) and (4)**—*Suit for money due under simple mortgage—Preliminary decree for sale passed in such suit—If one for money—Mortgaged property sold before 1st January, 1939—Personal decree for balance remaining unsatisfied on that date—Decree, if deemed to be fully satisfied.*

A suit for recovery of money due under a simple mortgage is substantially a suit for money for the purposes of S. 36 (4) of the Bengal Money-Lenders Act, though it is for the enforcement of the mortgage. Just as the suit is one for money, so a preliminary decree for sale passed in such a suit directing the sale of the mortgaged property in the event of non-payment of the decretal amount and providing for a personal decree for the balance if the net proceeds of the sale are insufficient to pay such amount, is substantially a decree for money. It lays down that the decree is to be worked out in three stages indicated therein which cannot be severed from one another. They are not independent, but constitute different stages in a single decree. For the purposes of the Act these decrees passed in a suit to which the Act applies should be treated as a single money decree. Such a decree cannot be deemed to be fully satisfied within the meaning of S. 36 (1), proviso (ii) of the Act by the mere sale of the mortgaged property in execution of the final decree before 1st January, 1939, if the personal decree for the balance remains unsatisfied on that date. The Court can in such a case, therefore, in the exercise of the powers under S. 36 of the Act, re-open the preliminary decree, and the final decree, as well as the personal decree, so as to affect all the three. [48 C.W.N. 361 (F.B.), appr.] (*Sir Madhavan Nair.*) Jadunath Roy *v.* Kshitish Chandra Acharjya. 76 I.A. 179 =A.I.R. 1949 P.C. 268=85 C.L.J. 116=30 P.L.T. 222=53 C.W.N. 790 (P.C.).

———**S. 36 (2)**—Costs that may be added to new decree. [*See* Q.D. 1941-1945, Vol. I, Col. 280.] Subashini Poddar *v.* Sreenath Chakravarty. I.L.R. (1945) 2 Cal. 651=223 I.C. 422=1946 Cal. (Rul.) 171=A.I.R. 1946 Cal. 129.

———**S. 36 (2) (c) and (e)**—*Partial restoration of property—Permissibility—Duty of Court to estimate amount for which judgment-debtor has to be credited.*

The provisions of S. 36 (2), Beng. Money-Lenders Act, show beyond all doubt that there was the clearest intention that partial restoration of property could be claimed and given. These provisions are not nullified by cl. (*e*) of S. 36 (2). The Legislature clearly has made a mistake in the provision it has made in cl. (*e*) in providing that the judgment-debtor is to get credit only for the value of the property restored to him and again returned to the decree-holder. It is not possible to give any other interpretation to the section than in accordance with the manifest error but the Courts then must estimate in the best way they can what figure is to be given as the amount for which the judgment-debtor has to be credited. (*Roxburgh, J.*) Ramesh Chandra Roy *v.* Bhupendra Bhusan Gangully. A.I.R. 1950 Cal. 438.

———**Ss. 36 (2) (e) and 34 (2)**—*Instalment due under re-opened decree—Time for payment—Power of Court to extend—C. P. Code, S. 148.*

S. 36 (2) (*e*) of the Bengal Money-Lenders Act contemplates a case where a decree has already been executed by the sale of the property of the judgment-debtor and provides under S. 36 (2) (*c*), if he makes default in payment of any instalment the decree-holder shall be put back in possession of the property sold. The first proviso to S. 34 (2) of the Act empowers the Court to grant extension of time for the payment of any instalment "prior to an order for execution of the decree". The said proviso to S. 34 (2) does not, therefore, control S. 36 (2) (*e*) of the Act, and the Court has no power to extend time for the payment of an instalment due under a reopened decree which has been executed by the sale of the property of the judgment-debtor. 48 C.W.N. 453, referred to. S. 148, C. P. Code, cannot be availed of to extend the time for payment of an instalment due under a reopened decree, as the decree provides a penalty in case of default in payment of any instalment. 37 C.W.N. 878, referred to.

In such a case, the Court has no jurisdiction to give relief against forfeiture on equitable principles. In a case, where it is expressly provided by the statute that the Court shall direct, in default of the payment of any instalment, that the decree-holder shall be put into possession of the property, recourse cannot be had to equitable principles to override the statutory provision. (*Akram, J.*) Basudeb Guchait *v.* Bibhuti Bhusan Guchait. I.L.R. (1948) 1 Cal. 156.

———**S. 36 (2)**—*Re-opening of mortgage-decree—Mesne profits—Liability of decree-holder-purchaser.*

A decree-holder purchaser is not accountable to the judgment-debtor for mesne profits till the date of the order re-opening the mortgage-decree. [49 C.W.N. 30, foll.] (*Mitter and Waight, JJ.*) Promode Kumar Roy *v.* Nikhil Bhusan. 50 C.W.N. 407=A.I.R. 1946 Cal. 370=227 I.C. 600=1947 Cal. (Rul.) 37.

———**S. 36 (2) (a)**—Re-opening of decree—Position of parties—Plea of payment rejected in suit—If can be given effect to. [*See* Q.D. 1941-1945, Vol. I, Col. 282.] Ajaraddi *v.* Sonai Bibi. 224 I.C. 266=1946 Cal. (Rul.) 221=A.I.R. 1946 Cal. 65.

———**S. 36 (2) (b)**—*Purchaser by private sale from decree-holder auction-purchaser—If protected.*

S. 36 (2) (*b*) of the Bengal Money-Lenders Act only contemplates that the right should be acquired by a person other than the decree-holder as a result of the execution of the re-opened decree. If a person *bona fide* acquires a property under a private sale by the decree-holder auction-purchaser which is not remote in point of time, he acquires it "in consequence of the execution of the re-opened decree" within the meaning of that clause and is therefore within its protection. (*Edgley and Blank, JJ.*) Satish Chandra Nath *v.* Barada Prosad Mandal. 51 C.W.N. 112=A.I.R. 1947 Cal. 325.

———**S. 36 (2) (b) and (c)**—Scope—Decree-holder purchasing undivided share of judgment-debtor in execution of re-opened decree—Separate allotment given to him in partition suit—Right of judgment-debtor to restoration of possession of that allotment. [*See* Q.D. 1941-1945, Vol. I, Col. 283.] Subhashini Poddar *v.* Sreenath Chakrabarti] I.L.R. (1945 2 Cal. 651=A.I.R. 1946 Cal. 129=223 I.C. 422=1946 Cal. (Rul.) 171.

———**S. 36 (2) (c)**—*Lease obtained by purchaser on strength of renewal clause in lease held by judgment-debtor—If property of judgment-debtor.*

Obiter.—A lease obtained by the decree-holder purchaser of a leasehold interest on the strength of a renewal clause in the lease which the judgment-debtor held, would be regarded as the property of the judgment-debtor within the meaning of Cl. (*e*) of S. 36 (2) of the Bengal Money-Lenders Act. (*Mitter and Akram, JJ.*) Upendra Narain *v.* Sudhirchandra. 230 I.C. 476=51 C.W.N. 17=A.I.R. 1947 Cal. 172.

———**S. 36 (2) (c)**—Property purchased by decree-holder along with stranger in equal shares—Restoration of half share of decree-holder—If proper. [*See* Q.D. 1941-1945, Vol. I, Col. 284.] Subashini Poddar *v.* Sreenath Chakrabarti. I.L.R. (1945) 2 Cal. 651=A.I.R. 1946 Cal. 129=223 I.C. 422=1946 Cal. (Rul.) 171.

———**S. 36 (2) (c)**—*Restoration of possession—Question whether decree-holder is benamidar for another person—Power of Court to decide.*

In a proceeding under S. 36 of the Bengal Money-Lenders Act, the Court can go into the question as to whether the decree-holder on record is a benamidar for another person brought on the record of that proceeding by the judgment-debtor for the purpose of deciding whether the judgment-debtor is entitled to restoration of possession of his property sold in execution of the re-opened decree. (*Mitter and Chunder, JJ.*) f Aditya Narain Chakrabarty *v.* Iswar Gopal Jew. 4 D.L.R. (Cal.) 156=A.I.R. 1949 Cal. 315.

———**S. 36 (4)**—*"Suit to which this Act applies"—Sale in execution—Purchase by decree-holder and delivery of possession—Subsequent title suit with prayer for possession—If falls under section.*

A title suit with a prayer for recovery of possession purchased at a Court sale in execution and duly delivered over to the decree-holder purchaser, cannot be held to be covered by the expression "application for the possession of property purchased by him (decree-holder) in execution of his decree." Such a suit is not a "suit to which this Act applies" within the meaning of S. 36 of the Bengal Money-Lenders Act (*Sharpe, J.*) Mahomed Kazim Ali *v.* Rameshchandra Sil. 227 I.C. 236=1946 Cal. (Rul.) 441=A.I.R. 1947 Cal. 270.

———**S. 36 (5)**—*"Assignee"—Meaning of—Sub-mortgagee.*

The word "assignee" in S. 36 (5) of the Bengal Money-Lenders Act means only the transferee of a *complete transferee,* a person who by the act of the transferor was *substituted in his place.* A sub-mortgagee is not an assignee within the meaning of this sub-section as he does not acquire the totality of the rights of the original mortgagee. (*Mitter and Waight, JJ.*) Promode Kumar Roy *v.* Nikhil Bhusan. 50 C.W.N. 407=A.I.R. 1946 Cal. 370=227 I.C. 600=1947 Cal. (Rul.) 37.

———**S. 36 (5)**—*Assignee of decree—Co-sharer to whom decree is allotted on partition—If entitled to protection.*

Where on partition between co-sharers a decree obtained by them is allotted to one of them, the partition does not operate as an assignment of the decree to him, and he is not, therefore, entitled to the protection of S. 36 (5) of the Bengal Money-Lenders Act. [1923 M. 577 and 60 B. 34, N.F., I.L.R. (1945) 2 Cal. 651, foll.]

(*Sen and Das, JJ.*) Ksheeroda Sundari Dasi *v.* Amrita Lal Chaudhuri. I.L.R. (1946) 1 Cal. 137.

———**S. 36 (5)**—*"Assignee"—Sub-mortgagee under assignment by mortgagee of all his rights reserving right to redeem—Sub-section, if applies to loan before Act.*

Sub-S. (5) of S. 36 of the Bengal Money-Lenders Act applies not only to an assignee of a mortgage decree but also to an assignee of a mortgage-debt. A sub-mortgagee under an assignment made by the mortgagee of the entire mortgage-debt and all his rights as mortgagee, is an assignee within that sub-section. The fact that the mortgagee has reserved his right to redeem does not make the assignment any the less an assignment of all his rights under the mortgage.

The sub-section also refers to a case in which the loan was made before the Act came into operation. [72 I.A. 156, foll.] (*Lord Morton of Henryton.*) Promode Kumar Roy *v.* Nikhil Bhusan. 76 I.A. 74=A.I.R. 1949 P.C. 183=53 C.W.N. 416=4 D.L.R. (P.C.) 214 (P.C.).

———**S. 36 (5)**—*Mortgagee paying off earlier mortgage suing on his own mortgage—If protected as an assignee.*

A mortgagee who pays off an earlier mortgage and is even subrogated to the rights of the earlier mortgagee, is not in the position of an assignee when suing to recover the loan due on his own mortgage, and is not, therefore, protected under S. 36 (5) of the Bengal Money-Lenders Act. I.L.R. (1945) 2 Cal. 449 and 50 C.W.N. 407, Dist. (*Mitter and Chunder, JJ.*) Pramatha Nath Ray *v.* Pashupathi Nath Malia. I.L.R. (1946) 2 Cal. 413.

———**S. 36 (5)**—Pre-Act assignee—If protected. [*See* Q.D. 1941-1945, Vol. I, Col. 285.] Renula Basu *v.* Manmatha Nath Basu. I.L.R. (1945) 2 Cal. 449=222 I.C. 1=12 B.R. 256=1946 P.C. (Rul.) 92=I.L.R. (1945) Kar. (P.C.) 250 (P.C.).

———**S. 36 (5)**—*Pre-Act assignee of pre-Act loan—If protected.*

A pre-Act assignee of a pre-Act loan is protected by reason of S. 36 (5) of the Bengal Money-Lenders Act. (*Mitter and Waight, JJ.*) Promode Kumar Roy *v.* Nikhil Bhusan. 227 I.C. 600=50 C.W.N. 407=A.I.R. 1946 Cal. 370.

———**S. 36 (6)**—*Order re-opening decree and restoring possession of some of properties only—Appeal.*

In execution of a money-decree, the decree-holder purchased some of the properties in his own name and the other properties were purchased by strangers. On an application by the judgment-debtor under S. 36 (6) of the Bengal Money-Lenders Act, the Court re-opened the decree and directed restoration of possession of the properties purchased by the decree-holder but with respect to other properties purchased by strangers the Court rejected the prayer for restoration on the finding that the judgment-debtor had failed to show that it was a purchase by the decree-holder.

Held, that the orders passed by the Court were of a composite nature both on the one hand disposing of the application for re-opening the decree and also passing an actual new decree in the money-suit, and on this view the judgment-debtor had a right of appeal against the decree itself in respect of that part of it which ordered restoration of some of the properties and in effect refused restoration of the remaining properties. [45 C. W.N. 776, ref. to.] (*Ormond, J.*) Amrit Lal *v.* Ananta Lal. 1 D.R. 25.

——S. 36 (6) (a) (i) and (ii)—Order rejecting application for relief—Appeal. [*See* Q.D. 1941-45, Vol. I, Col. 287.] Bhupendra Nath Ray *v.* Sushil Chandra. I.L. R. (1945) 2 Cal. 666.

——S. 36 (6) (b)—*Grant of instalments—Power of High Court in revision.*

Under S. 36 (6) (*b*) of the Bengal Money-Lenders Act, the High Court has no power to grant instalments in revision. A Court before which an application in revision is pending is not a Court before which an appeal is pending within the meaning of that provision. (*Lodge, J.*) Mahendrachandra Dey *v.* Mahendrachandra Kar. 81 C.L.J. 260=A.I.R. 1947 Cal. 288.

——Ss. 38 and 36—Application for taking accounts—Mortgage bond more than 12 years old —Amount mentioned therein as principal including also arrears of interest on sum actually advanced—Such amount if to be treated as principal for all purposes—Interest on such amount from date of bond—If payable. [*See* Q.D. 1941-1945, Vol. I, Col. 290.] Birbhadra Chandra *v.* Surendra Prasad. I.L.R. (1945) 1 Cal. 202.

——Ss. 38 and 30 (2)—Method of taking accounts—Interest paid before act in excess of statutory rate up to certain period and at less than statutory rate thereafter—Excess interest, if to be credited towards outstanding principal at end of first period or towards interest accruing thereafter. [*See* Q.D. 1941-1945, Vol. I, Col. 290.] Sanat Kumar Mukherji *v.* Pramatha Nath Ray. I.L.R. (1945) 1 Cal. 254.

——S. 38 (3)—*Appeal against declaration—Respondent's right to file cross-objection—C. P. Code, O. 41, R. 22.*

Once a proceeding in appeal filed against a declaration under S. 38, Bengal Money-Lenders Act, reaches the Court of the District Judge the incidents and procedure applicable to that appeal are governed by the provisions of the Code of Civil Procedure. In that view of the matter, once an appeal is filed before the District Judge the respondent will have the right to file a cross-objection. (*Harries, C.J. and Bachawat, J.*) Ramasray Singh *v.* Bibhisan Sinha. 5 D.L. R. (Cal.) 83=A.I.R. 1950 Cal. 372.

——S. 38 (3)—*Applicability—Order declaring debtor's right to have accounts taken—Appeal, if competent.*

An order passed in a preliminary form in a proceeding under S. 38 of the Bengal Money-Lenders Act declaring the debtor's right to have accounts taken and directing a commissioner to

be appointed for that purpose, does not come within the express terms of S. 38 (3) of the Act conferring a right of appeal, and is therefore not appealable under this provision. The word "declaration" used in S. 38 (3) means a declaration which has been asked for by the borrower and which is made by the Court by virtue of powers given by sub-S. (2) of that section. Where the Court has not caused any accounts to be taken and has not made any declaration as to the amount "payable and already due", or as to the amount "payable but not yet due," the stage has not yet arrived at which a declaration of the above nature could be made.

But the order in question has all the essentials of a preliminary decree and is therefore, appealable under the general law, *viz.,* the Code of Civil Procedure, although the proceedings were originated in the Civil Court not on a plaint but on an application. The correct principle applicable in such cases is that where a Civil Court has given a decision which comes within the definition of a decree, an appeal would lie, although the special proceedings began by reason of the provision of a Special Act, unless there is some provision in the special Act, which takes away by express terms or by necessary implication the right of appeal conferred under the general law. The character of the order is the criterion for determining whether an appeal would lie under the general law, and not the fact that the proceedings originated not on a plaint but on an application. 39 M. 617 (P.C.), rel. on. (*Mitter and Chunder, JJ.*) Satish Chandra Nag *v.* Riyasat Hossain. I.L.R. (1949) 1 Cal. 487.

——S. 38 (3)—*Scope—Right of appeal—If exhaustive—Further appeals to Federal Court—Competency—C. P. Code, Ss.* 109 *and* 110.

S. 38 (3) of the Bengal Money-Lenders Act cannot be read as exhaustive of the right of appeal, and as excluding a further appeal from the decision of the High Court to the Federal Court under Ss. 109 and 110, C. P. Code, on the ground that a proceeding under S. 38 is to be deemed to be a suit only for purposes of S. 11 and for no other purpose. Ss. 109 and 110, C. P. Code, are not confined in their operation to suits. A declaration under S. 38, Bengal Money-Lenders Act, is "subject to appeal, if any, as it were a decree of the Court." Whether an appeal lies in a given case from a declaration made under S. 38, is left to be determined by the general law, i.e., the provisions of the C. P. Code. Once a proceeding under S. 38 reaches the High Court, further rights of appeal are governed by the C. P. Code, and if the requirements of Ss. 109 and 110 are satisfied, an appeal to the Federal Court is not incompetent. [14 I.A. 160; 39 I.A. 197, Dist. 39 Mad. 617, Appl.] (*Kania, C.J., Fazal Ali, Patanjali Sastri, M.C. Mahajan and Mukherjea, JJ.*) Pramatha Nath Roy *v.* Sanat Kumar Mukherji. 53 C.W.N. (F.R.) 12=4 D.L.R. (F.C.) 16=A.I.R. 1949 F.C. 60=1949 F.L.J. 73=83 C.L.J. 268=1948 F.C.R. 228 (F.C.).

BENGAL MOTOR VEHICLES RULES (1940), R. 96 (b) (1)—*Applicability—Driver of* *slowly moving taxi refusing fare—Indicator flag of taxi meter in vertical position—Offence.*

A driver refusing a fare would be guilty of an offence under R. 96 (*b*) (1) of the Motor Vehicles Rules (Bengal) only when the indicator flag of the taxi-meter is in a vertical position and the motor cab is on an authorised stand or otherwise stationary. Both these requirements have to be satisfied. Where the driver of a taxi cab refuses a fare when his cab is slowly moving along a street, he does not commit an offence although the indicator flag of the taxi meter is in a vertical position. (*Lodge, J.*) JATA SANKAR RAIJI *v.* EMPEROR. 224 I.C. 439=47 Cr.L.J. 705=A.I.R. 1946 Cal. 449.

BENGAL MUNICIPAL ACT (XV OF 1932), S. 3 (21)—*Applicability—"Adjoining holdings"—Different holdings used for different markets.*

Where two holdings existing separately are used for two different and distinct markets, one for the sale of fish and the other for the sale of vegetables, they cannot be held to be part and parcel of the "place of trade or business" within the meaning of the definition of "adjoining" holdings in S. 3 (21) of the Bengal Municipal Act. (*Mukherjea and Sharpe, JJ.*) COMMISSIONERS OF PABNA MUNICIPALITY *v.* NABA GOBINDA CHOWDHURY. 226 I.C. 540=1946 Cal. (Rul.) 398=51 C.W.N. 183=A.I.R. 1947 Cal. 245.

———**Ss. 3 (21), 129 and 139**—*Holding held under one title consisting of rice mill and land and surrounded by one set of boundaries—Land subsequently let to tenants—Sub-division of holding into two holdings for separate assessment—Legality.*

A holding consisting of a rice mill and certain land and surrounded by one set of boundaries and held under one title by the assessee cannot on his letting the land to tenants be subdivided into two different holdings and assessed separately. The letting of the land to tenants cannot in any way affect the title under which the assessee held. (*Harries, C.J.*) HARDAT ROY *v.* MUNICIPAL COMMISSIONERS OF KALNA. 52 C.W.N. 185.

———**S. 3 (21)**—*"Holding"—Test—Land in occupation of different persons.*

In order that a parcel or parcels of land may constitute a "holding", the occupation of the lands are surely to be looked to, but it would not be occupation of a single person or set of persons; there may be different occupiers, but if their ultimate source of title be the same according to the test adopted by the commissioners under S. 129 (*b*) of the Bengal Municipal Act, then if these parcels are covered by the same set of boundaries, they would constitute a "holding" within the meaning of S. 3 (21) of the Act. (*Mukerjea and Sharpe, JJ.*) DEBA PRASAD GARGA *v.* MUNICIPAL COMMISSIONERS OF TAMLUK. I.L.R. (1946) 2 Cal. 353=81 C.L.J. 160=A.I.R. 1947 Cal. 121=1947 Cal. (Rul.) 159=229 I.C. 488.

———**S. 3 (21), Expl.**—*Construction—"Adjoining" holdings—What are—"Separated by a street or other means of communication"—Interpretation.*

The words "separated by a street or other means of communication" contained in S. 3 (21) of the Bengal Municipal Act imply and must be construed as meaning that the holdings should be divided, the one from the other by a street or other means of communication. If they are not so divided, they cannot be considered to be "adjoining" holdings within the meaning of the explanation to S. 3 (21). (*Mukerjea and Sharpe, JJ.*) COMMISSIONERS OF PABNA MUNICIPALITY *v.* NABA GOBINDA CHOWDHURY. 226 I.C. 540=1946 Cal. (Rul.) 398=51 C.W.N. 183=A.I.R. 1947 Cal. 245.

———**(As amended in 1940, S. 23**—Construction—"Trades, professions and callings specified in Sch. IV"—Interpretation of. *See* BENGAL MUNICIPAL ACT, Ss. 123 AND 182 AND SCH. IV, ITEM 1. 1949 F.L.J. 67 (F.C.).

———**Ss. 38-B and 43**—*Decision of subordinate Court setting aside election—Revision—Powers of High Court—C. P. C., S. 115—Government of India Act* (1915), *S. 107—Government of India Act* (1935), *S.* 224.

The High Court has no power to revise a decision of a subordinate Court granting a declaration that the rejection of a nomination paper by the Election Authorities is illegal and *ultra vires* and setting aside an election, in view of the provisions of Ss. 39-B and 43 of the Bengal Municipal Act.

The powers of revision of the High Court under S. 115, C. P. Code, have been validly taken away by Ss. 39-B and 43 of the Bengal Municipal Act. The latter Act could not, however, affect the right of superintendence conferred on the High Court by S. 107 of the Government of India Act, 1915, which included not only superintendence on the administrative points but also superintendence on the judicial side. But this section was repealed by the Government of India Act, 1935, and the corresponding S. 224 of the latter Act is confined to the administrative functions of High Courts and does not give the High Courts any right of judicial interference. I.L.R. (1938) 2 Cal. 69 and 42 C.W.N. 647, referred to. A.I.R. 1949 Bom. 42, Diss. from. (*Das and Guha, JJ.*) JAHNABI PROSAD *v.* BASUDEB PAUL. 54 C.W.N. 626=A.I.R. 1950 Cal. 536.

———**Ss. 123 and 129**—*Different holdings treated as one holding for purpose of assessment—Legality of assessment.*

Under S. 123 of the Bengal Municipal Act, it is essential that the unit or subject of assessment must be one single holding as defined in S. 3 (21) of the Act, (*i.e.*) a piece of land held by an occupier under one title or agreement and surrounded by one set of boundaries. S. 129 (*b*) of the Act only gives the commissioners the power to determine at a meeting what shall be accepted as the test for determining whether lands are held under one title or agreement for the purpose of satisfying the definition of a holding. It does not empower the commissioners to create an imaginary holding by either treating a part of a parcel of land which is held under the same title and surrounded by one set of boundaries as one holding or by treating two or more parcels of land separated from each other and so surrounded by different sets of boundaries the case not falling within the explanation to S. 3 (21) or held under different titles as one holding. Accordingly, if two parcels of land separated from each other, and which according to the definition ought to be treated as two holdings, are lumped together by the commissioners and treated as one single holding for the purpose of assessing rates, an assessment on that basis would be *ultra vires* and so illegal. (*Nasim Ali and Mitter, JJ.*) SURI MUNICIPALITY *v.* CHARU SHASHI GHOSE. I.L.R. (1946) 1 Cal. 359=222 I.C. 501=1946 Cal. (Rul.) 111=50 C.W.N. 151=A.I.R. 1946 Cal. 236.

——(As amended in 1940), Ss. 123, 182 and Sch. IV, Item 1—*If to be read together—Specification of traders in Sch. if inconsistent and in conflict with Ss.* 123 *and* 182—*Duty to reconcile seeming conflict.*

S. 123 (*f*) of the Municipal Act (as also S. 182), provides that the trade or trades in respect of which the tax is to be levied (the licence is to be taken out) should be specified in Sch. IV to the Act. Under Sch. IV to the Act, *e.g.*, in Item I, the phraseology used is to the effect that the tax is imposed on the person carrying on the trade, etc. (company or association or body of individuals which exercises any profession, etc.). It cannot, however, be contended that that is not a specification of a trade as contemplated by S. 123 (or S. 182) but only a specification of the person to be taxed, and that, therefore, the schedule does not correspond with the sections controlling and hence is ineffective for the purpose of creating any liability, the schedule not having been drawn up in conformity with these sections. It must be borne in mind that Sch. IV has to be read with Ss. 123 and 182, and every attempt made to reconcile any seeming conflict between the two provisions. S. 123, no doubt, refers to a tax on trades, professions and callings, but evidently such a tax must ultimately be payable by the persons pursuing the trades, professions or callings which the Act proposes to tax. It cannot be suggested that merely because the schedule classifies traders instead of trades it does not substantially comply with S. 123. The words "trades, professions and callings specified in Sch. IV" in S. 123, may legitimately be read as "persons exercising a trade, profession or calling specified (or classified) in Sch. IV". A tax which is essentially a tax on trade cannot become otherwise by such reading, which simply shows on whom the burden of the tax is ultimately to fall. Hence the inclusion of a company exercising a trade for profit is perfectly consistent with the object of the Act as well as with the requirements of S. 123. [22 C.W.N. 581; 24 Mad. 205, dist. 41 C.W.N. 662, disappr. 41 C.W.N. 1022. appr.] (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) BATA SHOE CO., LTD. *v.* COMMISSIONER OF BURDWAN MUNICIPALITY. 4 D.L.R. (F.C.) 4=53 C.W.N. (F.R.) 23=1948 F.C.R. 276=84 C.L.J. 83=A.I.R. 1949 F.C. 12=1949 F.L.J. 67 (F.C.).

——Ss. 123 (1) (f) and 189—*"Specified in Sch. IV"—Interpretation.*

The phrase "trades, professions and callings specified in Sch. IV" occurring in Ss. 123 (1) (*f*) and 189 of the Bengal Municipal Act must be read as "trades, professions and callings *as specified* in Sch. IV". These sections do not require that trades, professions and callings must be *specified*, that is to say, described in detail in the Schedule. Therefore, a Commissioner of a Municipality can impose on any company a tax of the description mentioned in Item No. 1 of Sch. IV, although it does not contain an exhaustive list of trades, professions and callings. In any event, the general words introduced in Item No. 1 by the Notification dated 16th December, 1940, have the same effect as if there has been such an exhaustive list. (*Nasim Ali and Mitter, JJ.*) BURDWAN MUNICIPALITY *v.* BATA SHOE CO., LTD. I.L.R. (1946) 1 Cal. 542=50 C.W.N. 541=A.I.R. 1947 Cal. 383=81 C.L.J. 358.

——S. 129 (b)—*Powers of Commissioners—Test for determination of holding—Power to adopt any class of ownership.*

S. 129 (*b*) of the Bengal Municipal Act empowers the Commissioners to determine whether the actual occupier or any grade of rent receiver above him would be regarded as owner for the purpose of determining whether the lands are under one title within the definition of a "holding" as given in the Act. The Commissioners have authority to adopt any class of ownership as the test for the determination of the "holding" other than the ownership of the actual occupier.

The Commissioners have no authority to lay down a test for determination of boundaries at all. It is only if the lands are surrounded by one set of boundaries that the Commissioners can determine under S. 129 of the Act what sort of ownership should be accepted as the criterion for determining whether these lands are held under one title or not. (*Mukherjea and Sharpe, JJ.*) DEBA PRASAD GARGA *v.* MUNICIPAL COMMISSIONERS OF TAMLUK. I.L.R. (1946) 2 Cal. 353=81 C.L.J. 160=A.I.R. 1947 Cal. 121=1947 Cal. (Rul.) 159=229 I.C. 488.

——Ss. 135 and 136—*Fixation of percentage on valuation of holdings before preparation of valuation list—Legality of assessment.*

Obiter:—The provisions of Ss. 135 and 136 of the Bengal Municipal Act are directory and not mandatory. The fixation of the percentage on the valuation of holdings at which the rates on the annual value of holdings is to be levied before the preparation of the valuation list, will not invalidate the assessment. (*Nasim Ali and Mitter, JJ.*) SURI MUNICIPALITY *v.* CHARU SHASHI GHOSE. I.L.R. (1946) 1 Cal. 359=222 I.C. 501=1946 Cal. (Rul.) 111=50 C.W.N. 151=A.I.R. 1946 Cal. 236.

——S. 138—*Applicability—Notice—Form of—Notice not stating original assessment figure or that alteration was proposed—Old assessment accepted—If illegal or ultra vires.*

No special form of notice is required by S. 138 (2) of the Bengal Municipal Act. Where the Municipal Commissioners merely accept the assessments of his holdings as they originally stood in the list at the annual valuations and proceed to alter the same at a meeting held for that purpose, after issuing a notice under S. 138 (2) of the Bengal Municipal Act it cannot be said that there is any new assessment made. The fact that the notice does not state specifically, what the original valuations were or that it was proposed to alter and amend the original assessment, would not make the asssessment illegal or *ultra vires*, especially when the circumstances are well known to the assessee who had been litigating with the Municipality about the matter. *(Mukherjea and Sharpe, JJ.)* Commissioners of Pabna Municipality *v.* Naba Gobinda Chowdhury. 226 I.C. 540=1946 Cal. (Rul.) 398=51 C.W.N. 183=A.I.R. 1947 Cal. 245.

———**S. 189**—"Specified in Sch. IV"—Interpretation. *See* Bengal Municipal Act, Ss. 123 (1) (f) and 189. 50 C.W.N. 541.

———**S. 330**—*Application for removal of unauthorised structure—Time limit.*

The Bengal Municipal Act in S. 330 makes a clear distinction between an application made to the Magistrate for an order of removal of an unauthorised structure and any prosecution which may take place over the same matter. There is no time limit fixed in the Act for an application for removal under that section. *(Sen and Chunder, JJ.)* Ram Kumar Shaw *v.* Bhatpara Municipality. 4 A.I.Cr.D. 394=5 D.L.R. (Cal.) 109.

———**S. 330 (1)**—*Construction—Application for demolition—If ancillary to prosecution.*

The words "in addition to any prosecution that may be instituted under this Act," in S. 330 (1) of the Bengal Municipal Act do not mean and cannot be interpreted as indicating that an application for demolition is ancillary to a prosecution. The Act provides two remedies which are independent of each other, and the second is not a mere appendage to the first. *(Henderson, J.)* Durga Charan Biswas *v.* Purna Chandra Saha. 230 I.C. 435=48 Cr.L.J. 655.

———**Ss. 370 (1) (ix) and 531**—*Refusal of license by Municipality—Motive of members—If material—Appeal not filed—Jurisdiction of Civil Court.*

The question whether the grant of license under S. 370 (1) *(ix)* of the Bengal Municipal Act for burning or baking bricks would cause annoyance, offence, or danger is entirely for the Municipality to decide. If the Municipality decides this and refuses to grant the license after considering the objections from official and non-official bodies at a meeting and gives reasons in terms of the statute, it is not for the Civil Court to sit in judgment over the decision of the Municipality. The fact that the chairman and the members of the Municipality were actuated by improper motives in casting their vote is immaterial. The jurisdiction of the Civil Court is ousted although the remedy by way of an appeal to the Local Government under S. 531 of the Act against the order of the Municipality has not been availed of. *(Lodge and Gopendranath Das, JJ.)* Municipal Commissioners, North Barrackpur *v.* Provakar Prosad. A.I.R. 1948 Cal. 211.

———**S. 535**—*Applicability—Benefit of protection—If available to third party obtaining rights of municipality as charge-holder.*

The provision for notice in S. 535 of the Bengal Municipal Act is intended for the benefit of the Municipality as a public body, and the public body can waive the benefit. The protection is afforded to the Municipality because it is a public body and not because it is a charge-holder under S. 167 of the Act. A stranger or third party cannot take advantage of the provision for protection intended for the benefit of the public body. A third party who steps into the shoes of the Municipality in respect of the charge given to the Municipality does not step into the shoes of that body as a public body and cannot claim the benefit in that capacity. 42 C.W.N. 467, dist.; 17 C.W.N. 67; 136 I.C. 454, foll.; 6 Cal. 8, ref. *(K. C. Chunder, J.)* Chandra Madhab Ray *v.* Sushil Kumar Chatterjee. 4 D.L.R. (Cal.) 263.

———**S. 535 (2)**—*Suit for declaration that assessment is* ultra vires—*Limitation.*

A suit for a declaration that an assessment of municipal tax is *ultra vires* is not barred under the provisions of S. 535 (2) of the Bengal Municipal Act although brought beyond six months of the date of assessment, as the cause of action for a suit of this nature is a recurring one. *(Harries, C.J.)* Hardat Roy *v.* Municipal Commissioners of Kalna. 52 C.W.N. 185.

———**(as amended in 1940), Sch. IV**—Scope—If inconsistent with controlling S. 123—If ineffective to create liability to tax. *See* Bengal Munacipal Act, Ss. 123 and 182 and Sch. IV, Item 1. 1949 F.L.J. 67 (F.C.).

———**Sch. IV, Items 1 and 4**—*Company with paid up capital selling goods through retail shops within Municipality—Whether assessable under Item* 1 *or* 4.

A company with a paid up capital selling its goods through its retail shops within a municipality is assessable only under Item No. 1, and not under Item No. 4, of Sch. IV of the Bengal Municipal Act. As companies, associations and bodies of individuals "with paid up capital" are treated as a class by themselves and the maximum rate of tax is fixed with reference to the paid up capital, the nature of their trading activities or the volume of their business within a particular municipality is immaterial. Items Nos. 2 to 4 must have been intended to cover those persons, whether natural or artificial, who do not fall within the description mentioned in Item No. 1, namely those having a paid up capital. *(Nasim Ali and Mitter, JJ.)* Commissioners of the Burdwan Municipality *v.* Bata Shoe Co., Ltd. I.L.R. (1946) 1 Cal. 542=50 C.W.N. 541=81 C.L.J. 358=A.I.R. 1947 Cal. 383.

BENGAL NON-AGRICULTURAL TENANCY (TEMPORARY PROVISIONS) ACT (IX OF 1940), S. 3—*Decree for ejectment and for arrears of rent—Stay of execution in second appeal.*

Where a suit for ejectment of a non-agricultural tenant on grounds other than non-payment of rent and for recovery of arrears of rent is decreed, the execution of the decree in so far as it relates to ejectment will have to be stayed in second appeal having regard to the mandatory nature of the language which is used in S. 3 of the Bengal Non-Agricultural Tenancy Act, although that point which was raised in the trial Court was not pressed in the lower appellate Court. (*Edgley and Blank, JJ.*) Surendra Nath Das *v.* Sukumari Debi. 51 C.W.N. 687.

——S. 3—*Order staying decree for ejectment —Second appeal—W. B. Non-Agricultural Tenancy Act,* 1949, *coming into force during pendency—Proper order.*

In a suit by a landlord for ejectment of a tenant, the trial Court held that under the prayer for ejectment, though otherwise valid, the defendant could not be ejected as ejectment was barred under S. 3 of the Bengal Non-Agricultural Tenancy Act which was then in force. Direction was given that execution of the decree for delivery of possession would be stayed during the pendency of the Act if the rent due together with costs were deposited in Court within 30 days from the date of the decree. The deposit was made within the time fixed by the Court. On appeal by the plaintiff, the order for stay as made by the trial Court was maintained and the appeal was dismissed. The plaintiff filed a second appeal, and during the pendency of this appeal the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act was superseded by the West Bengal Non-Agricultural Tenancy Act, 1949.

Held, that the judgment and decree passed by the lower appellate Court must be set aside and the appeal must be sent back to that Court to consider whether the provisions of the new Act were applicable having regard to S. 88 of that Act, and if so, whether the plaintiff was entitled to a decree for ejectment as prayed for. (*Mookerjee, J.*) Binapani Devi *v.* Bankim Behari. 54 C.W.N. 581=A.I.R. 1950 Cal. 532.

——**S. 3 and proviso**—***Respective scope and applicability—Decree for ejectment passed in suit for ejectment other than on account of non-payment of rent—Proper order in second appeal—Setting aside of decree or stay of execution.***

The scheme of S. 3 of the Bengal Non-Agricultural Tenancy Act is that the suits for ejectment on account of non-payment of rent are outside the main provision altogether, and a tenant can claim no relief by way of a stay of the suit under that provision. He must suffer a decree, but after a decree has been passed, the proviso comes to his aid at that stage, for it provides that although the suit may be one for ejectment of a non-agricultural tenant on account of non-payment of rent, and although the suit could not have been stayed and was not stayed, still when the stage arrives for the execution of the decree, the tenant defendant may avert execution by putting in the decretal amounts, together with the costs of the proceedings. If in a suit in which the claim for ejectment is grounded in some reason other than non-payment of rent to which the main provision of S. 3 of the Act applies, a plea that it should be stayed was wrongly overruled by the Courts below, the decree subsequently passed for ejectment, when it is questioned before the High Court in second appeal, cannot be allowed to stand, leaving it to the defendant to have its execution stayed by availing himself of the proviso. The Courts below having proceeded with the suit in direct contravention of the Act, must be deemed to have erred in law and to have passed a decree which they had no jurisdiction to pass. Such a decree can only be set aside and cannot be maintained with the qualification that its execution would be liable to be stayed. [51 C. W. N. 687, dissented from.] (*Blank and Chakravartti, JJ.*) Rajabala *v.* Sukumari Debi. 51 C.W.N. 688=A.I.R. 1947 Cal. 441.

——S. 3—*Suit by landlord for ejectment against tenant and his transferee—Allegation that tenancy is not transferable—Suit, if liable to be stayed.*

Plaintiff-landlord sued for ejectment of Defendants 1 and 2 alleging that Defendant No. 2 who was his tenant had transferred the tenancy to Defendant No. 1 in breach of a clause against alienation contained in the Kabuliyat. Defendant No. 2 did not pretend to be a tenant and on his own showing had ceased to be one by reason of the transfer of the tenancy. An objection was taken on behalf of Defendant No. 1 that the suit was liable to be stayed under S. 3 of the Bengal Non-Agricultural Tenancy (Temporary Provisions) Act.

Held, (1) Defendant No. 2 was not an ex-tenant and the suit against him could proceed as a suit against a trespaser.

(2) that as Defendant No. 1 alleged that the tenancy was legally transferred to him and that he had become a non-agricultural tenant, the Court must take evidence and come to a decision on the question whether he was or was not a tenant before staying the suit against him (45 C.W.N. 991, appl.) (*Chakravartti J.*) Baidya nath Ghose *v.* Bajranglal Sureka. I.L.R. (1948) 2 Cal. 554=53 C.W.N. 783.

——S. 3—*Suit for ejectment and arrears of rent—Decree relating to ejectment—If must be stayed.*

The main provisions of S. 3 of the Bengal Non-agricultural Tenancy Act are intended to protect a non-agricultural tenant who is sought to be evicted on grounds other than non-payment of rent, so that in a suit for ejectment of such a tenant if there are claims for rent, mesne profits or damages, and the entire suit is proceeded with, the execution of the decree in so far as it relates to ejectment will have to be stayed. In a suit for ejectment against a non-agricultural tenant who has defaulted in payment of rent if a decree is passed against him on the ground of non-payment of rent, such a tenant is also protected from eviction by the remedy prescribed in the proviso to S. 3, if he avails himself of the conditions laid down therein. (*Edgley and Latifur Rahman, JJ.*) Ganjee Sajun & Co. *v.* Lalji Agarwala Jain. 51 C.W.N. 131=A.I.R. 1948 Cal. 45.

——S. 3—*Suit for ejectment on account of non-payment of rent—Meaning of.*

A suit for ejectment on account of non-payment of rent, as contemplated by S. 3 of the Bengal

Non-agricultural Tenancy Act and excepted from its purview, is a suit wherein the landlord asks for ejectment of the tenant on the ground that a default has been committed with respect to payment of rent. It cannot be laid down as a general proposition that every suit for ejectment in which there is a claim for arrears of rent is a suit for ejectment on account of non-payment of rent. (45 C.W.N. 22, dissented from.) (*Blank and Chakravarthi, JJ.*) RAJABALA *v.* SUKUMARI DEBI. 51 C.W.N. 688=A.I.R. 1947 Cal. 441.

———S. 3—*'Suit or proceeding'—If includes appeal—Appeal by tenant—If can be stayed.*

A tenant's appeal cannot be regarded in any sense to be a suit or proceeding for ejectment and is not liable to be stayed under **S. 3 of the Bengal** Non-Agricultural Tenancy (Temporary Provisions) Act. (*Chakravarthi, J.*) KALIPROSAD SAHA *v.* NAIHATI JUTE MILLS CO., LTD. 221 I.C. 561=50 C.W.N. 50=A.I.R. 1946 Cal. 73.

———S. 3—Validity. [*See* Q. D. 1941-1945, Vol. I, Col. 299.] MUKUNDA MURARI CHAKRABARTI *v.* PABITRAMOY GHOSH. I.L.R. (1945) 2 Cal. 295 (F.C.).

BENGAL NON-AGRICULTURAL TENANCY ACT (XX OF 1949), S. 3—*"Suit or proceeding"—If includes appeal.*

The expression "suit or proceeding" in S. 3 of the Bengal Non-Agricultural Tenancy Act does not include an appeal. 45 C.W.N. 967, rel. on. (*G. N. Das and Lahiri, JJ.*) SHEIKH ABDUL SAMMAD *v.* JITOO CHOWDHURY. 54 C.W.N. 149 =A.I.R. 1950 Cal. 20.

BENGAL PATNI REGULATION (VII OF 1819), Ss. 5 and 6—Scope and effect of—Patni tenure—Sale for arrears of rent averted by payment by one sharer—Right to contribution from others—Transfer by other sharer prior to period of arrears—Effect of. [*See* Q.D. 1941-1955, Vol. I, Col. 304.] MAHIDHAR *v.* BANSIDHAR. 27 P.L.T. 33.

———**Ss. 8, 9 and 17**—Patni sale not realising full amount of demand—Suit for unrealised balance—Maintainability—Covenant to pay rent in patni lease—If binds assignee of lessee—Bengal Tenancy Act S. 168-A. [*See* Q.D. 1941-1945, Vol. I, Col. 305.] USHA PRAVA DE *v.* SACHINDRA KUMAR BASU. I.L.R. (1945) 2 Cal. 201.

———**Ss. 11, 13 and 15**—*Purchaser at patni sale—Rights of.*

Whatever might have been the position, if S. 11 of the Bengal Patni Regulation stood alone, in view of the other provisions in the Regulation (*e.g.*), Ss. 13 and 15, there can be no doubt that excepting the leases which are protected by S. 11, the other kinds of interest created by the defaulting patnidar cannot, in any way, affect the right of the purchaser at the patni sale to get the property in the same state in which it was at the time of the creation of the patni. Accordingly a Zamindar who has purchased the patni under the Regulation, is entitled to get *khas* possession of the lands which were in his *khas* possession before the creation of the patni and in which the defaulting patnidar has created a *mokarari mourashi* tenancy. (*Nasim Ali and Mitter, JJ.*) RAMIJAN *v.* BAHADUR SINGH. 222 I.C. 491=1946 Cal. (Rul.) 109.

———S. 11—*Rights of purchaser at patni sale—Effect of such sale on under lease—Under lease created by patnidar to respect of land held in khas.*

The provisions of the Patni Regulation make it absolutely clear that the purchaser at the patni sale is to get the property in the same state in which it was at the time of the creation of the patni. An under-lease created by a patnidar in respect of land held by him in *khas* and on which there are no resident cultivators, may not come within S. 11, Cl. (2) of the Patni Regulation, which speaks only of under-leases which are creative of a middle interest between the patnidar and resident cultivators. But there is no room for excluding it from the scope of the term 'incumbrances' as used in Cl. (1) of S. 11. If it is an incumbrance, it stands annulled by the patni sale itself and no fresh act on the part of the purchaser is necessary. Even if it is not an incumbrance, the under-leasee does not enjoy a protected interest which cannot be annulled by a patni sale purchaser. If the under lessee refuses to vacate even after demand, no further overt act is necessary on the part of the purchaser to afford a cause of action for a suit to recover possession of the land. (*Mukherjea and Blank, JJ.*) HEMANGINI DEBI *v.* KUMUDESWAR CHAKRAVARTHY. I.L.R. (1946) 1 Cal. 564=50 C.W.N. 413.

———**S. 11 (2)**—Patni sale—Amendment of darpatni—Service of notice on darpatnidar—If necessary—Manner of service—Right of annulment—If personal to Zamindar—Time within which it has to be exercised. [*See* Q.D. 1941-1945, Vol. I, Col. 308.] ANADI NATH BANERJEE *v.* ANNAPURNA DEBI. 222 I.C. 39=1946 Cal. (Rul.) 56.

———S. 13—Darpatnidar holding possession of patni as girbidar—If tenant of Zamindar. [*See* Q.D. 1941-1945, Vol. I, Col. 308.] UDAY CHAND MAHTAB *v.* BIBHUTI BHUSHAN DAS. 222 I.C. 465=1946 Cal. (Rul.) 106=A.I.R. 1946 Cal. 35.

———S. 13—*Darpatnidar making deposit—If entitled to first charge or salvage lien.*

A darpatnidar making a deposit under S. 13 of the Patni Regulation acquires only a lien which is postponed to all the prior mortgages, and not a first charge on the patni taluq. No salvage lien independent of this section is created by the darpatnidar making a deposit. (*Lodge and Das, JJ.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* SARADINDU MUKHOPADHAYA. I.L.R. (1948) 2 Cal. 342=82 C.L.J. 334=A.I.R. 1948 Cal. 250=52 C.W.N. 724.

———S. 13 (4)—*Lien—If superior to that given under S. 65, Bengal Tenancy Act.*

The lien given under S. 13 (4) of the Patni Taluq Regulation is superior to that given under S. 65, Bengal Tenancy Act. A darpatnidar who comes into possession of the patni under the provisions of S. 13 (4) of the Regulation by depositing in the sale proceedings under the Regulation the amount of rent due for the patni, is entitled to sue for rent after that date, although the patni is subsequently sold in execution of a decree for rent of the patni by the zamindar. It is immaterial whether the decree for rent in execution of which the patni was sold was obtained in respect of rent prior to or after the date on which the other party acquired his lien under S. 13 (4) of the Regulation. 41 I.A. 91, disc.; 46 C.W.N. 704, dist. (*Roxburgh, J.*) Bibhuti Dhusan Das *v.* Shorashi Bala. 54 C.W.N. 714.

———**S. 13 (4)**—*Position of depositor—Depositor giving up possession in favour of defaulting tenure-holder—Latter, if can execute decree for rent obtained by former.*

The position of the depositor under S. 13 (4) of the Bengal Putni Regulation cannot be described either as that of a bailiff, or as an agent, or as a trustee, or the holder of a lien, or as that of an owner. His position is an anomalous one. He is in the position of a creditor who holds the defaulting tenure, as if it was mortgaged to him. He has an additional right to be put in possession on his applying for the same. In the latter event if he obtains possession, he can retain possession of the same and collect the profits of the tenure saved from sale including rents which were unrealised at the time of his entering into possession and rents accrued during the subsistence of his possession and apply the same in satisfaction of the deposit made by him. He can, however, give up possession even before the advance made by him is satisfied, amicably without recourse to a suit or an order of the Collector. If he gives up possession in such circumstances, his right to collect the rents already accrued or to accrue thereafter, decretal or otherwise, ceases and all such rights which had inhered in him because of his entry into possession become vested in the defaulting tenure-holder who goes into possession on the depositor vacating the same. (*G. N. Das and Lahiri, JJ.*) Maya Debi *v.* Rajlakshmi Debi. A.I.R. 1950 Cal. 1.

———**S. 17 (3)**—Applicability—Suit for balance remaining due after a sale for patni demand—Maintainability. [*See* Q.D. 1941-1945, Vol. I, Col. 310.] Usha Prava De *v.* Sachindra Kumar Basu. I.L.R. (1945) 2 Cal. 201.

BENGAL POLICE REGULATION, R. 254 (b)—*Statements recorded by Police—Accused's right to copies.*

Statements of witnesses recorded by the Police under R. 254 (*b*), Bengal Police Regulation, are not privileged, and an accused is entitled to copies of those statements for cross-examination of the witnesses under S. 145, Evidence Act. (*Sen, J.*) Abdul Majid *v.* The King. A.I.R. 1950 Cal. 165=51 Cr.L.J. 680.

BENGAL PRIMARY EDUCATION ACT (IV OF 1919), S. 29 (1)—Niskar *lands lying within Zamindari—Liability to education cess—Zamindari assessed to road and public works cesses.*

S. 29 (1) of the Bengal Primary Education Act declares the liability of all immovable property, on which road and public works cesses have been assessed, to be further assessed to the education cess. It cannot be said that *niskar* lands lying within the ambit of a Zamindari which is itself assessed to the payment of road and public works cess, are such immovable property on which road and public works cesses have not been assessed. The fact that the *niskardar is not liable* to pay road cess to the Zemindar does not lead to the conclusion that education cess is not recoverable from him. (*Das, J.*) Sree Iswar Gopinath Deb Thakur *v.* Kameswar Nath. A.I.R. 1950 Cal. 189.

———**S. 32**—*Road cess not recoverable because of non-service of notification under S. 54, Cess Act—Education cess, if recoverable.*

In order to entitle the holder of an estate to recover primary education cess no special notice under S. 54 of the Bengal Cess Act is required to be served. Primary Education Cess is recoverable although road cess is not recoverable because of the non-service of the requisite notification under S. 54 of the Bengal Cess Act. (*Das, J.*) Sree Iswar Gopinath Deb Thakur *v.* Kameswar Nath. A.I.R. 1950 Cal. 189.

BENGAL PRIVATE FISHERIES PROTECTION ACT (II OF 1889), S. 3, Proviso—*Construction and scope—First part—If confined to navigable river or portion thereof.*

The proviso to S. 3 of the Bengal Private Fisheries Protection Act consists of two parts which are really independent of each other. The words 'in any portion of a navigable river' occurring in the second part of the proviso cannot be read as controlling the first part also. The first part is not necessarily confined to a navigable river or any portion thereof. It extends also to private waters other than a navigable river in which there may be private rights. (*Das, J.*) Megha Palai *v.* Emperor. 12 Cut.L.T. 27=229 I.C. 165=A.I.R. (1947) Pat. 105=13 B.R. 289=48 Cr.L.J. 424=1947 Pat. (Rul.) 248.

BENGAL PUBLIC DEMANDS RECOVERY ACT (III OF 1913), Ss. 4 and 6—Certificate forwarded to Collector under S. 46 (2) of Income-tax Act—Certificate by Certificate Officer in respect thereof—If issued under S. 4 or 6—Filing of Certificate—Proof. [*See* Q.D. 1941-1945 Vol. I, Col. 312.] Doorga Prasad *v.* Secretary of State. I.L.R. (1945) 2 Cal. 1 (P.C.)=I.L.R. (1945) Kar. (P.C.) 203.

———**S. 4**—Certificate in respect of arrears of income-tax—Name of certificate holder given as "Secretary of State on behalf of Income-tax Officer"—Period for which demand is due not mentioned—Validity of certificate. [*See* Q.D. 1941-1945 Vol. I, Col. 311.] Doorga Prosad Chamaria *v.* Secretary of State. I.L.R. (1945) 2 Cal. 1 (P.C.)=I.L.R. (1945) Kar. (P.C.) 203.

———**S. 6**—*Duty of certificate officer—Failure to certify that demand is recoverable and not barred by law—Validity of certificate.*

Under S. 6 of the Public Demands Recovery Act the certificate officer, before signing the certificate on requisition under S. 5, should apply his mind to the claim put forward and be satisfied that the demand is recoverable and that recovery by suit is not barred by law. It would not be regarded as of substance, if he does not repeat in the certificate the formula which is in the section, that he is satisfied that the demand is recoverable and that recovery by suit is not barred by law. If there is nothing to show on the record that he had not applied his mind to those two questions, his certificate that the amount is due would have to be regarded as being quite in order. 23 C. 775, 19 C.W.N. 1159, 31 C.W.N. 299 and 44 C.W.N. 1097, cons. (*Mitter, J.*) Dhirendra Kumar Chandra *v.* Pramatha Nath Saha. I.L.R. (1946) 2 Cal. 18.

———S. 20—*Certificate sale—What passes.*

Under S. 20 of the Public Demands Recovery Act, what passes at a certificate sale is not the property but merely the existing interest of the certificate-debtor at the time of the sale, if any. If, therefore, the certificate-debtor has, prior to the sale, parted with all his interest in the property, the purchaser acquires nothing by the sale. (*Ram Labhaya, J.*) Gahan Priya *v.* Bhabat Chandra. A.I.R. 1950 Assam 117.

———**S. 20 (3)**—Applicability—Certificate sale at instance of Receiver appointed by Collector—Estate attached by Collector under S. 99 of Cess Act. [*See* Q.D. 1941-1945 Vol. I, Col. 314.] Fayez Uddin Ahmed *v.* Natabar Chandra. I.L.R. (1945) 2 Cal. 279.

———**S. 20 (3)**—*Purchaser at certificate sale—Rights of—If entitled to annual interest of under-raiyat with occupancy rights—B. T. Act, S. 48-G (3).*

When the Public Demands Recovery Act was introduced in 1913, the Legislature intended that the purchaser at a sale in execution of a certificate for arrears of rent in those Districts, where Ch. XIV of the Bengal Tenancy Act was in force, should have the same rights as a rent sale purchaser had under Ch. XIV of the Bengal Tenancy Act. In other words, he would get the tenure or holding subject to all protected interests as defined in S. 160 of the Bengal Tenancy Act and with power to annul all incumbrances as were specified in S. 161. At that time the occupancy right of an under-raiyat was a protected interest and the purchaser had therefore no right to eject an under-raiyat having occupancy rights. In 1928, the Bengal Tenancy Act was amended and S. 48-G (3) was newly enacted laying down that the occupancy right acquired by an under-raiyat should not be deemed to be a protected interest. If it was the intention of the Legislature that S. 48-G (3) should be read into S. 20 (3) of the Public Demands Recovery Act, nothing prevented it from expressing its intention in clear words. There is nothing to suggest that when the Public Demands Recovery Act was passed in 1913, with certain provisions of the Bengal Tenancy Act incorporated in it, the Legislature intended to bind themselves to any future addition that might be made in the Bengal Tenancy Act. It follows, therefore, that the interest of an under-raiyat with right of occupancy

is a protected interest as against the purchaser at a certificate sale and is, therefore, not liable to be annulled by him notwithstanding the provisions of S. 48-G (3) of the Bengal Tenancy Act. There is nothing inherently improper if a certificate purchaser is not allowed to have the extended rights of a purchaser at a rent sale under the Bengal Tenancy Act. (*Mukherjea and Sharpe, JJ.*) Akubali Haoladar *v.* Najamali. I.L.R. (1946) 1 Cal. 325=50 C.W.N. 382=A.I.R. 1946 Cal. 326=228 I.C. 67=1947 Cal. (Rul.) 52.

———Ss. 34 to 37—*Applicability—Suit for declaration that certificate is null and void—Limitation Act, Art.* 120.

Ss. 34 to 37, Public Demands Recovery Act, relate to a certificate which has been duly made but which is defective for some of the reasons mentioned in those sections. They have no application to a case when it is alleged that the certificate is a nullity. A suit for a declaration that a certificate is null and void and unenforceable against the plaintiff is governed by Art. 120, Limitation Act and not by S. 34 of the Public Demands Recovery Act. Such a suit is also not barred by reason of any of the provisions of Ss. 35, 36 and 37 of the last mentioned Act. (*Sen and Chunder, JJ.*) Satya Kishore Banerjee *v.* Province of Bengal. A.I.R. 1950 Cal. 467.

———**Ss. 37 and 41**—Minor certificate-debtor not represented by guardian in certificate proceedings—Suit by him challenging validity of certificate—If barred. [*See* Q.D. 1941-1945 Vol. I. Col. 316.] Manindra Kumar *v.* Satish Chandra. I.L.R. (1945) 2 Cal. 567.

———**Ss. 45 and 46**—*Applicability—Certificate sale—Debtor parting with interest to another before proceedings—Suit by latter against purchaser of sale for declaration that his interests were not affected and for injunction—If barred—Specific Relief Act, S. 42—C. P. Code, O. 7, R. 7.*

What passes at a certificate sale is merely the right, title and interest of the judgment-debtor or defaulter. When at the time of the sale the certificate debtor had no interest, the sale, in so far as it purports to be a sale of his interest, is a sale of nothing and it cannot operate to convey the interest of another person who before the proceedings, had acquired the interest of the debtor. In such a case neither S. 45 nor S. 46 of the Bengal Public Demands Recovery Act would bar a suit by that other person for a declaration that his interests are not affected by the sale, and for an injunction restraining the purchaser from interfering with his possession of the estate. Since the latter relief is a consequential relief, namely, maintaining him in his possession as against the purchaser at the certificate sale, the suit is not also bad under S. 42, Specific Relief Act. O. 7, R. 7, C. P. Code, would apply at such a case and the plaintiff can be given a decree for possession, in case it turns out that he is not in possession of any party, though he honestly believed that he was and therefore did not ask for possession. (*Agarwala, C.J. and Meredith, J.*) Bundi Singh *v.* Shivanandan Prasad. A.I.R. 1950 Pat. 89.

BENGAL PUBLIC GAMBLING ACT (II OF 1867), S. 11—*Scope—Conviction—Order of forfeiture of moneys with accused—Powers of magistrate to pass.*

There is no authority under the Bengal Public Gambling Act for a magistrate to direct forfeiture of the money found with the accused who has been convicted under S. 11 of the Act. S. 11 makes no mention whatever of any money and hence a magistrate recording a conviction under S. 11 has no power to order forfeiture of moneys with the accused. (*Roxburgh and Ellis, JJ.*) Sukumar Bose *v.* Emperor. I.L.R. (1948) 1 Cal. 39=229 I.C. 157=1947 Cal. (Rul.) 131=A.I.R. 1948 Cal. 116 (1)=48 Cr.L.J. 256.

BENGAL REGULATION (XVII OF 1806), Ss. 7 and 8—*Suit by mortgagee for possession of mortgaged properties—Conditions prescribed by section—Need for fulfilment.*

In cases where a mortgagee sues for possession of the mortgaged property upon the ground that he has become owner thereof under the terms of the conditional sale clause, it is incumbent upon him to prove affirmatively that each and all the conditions prescribed by Ss. 7 and 8 of Regulation XVII of 1806, have been duly fulfilled. The plaintiff must prove not only that the year of grace had expired, but that the procedure prescribed by law, both preparatory to and in connection with the notice of foreclosure, had been duly observed. It is only the complete observance of the procedure coupled with the non-payment by the mortgagor of the sum due upon the mortgage within the year of grace that gives the plaintiff a right to enforce forfeiture of the mortgagor's estate. (*Bhandari and Harnam Singh, JJ.*) Gopal Fateh Singh *v.* Sis Ram. A.I.R. 1949 E. P. 283.

———**S. 8**—Parwana to *mortgagor—Details of mortgage-debt—If to, be specified.*

There is no requirement of law that in the *parwana* which goes to the mortgagor from the Court of the District Judge the details of the mortgage-debt are to be specified. (*Bhandari and Harnam Singh, JJ.*) Gopal Fateh Singh *v.* Sis Ram. A.I.R. 1949 E. P. 283.

BENGAL RENT ACT (X OF 1859)—*Applicability—Urban property.*

The Bengal Rent Act was intended to apply only to agricultural tenancies and cultivators, and not to urban propery. [18 W.R. 234, appro.] (*Lord Goddard.*) Prasanna Deb Raikat *v.* Tanjina Khatun. 73 I.A. 18=I.L.R. (1946) 1 Cal. 349=223 I.C. 1=1946 P.C. (Rul.) 121 =1946 P.W.N. 90=12 B.R. 345=50 C.W.N. 252=A.I.R. 1946 P.C. 46 (P.C.)=I.L.R. (1946) Kar. (P.C.) 56.

———Enhancement of rent by head landlord—Land sublet by tenant to under-tenants—"Justice, equity and good consience". *See* Bengal, Agra and Assam Civil Courts Act, S. 37. 50 C.W.N. 252 (P.C.).

———**S. 17**—*Enhancement of rent—Some one of grounds—If sufficient.*

It is not in all cases necessary for the landlord who seeks an enhancement of rent to prove that the rent is below the prevailing rate. *Some one* of the grounds mentioned in S. 17 of the Bengal Rent Act is sufficient. (*Lord Goddard.*) Prasanna Deb Raikat *v.* Tanjina Khatun. 73 I.A. 18=I.L.R. (1946) 1 Cal. 349=223 I.C. 1=1946 P.C. (Rul.) 121=1946 P.W.N. 90=12 B.R. 345=50 C.W.N. 252=A.I.R. 1946 P.C. 46 (P.C.)=I.L.R. (1946) Kar. (P.C.) 56.

———**S. 23 (5)**—*Suit for ejectment of tenant and for mesne profits—Jurisdiction of Civil Court—C. P. Code, S. 9.*

A civil Court has jurisdiction to try all suits of a civil nature, and S. 23 (5) of Act X of 1859 having conferred a special jurisdiction on the revenue Court only with respect to suits for ejectment of a tenant and not with respect to suits of a composite character like a suit for ejectment of a tenant in which there is also a claim for mesne profits, the jurisdiction of the civil Court to try such suits remains. 10 W.R. 41, rel. on. 3 C.L.J. 143, Disc. (*Harries, C.J. and Chakravartti, J.*) Baleswar Ram Kanno *v.* Governor of Province of Bengal. A.I.R. 1949 Cal. 321.

BENGAL REVENUE-FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793), S. 10—*Applicability—Rent-free grant by Zamindar of land within his revenue-paying estate.*

S. 10 of Regulation XIX of 1793 is not applicable to a rent-free grant by a Zamindar of a plot of land within the ambit of his revenue-paying estate, and the Zamindar is not, therefore, entitled to resume the land covered by the grant. 9 W.R. 1, rel. on. (*Akram, C.J.*) Bama Charan Banerjee *v.* Jaleswari. A.I.R. 1949 Dacca 7=1 D.R. 153.

———**Ss. 26 and 27**—*Revenue free title—Presumption*—Taidad *filed in* 1802 *claiming takheraj grant—Government not taking proceedings to assess lands to revenue.*

Where a *taidad* was filed in the year 1802 or 1803 claiming a lakheraj grant dating from before 1790, and the plaintiffs or their predecessors had been in possession without paying revenue and by realsing rent from their subordinate tenants at least from the year 1871, and the Government took no proceedings to assess the lands to revenue after the filing of the *taidad,* the presumption arising therefrom is that they accepted the claim of the plaintiffs. (*Chakravartti, J.*) Kumud Kanta Pahari *v.* Province of Bengal. 81 C.L.J. 274 =A.I.R. 1947 Cal. 209.

———**S. 26**—*"Shall amit to register"—Meaning of.*

When S. 26 of Regulation 19 of 1793 uses the words "shall omit to register" it means, shall omit to make an application for registration. (*Chakravartti, J.*) Kumud Kanta Pahari *v.* Province of Bengal. 81 C.L.J. 274=A.I.R. 1947 Cal. 209.

BENGAL (RURAL) PRIMARY EDUCATION ACT, S. 30 (3) and (4)—*Tenure holder at last cess validation becoming cultivating raiyat—Liability to pay education cess.*

A person who was a tenure-holder within the meaning of the Cess Act at the time of the last cess valuation and whose lands were valued as a tenure, but who has since become a cultivating raiyat with respect to the same lands continuing to pay the same rent, is liable to pay education cess under S. 30 (3) of the Bengal (Rural) Primary Education Act on the annual value of the lands as determined at the cess valuation and is not merely liable to pay cess under S. 30 (4) of that Act as a cultivating raiyat upon the rent paid by him. (*Blank and Chakravartti, JJ.*) Aswini Kumar Roy *v.* Debendra Kumar. 51 C.W.N. 783=A.I.R. 1949 Cal. 216=83 C.L.J. 27.

———**S. 34**—*Assessment list prepared by President of Union Board—Validity.*

The President of a Union Board is not under the control, administrative or otherwise, of the District Magistrate, and is not one of his subordinate officers within the meaning of S. 34 (1) of the Bengal (Rural) Primary Education Act. An assessment list prepared by him is not, therefore, prepared in conformity with the provisions of S. 34 (1) of the Act, and cannot form a basis of assessment. (*Das and Das Gupta, JJ.*) Phani Bhusan Bose *v.* Province of Bengal. 54 C.W.N. 176.

———**S. 34**—*Education-tax—Assessment based on assessee's total income including income derived from property—If* ultra vires.

S. 34 of the Bengal (Rural) Primary Education Act enables the education-tax to be imposed on a person who carried on trade, business or profession. The income which a person derives from the property is not subject to that tax. An assessment based on the total income of an assessee, *viz.*, the income derived from property and profession and not merely on his income derived from profession is not justified by the provisions of S. 34 (1) of the Act, and must therefore be deemed to be *ultra vires*. The power to levy rates, taxes, tolls, customs, etc., from the subject is not one of the ordinary incidents of a corporate body. Such power cannot be exercised unless authorised by statute. If the statute authorises such an imposition, the imposition cannot exceed that which the statute so authorises. 38 B. 293 and 35 C. 859, applied. (*Das and Das Gupta, JJ.*) Phani Bhusan Bose *v.* Province of Bengal. 54 C.W.N. 176.

BENGAL SALES TAX ACT (VI OF 1941). *See* Bengal Finance (Sales Tax) Act (VI of 1941).

BENGAL SERVICE RULES, Part I, R. 46—*Increment above efficiency bar—When may be given—Right of employee under District Board—Fundamental Rules, R.* 25.

Where an efficiency bar is prescribed in a time scale, the increment next above the bar shall not be given without specific sanction of the authority empowered to withhold increments. Accordingly, an employee under the District Board is not entitled to draw increments of pay above the efficiency bar, when there is no specific order by the Chairman of the District Board sanctioning the removal of the bar and there is nothing to show that the District Board has acquiesced in the position that the employee has been permitted to cross the efficiency bar. (*Lahiri and Guha, JJ.*) Bhujagendra Bhusan *v.* District Board of 24 Parganas. A.I.R. 1950 Cal. 366.

BENGAL SPECIAL POWERS ORDINANCE (VI OF 1946)—Scope—Offence—Prosecution commenced after expiry of ordinance—Legality—Bengal Act I of 1947—Effect of. *See* Interpretation of Statutes. 49 Cr.L.J. 410.

———**S. 2 (3) (a)**—*Offence under—Essentials of.*

What Cl. (*a*) of S. 2 (3) of the Bengal Special Powers Ordinance contemplate is not disaffection against public servants, but disaffection amongst them. The provisions of that clause connote a generality of the effect of the article complained of, an unless it can be said that the writing concerned would lead to a fairly general dissatisfaction or disaffection on the part of a considerable body of members of a class of public servants (*e.g.*, the police force), it cannot come within the mischief of S. 2 (3) (*a*). (*Chakravartti, J.*) Ramani Mohan Sarkar *v.* Emperor. 49 Cr.L.J. 410=A.I.R. 1948 Cal. 247=3 A.I.Cr.D. 273=4 D.L.R. (Cal.) 118.

———**S. 10-A**—*Order under, against person previously dealt with under S. 18—Power of Government.*

The Government has power to pass an order under S. 10-A of the Bengal Ordinance No. VI of 1946 against a person who had been dealt with under S. 18 of that ordinance. (*Roxburgh and Chakravartti, JJ.*) Abdul Rahim *v.* Emperor. 52 C.W.N. 655=A.I.R. 1949 Cal. 59=49 Cr.L.J. 655.

———**S. 10-A**—*Person detained under ordinance—Whether can be required to work.*

Under S. 10-A (4) of the Bengal Ordinance No. VI of 1946, the Government may impose as a condition of detention of any person under the Ordinance that he shall in all respects including the liability to work be treated as a prisoner sentenced to rigorous imprisonment. (*Roxburgh and Chakravartti, JJ.*) Abdul Rahim v. Emperor. 52 C.W.N. 655=A.I.R. 1949 Cal. 59=49 Cr.L.J. 655.

———**S. 18**—*Order of detention by Governor after expiry of 15 days from date of arrest—Legality.*

There is nothing in the provisions of S. 18 of the Bengal Special Powers Ordinance which prevents the Governor passing an order of detention after the expiry of fifteen days from the date of arrest. (*Roxburgh and Chunder, JJ.*) Rahman Mistri *v.* Emperor. I.L.R. (1948) 2 Cal. 115.

———**S. 18 (2)**—*Detention for more than two months—Power of Government.*

An order of detention by the Government for more than two months from the date of arrest is not within its competence under S. 18 (2) of the Bengal Special Powers Ordinance of 1946. (*Sharpe and Chunder, JJ.*) Haji Goala *v.* Emperor. I.L.R. (1948) 2 Cal. 113.

———**S. 19 (1)**—*Proper report—Officer making report not reading for himself offending article* *constituting prejudicial act—If renders report improper.*

S. 19 (1) of the Bengal Special Powers Ordinance does not impose on the part of the officer making the report contemplated by the section any duty of exercising his own discretion in the matter of choosing the subject-matter of the charge. The omission on the part of that officer to read the offending newspaper article, which is alleged to constitute a prejudicial act, for himself does not therefore vitiate the report and it cannot be said that on that ground the report is not a proper report under S. 19 (1). (*Chakravartti, J.*) RAMANI MOHAN SARKAR *v.* EMPEROR. 49 Cr.L.J. 410=A.I.R. 1948 Cal. 247=3 A.I.Cr. D. 273=4 D.L.R. (Cal.) 118.

BENGAL STATE PRISONERS REGULATION (III OF 1818)—Detention under of deposed ruler of Native State—Jurisdiction of Court to act under S. 491, Cr. P. Code in case of—Remedy of detenu. *See* CR. P. CODE (V OF 1898), S. 491. (1949) F.L.J. 1.

———(as amended by Bengal State Prisoners Regulation (Adaptation) Order, 1947, S. 2—*Warrant under—Detention for reasons connected with "the discharge of the functions of the Crown, etc."—Legality after 15th August, 1947—Power of Court to interfere—Cr. P. Code, S. 491 (3).*

S. 2 of the Bengal State Prisoners Regulation of 1818, as amended by the Bengal State Prisoners Regulation (Adaptation) Order, 1947, does not authorise the Central Government any longer to detain a person for reasons connected with "the discharge of the functions of the Crown in its relations with Indian States," the words "the discharge of the functions of the Crown in its relations with Indian States," having been deleted by the Adaptation Order, 1947, with retrospective effect from 15th August, 1947. Where a person was detained under a warrant under S. 2 of Bengal Regulation III of 1818 as it stood before it was amended in 1947, his detention after 15th August, 1947, therefore becomes illegal by reason of the Bengal State Prisoners Regulation (Adaptation) Order, 1947, as the reason for detention has ceased to exist thereafter, and as there is no provision in the latter (Adaptation) Order, 1947, validating warrants issued prior to 15th August, 1947. The original warrant being no longer valid, the detention becomes illegal and cannot be continued.

Nor does S. 491 (3), Cr. P. Code, preclude the Court from considering whether the detention is in fact a detention under Regulation III of 1818. If it is such a detention then the provision prevents the High Court's interference; but whether a detention is or is not a detention under the Regulation is a matter of substance and is not concluded by the circumstance that the Regulation is mentioned in the warrant. When the detention is something entirely outside the Regulation as it stands as amended and therefore is not a detention under the Regulation, and S. 491 (3), Cr. P. Code, is no bar to the exercise of the High Court's powers under the section. (*Weston and Chainani, JJ.*) BIRPAL SINGH, *In re*. I.L.R. (1949) Bom. 28=51 Bom.L.R. 108 =A.I.R. 1949 Bom. 161=50 Cr.L.J. 591.

———S. 7-A—If in conflict with S. 2 of the Government of India Act—Effect of introduction of the amendment of S. 7-A. [*See* Q.D. 1941-1945, Vol. I, Col. 320.] SETH *v.* EMPEROR. I.L.R. (1946) Lah. 71 (F.B.)=227 I.C. 377 =48 Cr.L.J. 5=1947 Lah. (Rul.) 24.

———*If* ultra vires—*Indian Independence Act, Ss.* 9 (1), 18 (3) *and* 19 (5).

The Bengal State Prisoners Regulation (Adaptation) Order, 1947, dated 26th August, 1947, is not *ultra vires* the powers of the Governor-General under S. 9 (1) read with S. 18 (3), Independence Act. By reason of the change in the constitutional position in August, 1947, it became necessary to adapt the old Regulation of 1818 and to substitute for the expression, "the discharge of the functions of the Crown in its relation with Indian States" the words "reasons of State connected with defence, external affairs or relations with acceding States".

The above Adaptation Order which may be considered to have revoked to some extent or, at any rate, varied, the India (Adaptation of Existing Indian Laws) Order, 1947, dated 14th August, 1947, must be considered to have been made in virtue of the provisions of S. 19 (5), Independence Act. Furthermore, Art. 3 of the Adaptation Order of 26th August, 1947, has expressly provided that the provisions of that order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947. (*Wali Ullah, Ag.C.J., Sapru and Bind Basni Prasad, JJ.*) GULAB SINGH *v.* DT. MAGISTRATE, DEHRA DUN. 1949 A.L.J. 587=A.I.R. 1950 All. 11= 4 A.I.Cr.D. 41=5 D.L.R. (A.) 38=51 Cr. L.J. 269 (F.B.).

BENGAL SURVEY ACT (V OF 1875), S. 41—*Order under—Effect and value of.*

Although demarcation proceedings under S. 41 of the Survey Act are not conclusive evidence of title, an order made in such proceedings has, until reversed or modified by a competent authority, the force of an order of a civil Court declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector. 34 C.L.J. 465, rel. on. (*Ellis and Amin Ahmed, JJ.*) PROVINCE OF BENGAL *v.* NALINI KANTO. 2 D.R. 265.

———S. 45—*Application under for* ballabandi—*Dismissal without notice to opposite party on the ground that it will tend to cause disputes and litigation—Propriety.*

It is hardly reasonable to reject an application under S. 45 of the Bengal Survey Act for *ballabandi* on the ground that it will tend to cause disputes and litigation without at least serving a notice on the opposite party to find out whether there is any ground for such apprehension. (*Lee.*) GOPAL NARAIN SINGH *v.* SECRETARY OF STATE FOR INDIA. 12 B.R. 617.

———S. 45—Ballabandi—*Objection filed out of time—Plea of false excuse for delay—Duty to summarily reject.*

Where an objection to a *Ballabandi* proceeding is filed out of time and gives a false excuse for its being out of time, it must be summarily rejected. (*Lee.*) Manager, Gidhadur Wards Estate v. Madhu Sudan Singh. 12 B.R. 382.

———S. 45—*Demarcation of land in cultivating possession of occupancy raiyat—Application for—plea that land has become occupancy holding long ago though recorded as* bakasht—*Procedure—Demarcation—If can be allowed.*

Where an applicant for demarcation claims, as his '*bakasht*' land portions, undemarcated by ails, of fields in the cultivating possession of occupancy *raiyats*, his only object must be held to be to take possession of the land as soon as it is demarcated; and when the objector claims that the land, though recorded as *bakasht* at the settlement, has become his occupancy holding years ago, the applicant for demarcation cannot be held to be entitled to anything but rent. No demarcation can be ordered in such circumstances, because to do so would lead to a grave breach of the peace. (*Lee.*) Uchit Thakur v. Kailash Chandra Prasad. 12 B.R. 760.

———S. 58—*Collector's order under S. 45 defective—Procedure—Power of succeeding Collector to revise—Powers of Commissioner and Board.*

A succeeding Collector has no power to revise his predecessor's order under S. 45 of the Bengal Survey Act. If the order of a previous Collector under the Act is found to be defective and requires revision, the proper course is to refer it under S. 58 to the Commissioner or the Board of Revenue both of whom have powers of supervision and control and can set aside the Collector's order passed under S. 45. (*Lee.*) Uchit Thakur v. Kailash Chandra Prasad. 12 B.R. 760.

———S. 62—*Scope—Suit to demarcate boundaries between two estates—Jurisdiction of Civil Court.*

It is well-settled that no suit is entertainable in a Civil Court which is purely for demarcation of boundaries between two estates. There are provisions in the Bengal Survey Act which authorise the Collector to determine such questions. There may however be circumstances in which the question of demarcation of boundaries between two estates may arise for decision by a Civil Court in connection with the reliefs claimed in the pleadings by the parties. 29 Bom. 73; A.I.R. 1931 Mad. 19, ref. (*Imam and Narayan, JJ.*) Province of Bihar v. Balam Singh. A.I.R. 1950 Pat. 356.

BENGAL TENANCY ACT (VIII OF 1885), Ss. 4 and 5—*Lease acquired to set up factory—Lessee given power to use lands for any purpose—Some of them settled by him with tenants for bringing them under cultivation—Status of lessee and sub-tenants—If tenure-holder and non-occupancy raiyats.*

A company acquired by purchase occupancy rights in small parcels of land from raiyats. Then it took *mukrari mourashi* leases from superior landlords. The object of the company in making the acquisitions was to have a factory site. But by the terms of those leases it could use the lands in whatever way it liked. The company settled some of the lands with tenants for the purpose of bringing them under cultivation.

Held, that the company was a tenure-holder and the sub-tenants were non-occupancy raiyats who were liable to be ejected only on grounds mentioned in S. 44 of the Bengal Tenancy Act notwithstanding their agreement with the company to give up possession on the expiry of their term of settlement. (*Mitter and Blank, JJ.*) Abdul Hossain v. Shalimar Paint Colour and Varnish Co., Ltd., I.L.R. (1945) 2 Cal. 642=81 C.L.J. 138=220 I.C. 60=1947 Cal. (Rul.) 171=A.I.R. 1947 Cal. 36.

———S. 4 (3)—*Under-raiyat—Who is.*

A person will be an under-raiyat only if he holds under a raiyat at the inception of his lease. (*G. N. Das and Lahiri, JJ.*) Sheikh Abdul Sammad v. Jitoo Chowdhury. 54 C.W.N. 149 =A.I.R. 1950 Cal. 20.

———S. 5 (1)—*"Tenure-holder" — Lessee under* Ijara *patta—Patta giving lessee almost all powers of lessor—Lands held by lessor in* Zamindari, patni, darpatni *and* jote *rights—Settlement records showing most of them as agricultural lands.*

The mere fact that a lessee is empowered to collect rents from tenants would not make him a tenure-holder within the meaning of S. 5 (1) of the Bengal Tenancy Act, unless the lands are agricultural or horticultural or the tenants are of the same description.

Where under a lease which is described to be an *ijara patta* the lessor gives the lessee the right to use the lands held by the lessor in *Zamindari, patni, darpatni* as well as *jote* rights, either through *khas* possession or by settlement and also to establish markets, excavate tanks or start brickfields, and the settlement-records show that most of them are agricultural lands, the *patta* creates the interest of a tenure-holder in the lessee and the incidents of the tenancy are governed by the Bengal Tenancy Act. 81 C.L.J. 138, ref. to; 27 C. 205, rel. on. (*Mukherjea and Chunder, JJ.*) Shyam Rangini Ray v. Ajindra Nath Tagore. I.L.R. (1949) 1 Cal. 165.

———S. 12—*Permanent lease—Condition that on transfer, transferee must pay a fee to landlord—Non-payment of such fee—Effect of—Sale in execution of decree for rent against old tenant—Validity.*

Where a permanent lease provides that if the lease is transferred, the transferee must pay the landlord a certain fee in order to have his name registered in the *sherista* of the landlord, the payment of his money is a condition precedent to the transferee being recognised as a tenant. So long as it is not paid, the liability of the old tenant to pay rent does not cease. Therefore, a sale held in execution of a decree for rent obtained against the old tenant is perfectly valid and confers a good title upon the purchaser. (*Mukerjea and Sharpe, JJ.*) Mahendra Nath v. Karali Mohan. I.L.R. (1946) 1 Cal. 647 =50 C.W.N. 528=A.I.R. 1946 Cal. 496= 227 I.C. 485=1947 Cal. (Rul.) 22.

——**S. 22 (2) (as amended in 1928)**—*Scope—Holding acquired before* 1928.

S. 22 (2) of the Bengal Tenancy Act, as amended in 1928, merely relates to the acquisition of a holding after 1928, but it does not confer any rights in respect of a holding which had already been acquired. (*Edgety, J.*) MAHOMED ISHA SHAH *v.* MD. IBRAHIM SHAH. 50 C.W.N. 485.

——**S. 26-F** — *Applicability — Involuntary sales—Transfer—Meaning of.*

S. 26-F of the Bengal Tenancy Act applies to a transfer by an involuntary sale. There is no indication that the word "transfer" is used in the section in any restricted sense. It is used in the general and ordinary sense and if any assistance can be obtained from sub-S. (11) the only conclusion that can be drawn is that the intention of the legislature was not to limit the scope of the word "transfer" in any particular manner. The word "transfer" means the passage of a right from one individual to another. Such transfer may take place in one of three different ways. It may be by virtue of an act done by a transferor with an intention, as in the case of a conveyance or a gift, or, secondly, it may be by operation of law, as in the case of a forfeiture, bankruptcy, intestacy, etc., or thirdly, it may be an involuntary transfer effected through Court, as in execution of a decree for either enforcing a mortgage or for recovery of money due under a simple money decree. The word "transfer" in its ordinary sense would include all these different kinds of transfer. (*Mookerjee and Lahiri, JJ.*) SASHI BHUSAN *v.* SHANKAR MAHATO. 54 C.W.N. 936=A.I.R. 1950 Cal. 252=5 D.L.R. (Cal.) 65.

——**Ss. 28-F (1) and 26-J (3)**—*Applicability—Notice not served on landlord under Ss. 26-C or 26-F—Landlord held entitled to additional transfer fee—Pre-emption—Limitation for application.*

Where in an application under S. 26-J of the Bengal Tenancy Act, the landlord is held entitled to an additional transfer fee, the period of two months for an application under S. 26-F of the Act, commences to run only from the date on which the additional transfer fee is deposited in Court. An application presented by the landlord before the expiry of such period is therefore in time. Where no notice is served on the landlord under S. 26-C or 26-E, the specific provision of limitation in S. 26-F (1) has no application and in such a case the specific provision in S. 26-J (3) would apparently apply, though it may be that the landlord had knowledge of the sale more than two months before the application was made. (*Lodge, J.*) ASUTOSH SASMAL *v.* BHUPENDRA NARAYAN. 225 I.C. 561=A.I.R. 1947 Cal. 190.

——**S. 26-F**—*Applicability—Non-occupancy holding.*

S. 26-F of the Bengal Tenancy Act does not apply to non-occupancy holdings. (*Edgley, J.*) LAL MIA *v.* AMENA KHATUN. 222 I.C. 548=1946 Cal. (Rul.) 144=50 C.W.N. 428=A.I.R. 1946 Cal. 233.

——**S. 26-F**—*Applicability and scope—Raiyoti holding—Transfer of share by co-sharer—Subsequent transfer by transferee to another—Pre-emption by co-sharer after second transfer—Right of—barred.*

Where a co-sharer in a raiyati holding makes a transfer to a stranger and he in his turn transfers the interest to another, another co-sharer in the holding, being a co-sharer tenant at the time of both transfers, can invoke he provisions of S. 26-F of the Bengal Tenancy Act and apply to the Court within the prescribed period for the portion transferred to be transferred to himself. The second transferee purchases from the first transferee subject to the rights of pre-emption of a co-sharer under S. 26-F. The fact that the co-sharer does not exercise his right until after the first transferee transfers to a second transferee is no bar, provided the co-sharer exercises his right within the period limited. (*Lodge, J.*) LOKEMAN ALI *v.* ABDUL MOTLEE. 224 I.C. 418=1946 Cal. (Rul.) 256=50 C.W.N. 807=A.I.R. 1947 Cal. 327=82 C.L.J. 14.

——**S. 26-F**—*Applicability—Sale by Receiver in Insolvency—If one by Court or voluntary—Pre-emption—Provincial Insolvency Act, S.* 59.

A sale by a Receiver in Insolvency under S. 59 of the Provincial Insolvency Act is not a sale by the Court but a voluntary sale by the Receiver, though it is subject to the superintendence of the Court; and as it is a voluntary transfer it is one which gives rise to a right of pre-emption under S. 26-F, Bengal Tenancy Act. (*Gopendranath Das, J.*) DEBENDRA NATH *v.* GANENDRANATH. I.L.R. (1949) 1 Cal. 371=3 D.L.R. (Cal.) 23=A.I.R. 1948 Cal. 353=53 C.W.N. 107.

——**S. 26-F**—*Applicability—Sale reserving vendor's right to obtain re-conveyance of property.*

A condition accompanying a sale that the purchaser would be bound to reconvey the property to the vendor, if the consideration is offered back to him within a certain period of time, cannot operate to exclude the application of S. 26-F of the Bengal Tenancy Act to the sale. (*Chakravartti, J.*) TARAPADA KARATI *v.* SUDHAMOY DOLUI. 53 C.W.N. 678.

——**S. 26-F**—*Applicant under—Status of—Description in the Record of Rights as co-sharer tenant and also by the transferee in his notice under S. 26-C—Conclusive nature of.*

Where an applicant under S. 26-F of the Bengal Tenancy Act is described as a co-sharer tenant not only in the Record of Rights but also in the notice issued to him under S. 26-C by the transferee and there is no evidence to rebut the presumption as to the correctness of the entry in the Record of Rights, it is not open to the transferee when an application is made later on under S. 26-C to contend that the applicant is not a co-sharer tenant. (*Chakravartti, and Ellis, JJ.*) NURAL HOSSAIN *v.* MIHILAL SHEIKH. I.L.R. (1948) 1 Cal. 353=A.I.R. 1948 Cal. 144.

——**S. 26-F**—Application against some heirs of transferee—One added after limitation—Partial pre-emption—If can be allowed. [*See* Q.D. 1941-1945, Vol. I, Col. 327.] Khoka Bairagi *v.* Bhabani Dasi. 221 I.C. 349=1946 Cal. (Rul.) 36.

———S. 26-F (2)—*Application for pre-emption—Necessary deposit made later but within the period of limitation—Maintainability of application—Duty of Court.*

In the case of S. 26-F (2) of the Bengal Tenancy Act the Legislature has clearly enacted that if the required deposit is not made at the time of making the application it shall be dismissed. In other words the only way in which the Court can deal with such an application, when it finds that there was no deposit accompanying it, is to dismiss it at once except in cases where the circumstances are such that the deposit may be deemed to have been made at the time of making the application. (*Chakravartti and Ellis, JJ.*) Nural Hossain *v.* Mihilal Sheikh. I.L.R. (1948) 1 Cal. 353=A.I.R. 1948 Cal. 144.

———S. 26-F—*Application for pre-emption by co-sharer tenant—Order granting that application during pendency of similar application by another co-sharer—Propriety—Proper procedure.*

One *S* sold certain plots of land. One of his co-sharers, *G,* thereupon filed an application for pre-emption under S. 26-F of the B. T. Act, which was granted *ex parte.* During the pendency of this application, one *R* who happened to be another co-sharer of *S,* filed an application claiming pre-emption. The Court dismissed this application as not maintainable holding that the right, title and interest of the purchaser had already vested in the pre-emptor in the case started by *G* and that the same could not be pre-empted twice. On appeal by *R,* the District Judge set aside the orders passed in both the applications and remanded them for disposal in accordance with the provisions of S. 26-F (4), (5) and (6) of the Act.

Held, that the District Judge acted rightly in exercising the inherent power by re-opening the two cases and correcting the wrong procedure adopted by the trial Court, and that the trial Court acted in contravention of the provisions of S. 26-F (4), (5) and (6) of the Act while making a final order in one case without adverting to the other. (*Akram, C.J.*) Golapjan *v.* Rupjan. 2 D.R. 289.

———S. 26-F—*Application for pre-emption—Parties—subsequent purchaser from purchaser from cosharer tenant—If necessary party.*

A subsequent purchaser from a purchaser from a co-share tenant is not only a proper but a necessary party to an application for pre-emption under S. 26-F of the Bengal Tenancy Act, and the rights of the applicant for pre-emption as against him can be determined in the pre-emption proceedings. (*Mitter, A.C.J.*) Amir Sardar *v.* Ismail Hossain Sardar. I.L.R. (1948) 1 Cal. 425=51 C.W.N. 795=A.I.R. 1947 Cal. 405.

———S. 26-F—*Application or pre-emption—Property again transferred—Subsequent transferee, if may be made party—Latter, if can claim more than original deposit.*

As soon as a transfer of a share in a holding is effected, a right to pre-empt immediately accrues to the co-share tenants and any subsequent transferee of the property must take it subject to that right. If at any time after an application for pre-emption has been made it comes to the notice of the co-sharer applicants for pre-emption that the property has been again transferred, there is nothing in S. 26-F of the Bengal Tenancy Act to prevent the subsequent transferee from being made a party to the proceedings. Under S. 26-F (5) of the Act, the money which has been deposited by the pre-emptor may be paid to him in suitable cases. He is not, however, entitled in the proceeding for pre-emption to recover any sum in excess of the original deposit. (*Edgley, J.*) Girija Nath Kundu *v.* Ahamad Ali Sardar. 50 C.W.N. 806=A.I.R. 1947 Cal. 127=229 I.C. 237=1947 Cal. (Rul.) 132.

———S. 26-F—*Application for pre-emption—Property transferred again before application—Subsequent transferee, if proper party.*

As soon as a transfer of a share in a holding is effected, a right to pre-empt immediately accrues to the co-share tenants, and any subsequent transferee of the property, whether the subsequent transfer is made before or after the application for pre-emption under S. 26-F of the Bengal Tenancy Act, must take it subject to that right. Such subsequent transferee is a proper party to the proceeding for pre-emption and the applicants for pre-emption are entitled to recover the property from him. (*Lodge, J.*) Lokeman Ali *v.* Abdul Motalib. 224 I.C. 418=1946 Cal. (Rul.) 256=50 C.W.N. 807=A.I.R. 1947 Cal. 327=82 C.L.J. 14.

———S. 26-F—Application for pre-emption—Purchaser alleging that he is benamidar for co-sharer tenant—Question of benami—If should be enquired into. [*See* Q.D. 1941-1945 Vol. I, Col. 329.] Santasila Dasi *v.* Narendra Nath. A.I.R. 1946 Cal. 14.

———S. 26-F—*Application for pre-emption—Valuation for jurisdiction.*

For the purposes of an application for pre-emption under S. 26-F of the Bengal Tenancy Act, the value of the subject-matter must be taken to be the amount of consideration stated in the deed, together with a further 10 per cent. thereon as compensation. It is this value that determines the jurisdiction of the Court. (*Harries, C.J. and Chakravartti, J.*) Masior Rahaman *v.* Samsannessa Bibi. A.I.R. 1949 Cal. 307.

———S. 26-F—*Cause of action.*

The cause of action which gives rise to the exercise of the right under S. 26-F, Bengal Tenancy Act, is not merely the service of notice, but the transfer of a portion of the occupancy holding. (*Mookerjee and Lahiri, JJ.*) Sashi Bhusan *v.* Shankar Mahato. 5 D.L.R. (Cal.) 65=A.I.R. 1950 Cal. 252=54 C.W.N. 936.

———(as amended in 1938), S. 26-F—*Co-sharer in tenancy and co-sharer tenant—Meaning of—Partition between co-tenants* inter se—*Effect*

—Subsequent transfer by one—Right of other to pre-empt.

Partition among the co-tenants of a holding is binding among the co-tenants who join in the partition and is effective against the whole world except the landlord; and even if the landlord does not recognise the partition, its effect is to sever the joint status of the co-tenants. Hence after such partition, neither the parties to the partition nor their successors can any longer be regarded as co-tenants, so as to give to one of them a right of pre-emption on a sale by the other, under S. 26-F, Bengal Tenancy Act. The section merely adjusts the rights of co-tenants, *inter se*, and has no reference to the landlord. (*Gopendranath Das, J.*) DEBENDRA NATH *v.* GANENDRANATH. 3 D.L.R. (Cal.) 23=A.I.R. 1948 Cal. 353=53 C.W.N. 107=I.L.R. (1949) 1 Cal. 371.

——**S. 26-F**—*"Co-sharer in the tenancy"—Meaning of—Unrecognised transferee of share of occupancy holding—Further purchase by him—Whether protected from pre-emption.*

The two expressions "co-sharer in the tenancy" and "co-sharer tenant" as used in S. 26-F (1) of the Bengal Tenancy Act bear the same meaning and cover all persons who had the status of co-sharers as against the tenants of the holding. They therefore include an unrecognised transferee of a share of a non-transferable holding who made his purchase before the Amending Act of 1928. Consequently such a transferee, if he makes a further purchase of a share of the holding, is protected from pre-emption under S. 26-F (1) (*a*). (*Chakravartti and Ellis, JJ.*) GOAS ALI BHUIYA *v.* LAL MIA. I.L.R. (1948) 1 Cal. 418=52 C.W.N. 90=A.I.R. 1948 Cal. 27.

——**S. 26-F**—*Co-sharer tenant—Landlord acquiring part of tenancy before amendment of section—If co-sharer tenant.*

When a landlord acquires part of a tenancy before the amendment of S. 26-F of the Bengal Tenancy Act, no partial extinction of the tenancy results, and the tenancy continues with only this change, that the landlord and the co-sharer tenant whose share has not been acquired are now the tenants of the holding. As a co-sharer tenant, the landlord is entitled to exercise a right of pre-emption under the new S. 26-F of the Act, if the other co-sharer tenant transfers his interest in the tenancy to another. 45 C.W.N. 901, rel. on. (*K. C. Das Gupta and B. K. Guha, JJ.*) NATIONAL INVESTMENT CO., LTD. *v.* MAHENDRA NATH KUNDU. 5 D.L.R. (Cal.) 31=A.I.R. 1950 Cal. 163.

——**S. 26-F**—*Date of transfer—Right to pre-empt—When accrues—Date of execution of sale deed or date of registration.*

The right of pre-emption under S. 26-F, Bengal Tenancy Act, accrues on transfer. The material date is the date when the deed of sale is registered and title effectively passes to the vendee. Neither the date of execution of the sale deed, nor any earlier date, *e.g.*, the date of payment of price or the delivery of possession is material for the purpose of accrual of the right of pre-emption (*Gopendranath Das, J.*) DEBENDRA NATH *v.* GANENDRANATH. I.L.R. (1949) 1 Cal. 371=3 D.L.R. (Cal.) 23=A.I.R. 1948 Cal. 353=53 C.W.N. 107.

——**Ss. 26-F and 88**—Locus standi *to apply for pre-emption—Application and his co-sharers effecting partition of holding prior to transfer.*

The essential requisite for the exercise of the right of pre-emption is that the applicant should be a co-sharer in the tenancy at the time of his application for pre-emption under S. 26-F of the Bengal Tenancy Act. Where the applicant and his co-sharers in the tenancy had effected a partition of the holding through the civil Court prior to the transfer of the demarcated portion for which pre-emption is sought and the rent payable on account of their demarcated shares had been amicably apportioned between them, the applicant is not a co-sharer tenant at the time of the presentation of the application and has therefore no *locus standi* to present it. (*R. C. Mitter and Sharpe, JJ.*) NILMONEY JALUI *v.* RADHARANI DEBI. I.L.R. (1948) 2 Cal. 354=A.I.R. 1948 Cal. 224.

——**S. 26-F**—Locus standi *to apply—Purchaser of non-transferable occupancy holding before Amendment Act of* 1928 *came into force.*

A purchaser of a share of an occupancy holding before it was made transferable by law, that is before the amendment of the Bengal Tenancy Act in 1928 came into force and who has not been recognised by the landlord is a "co-sharer tenant" within the meaning of S. 26-F of the Act, and he or any one claiming through him can, therefore, apply for pre-emption. (*Mitter, A.C.J.*) AMIR SARDAR *v.* ISMAIL HOSSAIN SARDAR. I.L.R. (1948) 1 Cal. 425=51 C.W.N. 795=A.I.R. 1947 Cal. 405.

——**Ss. 26-F and 3 (17)**—Locus standi *to apply—Purchaser of occupancy holding before Amendment Act of* 1928 *recognised by some of landlords.*

An unrecognised purchaser of a share of an occupancy holding before the Bengal Tenancy Amendment Act of 1928, is not a tenant and accordingly has no *locus standi* to maintain an application for pre-emption under S. 26-F of the Bengal Tenancy Act. Of course he becomes a tenant as soon as he is recognised by the landlord. But if he is recognised not by the entire body of landlords but only by some of them, he does not acquire the status of a tenant within the meaning of the definition given in S. 3 (17) of the Act, and cannot, therefore, claim pre-emption. (*Mukherjea and Amiruddin Ahmad, JJ.*) S. K. DALIL *v.* RADHA NATH. A.I.R. 1947 Cal. 367=52 C.W.N. 88.

——**S. 26-F**—Locus standi *to apply—Unrecognised-purchaser of portion of* raiyati jote*—Whether co-sharer tenants entitled to pre-empt.*

A purchaser of a portion of a *raiyati jote* whose purchase in 1927 was not recognised by the landlord, cannot be regarded as a co-sharer tenant entitled to pre-empt under S. 26-F (4) (*a*) of the Bengal Tenancy Act. (*Akram, C.J.*) GOAS ALI BHUIYA *v.* APSARADDIN. 1 D.R. 55.

——**S. 26-F (as amended)**—*Occupancy holding purchased by co-sharer landlord at execution sale held before amendment—Sale confirmed after* *amendment—Co-sharer tenant, if entitled to pre-emption.*

In an execution sale of an occupancy holding, title passes to the auction-purchaser at the date of the sale and not at the date of its confirmation. Where an occupancy holding was purchased by a co-sharer landlord at a sale in execution of a money decree held at a time when the old S. 26-F of the Bengal Tenancy Act was in force, the rights of the auction-purchaser having accrued at the date of the sale, could not be taken away by the subsequent amendment of S. 26-F in 1938 which gave a right of pre-emption to co-sharer tenants taking it away from the co-sharer landlord, although the confirmation of the sale took place long after the amendment. Consequently in such a case a co-sharer tenant cannot take advantage of the amendment and apply for pre-emption under the amended section. The charge in S. 26-F does not affect the rights of the parties retrospectively and the co-sharer tenant cannot avail himself of any right which might have been available to co-sharer landlords under the old section. [44 C.W.N. 802, rel. on. 27 C.W.N. 570, dist.] (*Akram, C.J. and Amiruddin Ahmad, J.*) SRISH CHANDRA ROY *v.* BISWANATH BAROI. 1 D.R. 13.

———S. 26-F—*Parties—Transferee co-sharer tenant—If necessary party.*

A transferee co-sharer tenant is a necessary party to an application under S. 26-F, Bengal Tenancy Act, and sub-S. (3) provides for a notice to be given to the transferee. The transferee co-sharer tenant in a proceeding under S. 26-F after the amendment of 1938, therefore, stands in the same position as a co-sharer landlord in a proceeding under S. 26-F before the amendment. (*Mookerjee and Lahiri, JJ.*) ABDUL AJIZ KHAN *v.* LALIT MOHON. 54 C.W.N. 442=A.I.R. 1950 Cal. 265.

———S. 26-F—Proceeding under—Decision as to nature of tenancy—*Res judicata. See* C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS. A.I.R. 1950 Cal. 300.

———S. 26-F—*Proceeding under—Question of of title—Whether can be gone into.*

It is impossible to maintain that in a proceeding under S. 26-F of the Bengal Tenancy Act all questions of title are necessarily excluded from the purview of the Court. It will all depend on the nature of the question which is raised between the parties. It may be that if it involved complicated questions of title, the Court would be well advised in relegating the parties to a regular title suit for the adjudication of such questions, but if it was only a quesion of the maintainability of the application which could be easily disposed of in the proceeding, there is no reason why the Court should decline jurisdiction. (*Biswas, J.*) HOSSAIN ALI *v.* KALA CHAND GHOSE. 51 C.W.N. 415=A.I.R. 1947 Cal. 444.

———S. 26-F—*Proceedings under—Question whether there has been real transfer or only a benami transaction—Decision in transferor's presence*—Res judicata.

If a question is within the proper scope of an enquiry under S. 26-F of the Bengal Tenancy Act, it can and must be gone into and the decision thereon will operate as *res judicata* against a subsequent suit.

The matters expressly specified in S. 26-F are not the only matters within the proper scope of an enquiry under the section. The question raised by a plea that there was no sale at all, but only a pretence of a sale, and the ostensible purchaser was merely holding the property in his name on behalf of the transferor himself, is within the proper scope of an enquiry under the section. Since the section gives a right of pre-emption only to co-sharers of a holding, "a portion or share of which is transferred", the Court, in a proceeding under the section, can and indeed must determine whether there has been a real transfer or only a benami transaction, if such a question is raised. If it is not the transferor who raises the objection, he may and ought to be made a party under the general provisions of the Civil Procedure Code. Such a question is not merely "incidentally cognisable" in a proceeding under the section, but directly in issue, when it is raised, since the very maintainability of the application depends upon it. The basis of an order for pre-emption is that there has been a transfer and in a case where, on a dispute being raised, a decision is given in the presence of the transferor, the decision should bind him on the principles of *res judicata.* (*Chakravartti and Ellis, JJ.*) BALAI CHAND *v.* NIBARAN CHANDRADAS. I.L.R. (1948) 1 Cal. 430=51 C.W.N. 644=A.I.R. 1947 Cal. 410.

———S. 26-F—*Right to pre-empt—Cause of action.*

The cause of action which gives rise to the exercise of the right under S. 26-F, Bengal Tenancy Act, is not merely the service of notice, but the transfer of a portion of the occupancy holding. (*Mookerjee and Lahiri, JJ.*) SASHI BHUSAN *v.* SHANKAR MAHATO. 54 C.W.N. 936=5 D.L.R. (Cal.) 65=A.I.R. 1950 Cal. 252.

———S. 26-F—*Right to pre-empt—Co-sharer tenant not served with notice under S. 26-C—Period of limitation—Limitation Act, Art.* 181.

The right to apply for pre-emption is given by S. 26-F (1) of the Bengal Tenancy Act to all co-sharer tenants irrespective of the fact whether the notice of transfer under S. 26-C is served or not. As the co-sharer who has not been served with a notice of transfer comes within the provision of S. 26-F (1), the only way by which he can enforce his right to pre-emption is by way of application as provided for by the section. He can comply with the provision of S. 26-F (2) by depositing the amount of consideration stated in the instrument of transfer.

An application by a non-notified co-sharer for pre-emption under S. 26-F is governed by Art. 181 of the Limitation Act, and the applicant has three years' time from the date of transfer when the right to apply accrues. (*Mukherjea, Ormond and Das, JJ.*) ASMATALI SHARIP *v.* MUJAHARALI SARDAR. 52 C.W.N. 64=I.L.R. (1948) 2 Cal. 54=A.I.R. 1948 Cal. 48=2 D.L.R. 123 (S.B.).

———S. 26-F—*Right to pre-empt—Whether depends on service of notice under S. 26-E.*

The right of pre-emption does not depend on the service of notice under S. 26-E of the Bengal Tenancy Act. [52 C.W.N. 64, ref. to.] (*Akram, C.J. and Amiruddin Ahmad, J.*) Srish Chandra Roy *v.* Biswanath Baroi. 1 D.R. 13.

———**(as amended in 1938), S. 26-F**—*Scope—If retrospective—Right of pre-emption accruing before amendment—Application after amendment—Competency.*

A right of pre-emption which had already accrued to a landlord before S. 26-F of the Bengal Tenancy Act, as amended in 1938, came into force, is not affected by the amendment of 1938 and the landlord can apply after the amendment to enforce his right of pre-emption under S. 26-F as it stood before the amendment of 1938. (*Lodge, J.*) Asutosh Sasmal *v* Bhupendra Narayan. 225 I.C. 561=A.I.R. 1947 Cal. 130.

———**S. 26-F**—Scope of enquiry—Property described in document of transfer as occupancy holding and notice given by purchaser under S. 26-C—Plea of estoppel against him. [*See* Q.D. 1941-1945, Vol. I, Col. 330.] Sankaracharjya Mallik *v.* Sademani. I.L.R. (1946) 1 Cal. 67.

———**S. 26-F**—*Transer of holding before amendment in 1938—Right of landlord to apply for pre-emption under old section after amendment—Application by one of co-sharer landlords—If maintainable—Bengal General Clauses Act, S 8 (c).*

Where an occupancy holding was transferred and registration was completed before the commencement of the Bengal Tenancy Amendment Act of 1938, an immediate landlord who acquired a right to apply for pre-emption under S. 26-F of the old Act can make an application under that section after the Amendment Act came into force. The interconnection of the provisions from S. 26-A to S. 26-F of the old Act makes it clear that under that Act a right of pre-emption accrues immediately on the transfer and the application by the landlord is not the source of the right, but the means of enforcing it. There being nothing in the Amendment Act to take that right away, it survives by virtue of S. 8 (*c*) of the Bengal General Clauses Act, together with the remedy of an application which survives both by virtue of S. 8 (*c*) of that Act and the general principles of construction. Such an application is maintainable after the Amendment Act even by one of the co-sharer landlords, although Cl. (1) of S. 188 (1) which permitted it is no longer in the statute. That clause embodied a part of the procedure prescribed for the enforcement of the right under old S. 26-F, and as that procedure has been saved, the whole of it has been saved. Even assuming that the right of pre-emption which accrued to a co-sharer landlord under the old S. 26-F was a right limited to his share or that he had to apply for a transfer of the holding to all the co-sharer landlords, a co-sharer landlord would be entitled to have the whole holding transferred to him under sub-S. (6) of that section where the other co-sharers applied but their applications were rejected. (*Biswas, Blank and Chakravartti, JJ.*) Jatindra Nath De *v.* Jetu Mahato. I.L.R. (1946) 2 Cal. 235=225 I.C. 24=1946 Cal. (Rul.) 279=81 C.L.J. 60=50 C.W.N. 502=A.I.R. 1946 Cal. 339 (F.B.).

———**S. 26-F (4)**—*Nature of provision—Co-sharer aware of application for pre-emption made by other co-sharers—Whether can file independent application.*

———**S. 26-F** (4) of the Bengal Tenancy Act is merely permissive and a co-sharer has a two-fold remedy open to him, namely, either to make an independent application under sub-S. (1) of S. 26-F, or to join in an application already made by another co-sharer as provided for in sub-S. (4). Accordingly an independent application by a co-sharer for pre-emption made within reasonable time from his knowledge of the date of sale, is not liable to be dismissed even if he was aware of another application for pre-emption made by other co-sharers. (*Mukherjea, J.*) Jahiruddin Gain *v.* Mahomed Shoukat Ali. 52 C.W.N. 95.

———**S. 26-F (4) (a)**—*Application by transferee co-sharer tenant to join as co-applicant—Limitation—Starting point.*

Under S. 26-F (4) (*a*), Bengal Tenancy Act, the period of limitation for an application by a transferee co-sharer tenant for joining in the application as a co-applicant is one month, and the starting point is the date of the application by the original applicant and not the date of the service of the notice under S. 26-F (3). 52 C.W.N. 65, dist. (*Mookerjee and Lahiri, JJ.*) Abdul Ajiz Khan *v.* Lalit Mohon. 54 C.W.N. 442=A.I.R. 1950 Cal. 265.

———**S. 26-F (8)**—*Scope and effect of—Improvements made by transferee after purchase—Inquiry into and award of compensation for value of—Jurisdiction of Court.*

There is nothing in S. 26-F of the Bengal Tenancy Act which empowers the Court to award compensation for improvements effected by the transferee subsequent to his purchase. Under S. 26-F (8) the transferee has to be deemed to be a raiyat ejected from his holding only for the purposes of Cls. (*a*), (*c*) and (*d*) of S. 156, but not for any other purpose; this necessarily excludes the application of S. 82 of the Act, and the Court has therefore no jurisdiction to direct an inquiry into the value of the improvements made by the transferee after his purchase. [38 C.W.N. 849; 1930 Cal. 547, foll. 47 C.W.N. 184, not foll.] (*Amarendra Nath Sen, J.*) Kishore Mohan Pal *v.* Sudhamayee. 4 D.L.R. (Cal.) 168.

———**S. 26-F (10)**—*Order dismissing application made for setting aside dismissal for default of pre-emption application—If appealable—C. P. Code, O. 43, R. 1 (c).*

An order dismissing an application made for setting aside the dismissal for default and restoration of the application for pre-emption under S. 26-F of the Bengal Tenancy Act is not an order under that section but one under O. 9,

R. 9, C. P. Code, and no appeal, therefore, lies by reason of sub-S. (10) of S. 26-F of the Bengal Tenancy Act. Nor does an appeal lie from such an order under O. 43, R. 1 (*c*), C. P. Code, by reason of S. 141, C. P. Code, as this section speaks of procedure and does not deal with substantive rights like a right of appeal. (*Harries, C. J.*) Birendra Nath Biswas *v.* Monorama Devi. A.I.R. 1948 Cal. 77.

———**S. 26-F (10)**—*Scope—Order for inquiry into value of improvements by transferee after transfer—Appeal—Revision—C. P. Code, S.* 115.

Under S. 26-F (10), Bengal Tenancy Act, an appeal lies only from an order made under the section and not from every order made on an application under that section. An order for an inquiry into the value of improvements made by a transferee after his purchase is not an order which is provided for, and is not an order under S. 26-F. Hence no appeal lies against an order and a revision application under S. 115, C. P. Code, is competent. It is only when the order is appealable that a revision application is barred. (*Amarendra Nath Sen, J.*) Kishore Mohan *v.* Sudhamayee. 4 D.L.R. (Cal.) 168.

———**S. 26-G (as amended in 1940)**—*Whether* ultra vires—*Government of India Act, Sch. VII, List II, Entry No.* 21.

S. 26-G of the Bengal Tenancy Act, as amended in 1940, is not *ultra vires* the Provincial Legislature. The amendment is clearly within the terms of Entry No. 21 of List II of Sch. VII of the Government of India Act. It is not in conflict with the Transfer of property Act, because Entry No. 21 of List II covers the transfer of agricultural land which covers the transfer of an interest in such land also. (*Spens, C.J., Zafrulla Khan and Kania, JJ.*) Sripati Lal Khan *v.* Pasupati Modak. 1947 F.L.J. 7=1947 M.W.N. 77=51 C.W.N. (F.R.) 7=228 I.C. 604=81 C.L.J. 426=13 B.R. 295 =1947 F.C. (Rul.) 13=I.L.R. (1947) Kar. (F.C.) 39=A.I.R. 1947 F.C. 17=(1947) 1 M.L.J. 263 (F.C.).

———**S. 26-G (i) (a)**—Applicability—Proceedings under Bengal Agricultural Debtors' Act. *See* Bengal Agricultural Debtors 'Act, S. 18 (2) and (5) 227 I.C. 189.

———**S. 26-G (i) (a)**—*Complete usufructuary mortgage—Conditions—Mortgagee obtaining possession from trespasser through Court.*

In order that a mortgage may be deemed to be a complete usufructuary mortgage three conditions must be satisfied: (1) that it was a mortgage executed before the commencement of the Bengal Tenancy (Amendment) Act of 1928; (2) that it was subsisting on or after 1—8—1937; and (3) that possession of the land was delivered to the mortgagee. The third condition would be satisfied only when the mortgagee gets possession through the act of the mortgagor. Possession need not be actual *khas* possession. In cases where the property is in the possession of a sub-tenant of the mortgagor, the mortgagor would have constructive possession and delivery of that possession would be sufficient. It can be effected by asking the sub-tenant to attorn to the mortgagee. But if at the time of the mortgage the property is in the possession of a trespasser and the mortgagee obtains possession through process of Court, the mortgage is not to be deemed to be a complete usufructuary mortgage, in as much as possession is not delivered by the mortgagor to the mortgagee either at the date of the mortgage or at any time thereafter. (*Mitter and Amiruddin Ahmad, JJ.*) Partim Mandalani *v.* Ramnath Das. A.I R. 1947 Cal. 408=52 C.W.N. 759.

———**S. 26-G (1) (a)**—*Effect on pending suit for foreclosure of a mortgage by conditional sale with possession of occupancy holding of* 1927.

Sub-S. (1) (*a*) of S. 26-G of the Bengal Tenancy Act as amended in 1940 is intended to have retrospective action. There is neither a saving clause, nor anything in the section from which some saving can be implied as regards mortgages which at the date of the commencement of the Amending Act of 1940 were in question in a pending suit. Hence, a suit for foreclosure of a mortgage by conditional sale with possession of occupancy holding of 1927, pending when the Amending Act of 1940 came into force has to fail. (*Akram, C.J. and Sahabuddin, J.*) Ranjit Kumar Ray v. Kalamjan Bibi. 52 C.W.N. 530.

———**S. 26-G (1) (a)**—*Mortgage by conditional sale with possession—If exitinguished on expiry of fifteen years.*

The effect of sub-S. (1) (*a*) and sub-Ss. (8) to (11) of S. 26-G of the Bengal Tenancy Act taken together, is that a mortgage by conditional sale with possession to the mortgagee should not be deemed to be extinguished automatically on the expiry of the period mentioned in the instrument or of fifteen years whichever is less. It will be deemed to be a complete usufructuary mortgage only in the sense that notwithstanding its terms the usufruct must go towards the satisfaction of both the principal and interest, and for the accounting interest has to be taken at 8 per cent. per annum simple. If on an accounting made on that basis nothing is found due the mortgage would be taken as extinguished; if something is still found due to the mortgage, the Court is to make an order fixing the period during which the mortgagee is to continue to remain in possession, and it is only after the expiration of the period so fixed by the Court that the mortgage is to be taken as extinguished. The question wheher the mortgage had been extinguished by receipt of the usufruct can only be established in a suit instituted either by the mortgagors or the mortgagees under sub-S. (8) of S. 26-G. (*Mitter and Ahmad, JJ.*) Taramoni Dassi *v.* Mahendara Nath Haldar. 52 C.W.N. 1=A.I.R. 1948 Cal. 141.

———**S. 26-G (i) (a)**—*Mortgage by conditional sale—Possession for fifteen years—Debt if automatically extinguished.*

It cannot be said that, in the case of a mortgage by conditional sale with possession, as soon as fifteen years have elapsed, the loan has become extinguished as a matter of law under the provisions of S. 26-G of the Bengal Tenancy Act. Sub-S. (8) of S. 26-G clearly implies that fifteen years' possession will not automatically extinguish the debt. (*Chakravartti, J.*) MAHENDRA NATH SARDAR *v.* KALI PADA HALDAR. 227 I.C. 189=1946 Cal. (Rul.) 431=51 C.W.N. 140 =A.I.R. 1947 Cal. 249.

——**S. 26-G (5)**—*Applicability—Mortgage by conditional sale with possession of occupancy holding.*

Sub-S. (5) of S. 26-G of the Bengal Tenancy Act does not apply to the cases of a mortgage by conditional sale with possession of occupancy holding. The fact that specific reference has been made to them in sub-S. (1) (*a*) indicates that Legislature treated them as a distinct class of mortgages. (*Akram, C.J. and Sahabuddin, J.*) RANJIT KUMAR RAY *v.* KALAMJAN BIBI. 52 C.W.N. 530.

——**S. 26-G (5)**—*Applicability—Mortgage by conditional sale with possession—Right of mortgagor to recover possession by application.*

A mortgagor, who had executed a mortgage on his occupancy holding in the form of a mortgage by conditional sale before the commencement of Bengal Act IV of 1928 and which was subsisting on or after the 1st August, 1937, and had delivered possession to the mortgagee, is not entitled to recover possession by an application under S. 26-G (5) of the Bengal Tenancy Act. This applies to all mortgages with possession which are not usufructuary mortgages, either of the type described as a complete usufructuary mortgage or some other type. Under S. 26-G (5), the position of all such mortgages, whatever it may be, is the same. (*Biswas, Blank and Chakravartti, JJ.*) BADSHA MIA *v.* RAJJAB ALI. I.L.R. (1946) 2 Cal. 214=225 I.C. 280=50 C.W.N. 578=81 C.L.J. 16=A.I.R. 1946 Cal. 348 (F.B.).

——**S. 26-G (5)**—*Applicability—Mortgage including occupancy holding and other items of property.*

The mortgagor of a usufructuary mortgage executed before the Bengal Tenancy (Amendment) Act, 1928, which included not only occupancy holdings but also properties of other description, is entitled to get back possession on an application under sub-S. (5) of S. 26-G, Bengal Tenancy Act as soon as the period mentioned in sub-S. (1) thereof expires, for factually, the requirements of that section are complied with although the mortgage may have included as security a property which is not the holding of an occupancy raiyat. (*R. C. Mitter and Sharpe, JJ.*) BHADU DASI *v.* GOKUL CHANDRA. I.L.R. (1948) 2 Cal. 273=A.I.R. 1948 Cal. 240.

——**S. 26-G (5)**—*Application by mortgagor under—If competent after settlement of his debt under Bengal Agricultural Debtors Act.*

A mortgagor whose debt had been setted by a Debt Settlement Board on application under the Bengal Agricultural Debtors Act, is competent to file an application under sub-S. (5) of S. 26-G of the Bengal Tenancy Act after its enactment by Act VI of 1938. The Bengal Agricultural Debtors Act deals with agricultural debtors in general, while S. 26-G of the Bengal Tenancy Act deals with particular class of them. It is, therefore, quite meaningless to suggest that the former is a Special Act and the latter, a General Act. There is nothing unreasonable in a provision by which an agriculturist who took advantage of a less adequate remedy should be allowed to take advantage of a later and better one. This provision in S. 26-G of the Bengal Tenancy Act is quite inconsistent with that in S. 36 of the Bengal Agricultural Debtors Act. The proper inference, therefore, is that by implication, it repeals the section so far as these particular mortgages are concerned. On the other hand, there is nothin really inconsistent in the two Acts. The only provision in the Bengal Agricultural Debtors Act, which would interfere with the jurisdiction of the Court to give relief is that in S. 18 (4) which prohibits the Court from calling in question the amount of the debts determined by the Board under sub-S. (2). Here there is no attempt to question the amount as settled by the Board. The new section merely provides that by a legal fiction that debt, whatever may be its amount, has been paid off. (*Henderson, J.*) APTAR ALI *v.* AHAMMAD ALI MOLLA. I.L.R. (1946) 1 Cal. 556=223 I.C. 462=1946 Cal. (Rul.) 176=A.I.R. 1946 Cal. 414=82 C.L.J. 154.

——**S. 26-G (5)**—Mortgage deed providing that mortgagor would get back possession only on paying for buildings constructed by mortgagee—Order for possession in terms thereof—Legality. [*See* Q.D. 1941-1945, Vol. I, Col. 332] JYOTI LAL MANDAL *v.* BIRUBALA DASI. I.L.R. (1945) 2 Cal. 370.=80 C.L.J. 293.

——**S. 26-G (8)**—*Scope—If overrides sub-S.* (1) (a).

It cannot be said that sub-S. (8) of S. 26-G of the Bengal Tenancy Act overrides sub-S. (1) (*a*) of the section. These provisions are independent of each other and as such one cannot override the other. There is no real repugnancy between these provisions. The extinction under sub-S. (1) (*a*) is a legal fiction, the effect of which can be nullified only by the mortgagee taking action under sub-S. (8) (*b*). (*Akram, C.J. and Sahabuddin, J.*) RANJIT KUMAR RAY *v.* KALAMJAN BIBI. 52 C.W.N. 530.

——**S. 29, Proviso**—*Scope—If hit by S. 75-A—Landlord's right to rent at enhanced rate—Enhancement effected before 28th August, 1937—Effect of S. 75-A.*

The proviso to S. 29 of the Bengal Tenancy Act cannot clearly be read as a provision not relating to enhancement of rent. The net result of the proviso is that where the special circumstances mentioned in it exist the money rent of an occupancy raiyat may be enhanced by contract without being subject to the conditions. The mere fact that the enhancement of rent by contract took place earlier than 29th August, 1937, cannot help the landlord; before the landlord can show that he can realise enhanced rent he must bring into operation the proviso to S. 29, but in view of S. 75-A, which hits the proviso the landlord cannot recover enhanced rent. (*Das Gupta, J.*) Radha Govinda Roy *v.* Narayan Dhoba. 4 D.L.R. (Cal.) 114.

———**S. 38**—*Applicability—Mokurari raiyati tenancy.*

S. 38 of the Bengal Tenancy Act does not apply to a mokurari raiyati tenancy. 49 C.W.N. 417, Foll. (*K. C. Chunder, J.*) Chinmoyee Debi *v.* Daud Mondal. 5 D.L.R. (Cal.) 32.

———**S. 48-C, Proviso 1 (2)**—*Scope and effect—Transferee under-raiyat—If entitled to take possession of transferor.*

S. 48-C, Proviso (*i*) (2) of the Bengal Tenancy Act only confers a personal protection on the under-raiyat for the time being on the basis of his own possession and the poseession of persons from whom he may have got the holding by inheritance. If an under-raiyat has himself been in possession for a period of 12 years or he, together with his ancestors, has been in such possession, he is not liable to ejectment. Although the possession of an ancestor can be taken into account, the possession of a transferor is not available to the transferee under-raiyat to make up the total period of 12 years. Possession of a transferor is not contemplated by the proviso. (*Chakravartti, J.*) Bhupendra Kumar Dutt *v.* Shewdas Bilani. A.I.R. 1948 Cal. 263=53 C.W.N. 614.

———**S. 48-C, Proviso (i) (2)**—*Transfer of under-raiyati prior to 1928—Recognition by landlord—Effect of—Continuity of tenancy—If maintained.*

Although under the Bengal Tenancy Act as amended in 1928, which recognises the transferability of under-raiyati holdings, a recognition by the landlord of a transfer of an under-raiyati holding might effect a continuance of the tenancy, the position is different if the transfer of such holding was made prior to 1928 when such holdings were wholly non-transferable in law. Prior to 1928 on the transfer of an under-raiyati holding no interest passed from the vendor to the vendee and accordingly the possession of the vendor could not possibly be carried over to the vendee for his benefit for the purpose of Proviso (*i*) (2) to S. 48-C of the Bengal Tenancy Act. Further before 1928, there could be no recognition by the landlord of a transfer of an under-raiyat holding with the effect of making the tenancy continuous. When an under-raiyat holding was transferred, the landlord, who was entitled to deal with his property in any way he liked, was not bound to treat the transferee as a trespasser and might prefer to leave him on the land and to treat him as an under-raiyat. That, however, is something very different from recognising the transfer itself as a valid transaction. What happened in such a case was that a new tenancy was created in favour of the

transferee. (*Chakravartti, J.*) Bhupenra Kumar Dutt *v.* Shewdas Bilani. A.I.R. 1948 Cal. 263=53 C.W.N. 614.

———**S. 48-C, Proviso (ii)**—*Expiry of written tenancy—Question if tenant has or has not given up possession—If material.*

Where a tenant whose written tenancy has expired seeks the protection of proviso (ii) to S. 48-C of the Bengal Tenancy Act, it is essential to consider whether he has or has not given up possession on the expiry of the written tenancy. (*Blank, J.*) Taferaddi Molla *v.* Ratikanta Das. 223 I.C. 361=1946 Cal. (Rui.) 167=A.I.R. 1946 Cal. 381.

———**S. 48-F**—*Applicability—Under-raiyati lease created before its introduction—Right of under-raiyat to transfer—Lease to under-raiyati conferring transferable interest—Consent of landlord to transfer by under-raiyat—Whether may be inferred.*

S. 48-F of the Bengal Tenancy Act applies to an under-raiyati lease granted prior to its introduction by the Bengal Tenancy Amendment Act of 1928, and therefore, the consent of the landlord is a condition precedent to the validity of a transfer of the under-raiyati holding.

Where the lease granted by the raiyat to the under-raiyat confers a *mourashi mokarari* right and a transferable interest of the holding, the 'consent of the landlord' within the meaning of S. 48-F to a transfer of the holding by the under-raiyat should be inferred. There is nothing in S. 48-F to indicate that the consent which is contemplated must be contemporaneous with the transfer.

Even assuming that S. 85 (3) of the Act will be attracted and the under-raiyati lease ceased to be valid nine years after the introduction of the Act so long as the landlord permitted the under-raiyat to retain the tenancy, his possession was referable to the terms of the lease, and the grantor was bound to recognise the right of transfer which it created. (*Sharpe, J.*) Tin Cori Mondal *v.* Upendra Nath. 51 C.W.N. 661.

———**S. 48-F**—*Sale of under-raiyati holding without landlord's consent—Ejectment suit by purchaser against trespasser—If maintainable—Specific Relief Act, S. 42.*

The effect of S. 48-F of the Bengal Tenancy Act is not to render a sale of an under-raiyati holding without the landlord's consent a nullity. Such a sale is only voidable at the instance of the landlord or the landlords who do not consent to the transfer. A purchaser of a non-transferable under-raiyati holding after the enactment of the section by the Amending Act of 1928 is, therefore, entitled to maintain a suit for ejectment against trespassers. As his title is good against the whole world with the exception of the landlord alone, he has a legal character which the Court can declare under S. 42 of the Specific Relief Act. (*Gopendranath Das, J.*)

Ram Ratan Mudhara *v* Debendra Prosad Roy. A.I.R. 1947 Cal. 391.

———**Ss. 49-B and 49-H**—*Applicability—Dispossession by trespasser.*

S. 49-B of the Bengal Tenancy Act applies where there has been a transfer of some kind referred to in that section, and unless there was such a transfer, an order of the Collector under S. 49-H of the Act would be without jurisdiction. There is no provision in that section conferring jurisdiction merely because the aboriginal tenure-holder or raiyat as the case may be, has been dispossessed of his property, and there does not appear to be any provision in Ch. VII-A for the making of an order for ejectment of a trespasser or of the person who may have forcibly dispossessed the aboriginal tenant, unless, therefore, the aboriginal tenant has transferred the property in some manner set forth in S. 49-B, an order for ejectment is without jurisdiction. (*Sharpe, J.*) Phani Bhusan Dutta *v.* Banamali Majhi. I.L.R. (1946) 1 Cal. 515=50 C.W.N. 616.

———**S. 49-K**—*Sale in contravention of—Remedy of tenant.*

The remedy of a tenant who contends that an order for sale of his tenancy in execution of a decree against him is a nullity because of contravention of S. 49-K, Bengal Tenancy Act, is by way of an objection in the course of the execution proceedings, and not by way of a suit. (*G. N. Das, J.*) Bijoy Chandra Singha *v.* Doman Singh. I.L.R. (1948) 2 Cal. 320.

———**S. 49-K, Proviso (a)**—*Sale in execution of decree for rent having force of money decree —Validity.*

The words "to recover an arrear of rent" in proviso (*a*) to S. 49-K of the Bengal Tenancy Act, refer to the nature of the claim which was put in litigation. It does not mean that the decree which may be passed in a suit to recover an arrear of rent should also partake of the character of a rent decree. Accordingly a sale held in execution of a decree for rent against an aboriginal tenant, which has the force of a money decree is not a nullity by reason of the provisions of the section. The object of the section is to protect aboriginals from claims other than claims for arrears of rent or for claims recoverable as public demands. (*G. N. Das, J.*) Bijoy Chandra Singha *v.* Doman Singha. **I.L.R. (1948) 2 Cal. 320.**

———**S. 49-L**—*Notices under S. 163 not served —Validity of sale.*

If no notices under S. 163 were ever served upon the judgment-debtor then they knew nothing of the sale and quite apart from S. 174 the sale would be null and void under S. 49-L of the Bengal Tenancy Act, because they were never given any time at all to pay the debt. (*Harries, C.J.*) Jogindra Nath Roy *v.* Dingmi Garoni. A.I.R. 1948 Cal. 114.

———**S. 49-L**—*Order by Court giving time to pay—If necessary.*

S. 49-L of the Bengal Tenancy Act does not in terms require that an order should be passed

giving the judgment-debtor time to pay the decretal amount before the sale. If the judgment-debtor has in fact been given reasonable time to pay before the sale, the section is complied with. Whether the time was reasonable or not would depend upon the circumstances of the judgment-debtor existing at that time. (*Harries, C.J.*) Jogindra Nath Roy *v.* Dingmi Garoni. A.I.R. 1948 Cal. 114.

———**S. 49-L (as amended in 1945)**—*Retrospective operation.*

S. 3 of Beng. Act XII of 1945 which excludes decrees for rent from the operation of S. 49-L of the Bengal Tenancy Act does not apply to any proceeding instituted before the Amendment Act came into force. (*Harries, C.J.*) Jogindra Nath Roy *v.* Dingmi Garoni. A.I.R. 1948 Cal. 114.

———**S. 49-N**—*Jurisdiction of Civil Court—Order under S. 49-H without jurisdiction—Failure of party to appeal **under S. 49-M**—Effect.*

The failure of a party to avail himself of the right of appeal under S. 49-M, does not operate to oust the jurisdiction of the Civil Courts in a proper case to set aside under S. 49-N, an order of the Collector made without jurisdiction under S. 49-H, of the Bengal Tenancy Act. (*Sharpe, J.*) Phani Bhusan Dutta *v.* Banamali Majhi. I.L.R. (1946) 1 Cal. 515=50 C.W.N. 616.

———**S. 52**—*Applicability—Suit for rent based on contract to pay increased rent for additional area.*

Suit for rent based upon a contract between a landlord and a tenure-holder for the payment of increased rent on account of additional area, need not be brought under S. 52 of the Bengal Tenancy Act. (*Sharpe, J.*) Dharani Mohan Roy *v.* Srikrishna Das. 50 C.W.N. 160.

———**S. 52**—*Scope—Agreement between landlord and tenure-holder for increase of rent for additional area—Enforceability.*

S. 52 of the Bengal Tenancy Act is not exhaustive. There is nothing in the Act which prohibits a contract between the landlord and a tenure-holder for the increase of rent for additional area. If there is such an agreement, the tenure-holder is liable to pay in accordance therewith. [50 C.W.N. 160, rel. on.] (*Ormond, J.*) Mahaluxmi Bank, Ltd. *v.* Abdul Khaleque Meah. 1 D.R. 49.

———**S. 52**—*Standard of measurement at time of tenancy agreement—Continuity—Presumption.*

There is a presumption, even if not more than a weak presumption, unless there is evidence to the contrary, that the standard of measurement used in the *kabuliyat* would have continued the same as that current in the present day. (*Ormond, J.*) Mahaluxmi Bank, Ltd. *v.* Abdul Khaleque Meah. 1 D.R. 49.

———**S. 52 (1-A)**—*Nature of presumption.*

Obiter:—The word "presumed" in S. 52 (1-A) of the Bengal Tenancy Act cannot be read as carrying a conclusive presumption. (*Ormond, J.*) Mahaluxmi Bank, Ltd. *v.* Abdul Khaleque Meah. **1 D.R. 49.**

———**S. 52 (1-A)**—*Scope.*

S. 52 (1-A) of Bengal Tenancy Act is restricted to a suit agitating a right created by the section iself. (*Ormond, J.*) MAHALUXMI BANK, LTD. *v.* ABDUL KHALEQUE MEAH. 1 D. R. 49.

———**S. 52 (1) (b)**—"Deficiency in area"—Landlord undertaking to maintain embankment existing on boundary of tenure—Embankment washed away by river and new embankment erected encroaching upon demised land—Tenant, if can claim reduction of rent. [*See* Q.D. 1941-1945, Vol. I Col. 341.] SARAT CHANDRA MITRA *v.* SARADINDU. I.L.R. (1945) 2 Cal. 595=80 C.L.J. 279=A.I.R. 1946 Cal. 18.

———**S. 65**—*Applicability and scope—Rent sale—Essentials of validity—Holding sold in execution of mortgage decree before sale for rent—Purchaser not made party to rent execution proceedings—Title of—If affected—S. 146-A.*

The right of a landlord to bring to sale a tenure under S. 65 of the Bengal Tenancy Act, exists only so long as the relationship of landlord and tenant subsists between the parties; if such relationship has ceased and does not exist at the date of sale, the latter would not have the effect of rent sale under Ch. XIV of the Act. Where before the sale in execution of a decree for rent, the tenure is put up for sale and sold in execution of a decree on a mortgage, and the rent sale is held without impleading the purchaser at the mortgage sale as a party in the rent execution proceedings, the title of the purchaser at the mortgage sale is not affected by the rent sale. S. 146-A of the Act has no bearing on the point. (*Mukherjea and Sharpe, JJ.*) MENAJUDDIN v. HERONUDDIN MULLICK. 225 I.C. 575=A.I.R. 1947 Cal. 137=51 C.W.N. 914=82 C.L.J. 363.

———**S. 65**—*Decree for rent—When has effect of rent decree—Conditions.*

A decree for rent to have the effect of a rent decree under S. 65 of the Bengal Tenancy Act, must satisfy the following conditions: In the first place, the suit must be a suit for recovery of rent due from a permanent tenure-holder or a *raiyat* at fixed rates or an occupancy *raiyat* and possibly after the amendment, from an under-*raiyat* with a right of occupancy. In the second place, the claim in the suit must be a claim for arrears of rent only. In the third place, the suit must be framed in conformity with the provisions of S. 148-A of the Act. In the fourth place, the defendant in the suit should be either a recorded tenant or a tenant in conformity with the provisions of S. 148-A of the Act. In the fifth place, the relationship of landlord and tenant must subsist between the parties until the date of sale. (*Gopendranath Das, J.*) RABINDRA MANDAL *v.* C. K. NAG & SONS, LTD. A.I.R. 1948 Cal. 182.

———**S. 65**—*Sale of holding after rent decree and before execution—Purchaser not made party in execution proceedings—Title of purchaser at rent sale.*

Where after the passing of a rent decree and before its execution the occupancy holding is sold in execution of a mortgage-decree and purchased by the decree-holder, and the mortgagee decree-holder auction-purchaser is not made a party to the proceedings in execution of the rent decree by the landlord who was served with the notice of the confirmation of the sale before he started execution of his decree for rent, the rent sale does not pass the tenancy but merely passes the right, title and interest of the judgment-debtor, the title of the mortgagee decree-holder auction-purchaser being unaffected by the sale. 47 C.W.N. 651, 48 C.W.N. 105 and 51 C.W.N. 914, approved. 41 I.A. 91, Expl. (*Das and Das Gupta, JJ.*) NRI SINGHA PROSAD BOSE *v.* NIL RATAN SINGHA. 54 C.W.N. 683.

———**Ss. 66 and 168-A**—*Scope of—Execution of decree for arrears of rent after ejectment—If barred.*

S. 66 of the Bengal Tenancy Act does not give the landlord alternative reliefs. Sub-S. (2) merely gives the tenant another chance and has the practical effect of compelling the landlord to waive the default. The decree for arrears of rent is not extinguished by the execution of the decree for ejectment, nor is its execution barred under S. 168-A of the Bengal Tenancy Act. (*Henderson, J.*) MYMENSINGH LOAN OFFICE, LTD. *v.* PROBIRENDRA MOHAN. 50 C.W.N. 282.

———**S. 71**—*Applicability—Sale of tenure at revenue-sale—Purchaser annulling interest of tenure-holder and suing raiyat holding under him for rent.*

Although the provisions of S. 72 of the B. T. Act do not in terms apply to a case where a purchaser of a tenure at a revenue-sale annuls that tenure after his purchase, and sues the tenant holding a raiyati interest under the tenure-holder for rent, the principle of that section will apply, and in the absence of proof of receipt by the raiyat of a notice equivalent to the notice contemplated by that section, he cannot be asked to pay again the rent already paid to the tenure-holder who is his recorded landlord, when there is no adequate reason for supposing that the payment was not *bona fide*. (*Sharpe, J.*) ASIRAN BEWA *v.* NANDA KISHORE LAHA. I.L.R. (1947) 1 Cal. 155.

———**(as amended in 1937), S. 75-A**—Scope and operation—If controls S. 29, proviso. *See* BENGAL TENANCY ACT, S. 29, PROVISO. 4 D. L.R. (Cal.) 114.

———**S. 75-A (3)**—*Applicability—Covenant in contract for payment of additional rent for additional area.*

S. 75-A (3) of the Bengal Tenancy Act has no application to a covenant in a contract providing for the payment of additional rent for additional area. (*Das, J.*) UMARANI BASU *v.* SURENDRA NATH. 51 C.W.N. 743.

———**S. 85 (before amendment)**—*Unter-raiyati created in contravention of section—If valid as against stranger purchaser at rent sale.*

No doubt, an under-raiyati lease created in contravention of S. 85 of the Bengal Tenancy Act, as it stood prior to the Amendment of 1928 is not binding on the landlord and the raiyat, and any occupancy right gained by the under-raiyat would also be not binding on the landlord and could not be availed of against him as a protected interest, if the purchaser at a rent sale was the landlord himself. But where the purchaser was a stranger, the under-raiyati interest should be deemed to be a valid one as against him, unless annulled by him as an incumbrance under S. 161 of the Bengal Tenancy Act. (*Mukherjea and Sharpe, JJ.*) AKUBALI HAOLADHAR *v.* NAJAMALI. I.L.R. (1946) 1 Cal. 325=50 C.W.N. 382=A. I. R. 1946 Cal. 326=228 I.C. 67=1947 Cal. (Rul.) 52.

———**S. 86**—Surrender by tenant—Possession adverse to tenant prior to surrender—If also adverse to landlord. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. 51 C.W.N. 306.

———**S. 86-A (as amended in 1938)**—*Whether retrospective—Right extinguished under old section—Whether can be revived—"Subsists"—Meaning of.*

It is quite clear from the wording of S. 86-A (2) of the Bengal Tenancy Act as amended in 1938, that no retrospective effect was intended. Sub-S. (2) says that the right, title and interest of the tenant shall *subsist* in such lands or portion there during the period of loss by diluvion. This presupposes that the right existed at the time S. 86-A came into force. The right cannot subsist unless it existed. Subsists means "continues to exist". If, therefore, the right was extinguished by virtue of the provisions of S. 86-A as it stood in 1928, S. 86-A as it stands now cannot revive that right. (*Sen, J.*) JILLAR RAHMAN MONDAL *v.* DHARAM CHAND. 4 D.L.R. (Cal.) 151=53 C.W.N. 501.

———**S. 88**—*Distribution of portion of rent—Permissibility.*

S. 88, B. T. Act, does not contemplate a distribution of a portion of the rent. Such distribution may be at best an arrangement for purposes of convenience and does not affect the legal rights and liabilities of either side. (*Mukherjea and Chunder, JJ.*) SHYAM RANGINI RAY *v.* AJINDRA NATH TAGORE. I.L.R. (1949) 1 Cal. 165.

———**S. 88 (1)**—*Division of holding—Consent in writing of co-sharer tenants and landlord—If should be given at same time.*

All that S. 88 (1) of the Bengal Tenancy Act provides is that a division of the holding agreed upon between the landlord and all the co-sharer tenants shall not be valid unless it has been expressly consented to in writing by all of them. Such consent in writing need not all be expressed at the same time. (*Lodge, J.*) BITHI KARANI TARWAL *v.* KHUDIRAM CHAKRAVARTY. 50 C.W.N. 553=82 C.L.J. 163.

———**S. 88**—*Division of rent—Consent of whole body of landlords—Need for.*

Under S. 88, B. T. Act, the consent in writing to the division of rent in respect of a holding has got to be given by the landlord, by which expression is certainly meant the whole body of the landlords if there are more than one. Where under a trust-deed executed by a landlord three trustees become the landlords in respect to the leasehold interest, it is not competent to one of the trustees, even though he is a beneficiary trustee, to consent to the splitting up or division of the rent. (*Mukherjea and Chunder, JJ.*) SHYAM RANGINI RAY *v.* AJINDRA NATH TAGORE. I.L.R. (1949) 1 Cal. 165.

———**S. 88**—*Express consent of landlord to division of rent—Inference from recitals in rent-receipt—Permissibility.*

Under S. 88 of the Bengal Tenancy Act, the "express consent" of the landlord to a division of the rent payable in respect of the holding may, no doubt, be inferred from the recitals in the rent receipt which is signed by him, but for the purpose of testing the adequacy of such consent all the surrounding circumstances would have to be looked into. (*Mukherjea and Chunder, JJ.*) SHYAM RANGINI RAY *v.* AJINDRA NATH TAGORE. I.L.R. (1949) 1 Cal. 165.

———**S. 88**—*Partition between co-tenants—Order distributing rent under S. 88—Effect of on joint liability of the tenants—Disruption of old tenancy and creation of new ones.*

An order distributing rent under S. 88, Bengal Tenancy Act on an application by a co-tenant after a partition between the several co-tenants, has the effect of putting an end to the joint and several liability of the co-tenants from the date specified in the order. The order has the effect of disrupting the old tenancy and creating new tenancies. (*Gopendranath Das, J.*) DEBENDRA NATH *v.* GANENDRANATH. 3 D.L.R. (Cal.) 23=A.I.R. 1948 Cal. 353=53 C.W.N. 107.

———**S. 88 (2)**—*Remedy by applicant if exclusive—Suit, if competent.*

The remedy given by S. 88 of the Bengal Tenancy Act must be deemed to be exclusive. A suit for sub-division of a holding and for apportionment of rent is, therefore, not maintainable and the remedy of the plaintiff is by way of an application. (*G. N. Das, J.*) CHARU CHANDR HAIT *v.* SNIGDHENDU PROSAD. I.L.R. (1948) Cal. 77=52 C.W.N. 212=A.I.R. 1948 Cal. 150= 2 D.L.R. 407.

———**(as amended in 1938), S. 88**—*Scope—Burden of proof—Vendee's* Kobala *reciting sub-division of parent* jama *or* khariji—*If operates as estoppel against vendee from denying sub-division.*

Where the C. S. Record is to the effect that the ancestral *jama* is of a certain amount, and there is nothing to show an authorised or a legal sub-division, it lies on the pre-emptor to prove a sub-division set up and relied on by him. If he fails to discharge that burden, he cannot succeed. The legal requirements of S. 88, Bengal Tenancy Act, as amended, cannot be got rid of because the *Kobala* in favour of the purchaser who is sought to be pre-empted, recites a *khariji*; and the pre-emptor cannot on the basis of the recital in the *Kobala* plead that the vendee is estopped from stating that there was no sub-division of the parent *jama*. There being no change of position so far as the pre-emption is concerned, no question of estoppel can arise. (*G. N. Das, J.*) EJAHAR MOLLAH *v.* GOLAM ROBBANI MOLLAH. 5 D.L.R. (Cal.) 13.

———**Ss. 93, 94, 95, 98 and 99**—Appointment of common manager in respect of joint properties not belonging to same set of owners by one order on one application—Legality—Law before and after Amending Act of 1928. [*See* Q.D. 1941-1945 Vol. I Col. 345.] HARI PADA BISWAS *v.* MAHOMED NURUL ABSAR. I.L.R. (1945) 2 Cal. 389=80 C.L.J. 160.

———S. 95—*Appointment of common manager accepting nomination of parties—Validity.*

Where, on receipt of a notice under S. 93 of the Bengal Tenancy Act, issued at the instance of some of the co-owners who want a common manager to be appointed, the other co-owners on whom the notice is served agree to such appointment and also to the appointment of the person nominated by the applicants, the appointment of such person by the District Judge himself acting no doubt upon the agreement of the parties is a valid appointment under S. 95 of the Act. There is nothing in S. 95 to debar the District Judge from accepting the nomination of the parties in making an appointment under that section. Having regard to the fact that all the co-owners are consenting parties to the appointment, the issue of a formal notice on them under S. 94 to make an appointment is wholly unnecessary and the omission to issue such a notice is a mere technical irregularity. 23 C. 522, foll. (*Biswas, J.*) SHYAMA CHARAN PODDAR *v.* HAR CHANDRA BHOWMIK. I.L.R. (1946) 1 Cal. 445.

———Ss. 95 and 98 (3)—*Decree against common manager—Validity—Failure to implead proprietors or to appoint guardian of minor proprietor—Effect of.*

The common manager of an estate appointed under S. 95 of the Bengal Tenancy Act represents the estate and the co-owners thereof, and the failure to implead the proprietors or to appoint a guardian of a minor proprietor in a suit cannot affect the validity of a decree passed against the common manager or render it void or inoperative. [16 C.W.N. 96, rel. on; 31 C. 305 and 49 C.W.N. 808, dist.] (*Akram, C. J. and Shahabuddin, J.*) MANINDRA NATH SAHA *v.* BHOBESH CHANDRA. 1 D.R. 30.

———S. 102—*Suit for assessment of fair rent—Onus of proving that land was assessed to revenue at time of permanent settlement—If discharged by entry in Record of Rights that it appertains to revenue-paying touzi.*

In a suit for assessment of fair and equitable rent, the initial burden is no doubt upon the plaintiff to prove that the land was assessed to revenue at the time of permanent settlement. But this onus is discharged by the entries in the Record of Rights that the disputed land appertains to revenue-paying touzi and that the defendants are raiyats under the plaintiff. 49 I.A. 399, ref. to; A.I.R. 1948 Cal. 14, Dist. (*Das Gupta and Lahiri, JJ.*) MONMOTHA NATH MUKHERJEE *v.* SINDHUBALA DEBI. 54 C.W.N. 973.

———Ss. 102 and 103-B (5)—*Entry that defendants acquired rent-free title by adverse possession—Jurisdiction of Settlement authorities to record—Correctness of entry—Presumption.*

The opening paragraph of S. 102, Bengal Tenancy Act, indicates that the different clauses mentioned in that section are not exhaustive because that paragraph authorises the inclusion of other particulars besides those mentioned in Cls. (*a*) to (*j*). The Settlement authorities have therefore jurisdiction to record the manner in which rent-free title was acquired by the defendants. An entry in the Record of Rights to the effect that the defendants acquired a rent-free title by proof of adverse possession for more than 20 years means that there was a demand and refusal of rent more than 20 years before the final publication of the Record of Rights, and the entry should be presumed to be correct under S. 103-B (5) of the Bengal Tenancy Act. (*Das Gupta and Lahiri, JJ.*) MONMOTHA NATH MUKHERJEE *v.* SINDHUBALA DEBI. 54 C.W.N. 973.

———S. 103-B—*Entries in Record of Right prepared for* Deara *purposes—Value of—Evidence Act, S. 35.*

The entries in the Record of Rights prepared for *Deara* purposes is a valuable piece of evidence under S. 35 of the Evidence Act, although they may not raise the same presumption that attaches to the C. S. Records under S. 103-B of the Bengal Tenancy Act. (*Mukherjea and Sharpe, JJ.*) AKUBALI HAOLADHAR *v.* NAJAMALI. 50 C.W.N. 382=A.I.R. 1946 Cal. 326.

———S. 103-B—*Entries in Record of Rights—Presumption of correctness—Rebuttal—Implied finding by Court.*

Where in a suit brought for the correction of an entry in the Record of Righ after declaring plaintiff's title and confirming his possession, there was a specific issue on the question of the correctness of the entry and it was definitely found on examination of the evidence of both parties that the entry was not correct, it necessarily implies a finding by the Court that the presumption of correctness under S. 103-B of the Bengal Tenancy Act was rebutted. (*Sharpe, J.*) BAHADUR SINGH *v.* BARKATULLA GACHUA. 224 I.C. 55=1946 Cal. (Rul.) 202=A.I.R. 1946 Cal. 450=82 C.L.J. 158.

———S. 103-B—*Presumption under—If attaches, to C.S. Map—Its evidentiary value.*

In order that the statutory presumption under S. 103-B (5) of the Bengal Tenancy Act may attach to an entry, it must occur in a document which is a part of the Record of Rights and which has been finally published. A C.S. Map is no part of the Record of Rights and it is never finally published. It cannot, therefore, claim the presumption of correctness provided for in S. 103-B of the Act. But it cannot be discarded altogether. It is at least a piece of evidence and may also claim some presumption of correctness otherwise than under S. 103-B because, it is prepared by public officers with considerable formality and in the course of proceedings conducted with the greatest possible publicity. (*Chakravarti, J.*) MCDONALD *v.* MAHAMMADDIN AZAD. I.L.R. (1946) 1 Cal. 528=226 I.C. 115=1946 Cal. (Rul.) 337=50 C.W.N. 388=A.I.R. 1946 Cal. 331=82 C.L.J. 148.

———Ss. 103-B (5) and 51—*Rate of rent—Presumption raised by earlier record of rights or by later rent decree—Which prevails.*

Where a tenant had executed a kabuliyat for a limited period at a particular rate of rent, and on the basis of that kabuliyat, even after a lapse of 25 years, the landlord had obtained a rent decree and executed that decree, a presumption is raised under S. 51 of the Bengal Tenancy Act that the rent specified in the kabuliyat prevailed in the subsequent years. The presumption attaching to an entry recording the rate of rent in an earlier record of rights under S. 103-B (5) of the Bengal Tenancy Act is impaired by the later presumption raised under S. 51 by the decree. The decision in a previous rent suit as to the rate of rent, although it does not operate as *res judicata* in a suit for rent for subsequent years, does give rise to a presumption under S. 51 of the Bengal Tenancy Act that the rent for subsequent years remained the same. Moreover, where there are two conflicting presumptions arising with regard to the same matter, the later in date should prevail. The presumption under S. 51 of the Act raised by the rent decree, therefore, prevails over the earlier record of rights. 6 C.W.N. 589 and 38 C.W.N. 763, rel. on. (*Amiruddin Ahmad, J.*) Safiuddin Kazi *v.* Pranab Chandra Roy. A.I.R. 1949 Dacca 14.

———**S. 104**—Settlement of rent—Rent fixed under pre-Act contract—If can be ignored—Revenue settlement not accepted by proprietor. [*See* Q.D. 1941-1945, Vol. I, Col. 347.] Province of Bengal *v.* Midnapore Zemindary Co., Ltd. 80 C.L.J. 178.

———**S. 104-H**—*Applicability—Suit brought before publication of Record of Rights.*

S. 104-H of the Bengal Tenancy Act only deals with right of persons aggrieved with certain entries in a settlement Rent-roll incorporated in a Record of Rights finally published, and is not a bar to a suit brought while preparations were going on for the publication of Record of Rights but it had not been published. (*Harries C. J. of West Bengal*). Amiya Bala Singha *v.* Dhanai Naskar. 83 C.L.J. 101=A.I.R. 1949 Cal. 287.

———**Ss. 105 to 109**—*Proceedings for settlement of rents—Decisions of Revenue officers—Constructive* res judicata*—Doctrine, if applicable.*

The second proviso to S. 109 taken with the last part of S. 107 of the Bengal Tenancy Act has the effect of making the decision of a Revenue Officer final only when that officer had actually adjudicated upon the matter. This gives some indication of the intention of the Legislature to the effect that the doctrine of constructive *res judicata* is not to be applied on the strength of decisions of Revenue Officers in proceedings under Ss. 105 to 108 of the Act. (*Mitter and Ahmed, JJ.*) Upendra Lal *v.* Birenra Lal Das. I.L.R. (1948) 1 Cal. 381=52 C.W.N. 218=A.I.R. 1947 Cal. 457.

———**S. 105**—*Proceeding under—Validity—Some of co-sharer tenants not brought on record.*

If in a proceding under S. 105 of the Bengal Tenancy Act for the settlement of a fair and equitable rent, the tenancy is not properly represented by the contesting defendants, the proceeding will have to be treated as a nullity. If, on the other hand, the contesting defendants

actually opposed the application under the section not only on their own account but also on behalf of all the co-sharer tenants who had not been formally brought on the record, the order in the proceeding is not a nullity, and the landlord in a suit for rent is entitled to a money decree as against those who had actually contested the proceeding. 28 C.W.N. clxxxviii, applied. (*Edgley, J.*) Susama Rani Debi *v.* Bhairab Chandra Ray. I.L.R. (1946) 1 Cal. 355.

———**Ss. 111-A, proviso and 104-H**—*Scope and applicability.*

The proviso to S. 111-A of the Bengal Tenancy Act is applicable only where there is an initial lack of jurisdiction in the revenue authorities to proceed under Ss. 104-A to 104-F of that Act, in other words, where there cannot be any question of any land revenue being settled at all. But where an estate is, in fact, a temporarily settled estate, and a fresh settlement of land revenue can properly be made and has to be made, there is no initial want of jurisdiction in the revenue authorities to proceed under Chapter X, Part II of that Act with respect to the estate and any special or unalterable incident which they may come across in the course of settling rents of subordinate tenancies cannot exclude their jurisdiction, although as a matter of law they may be bound to give effect to the incident. In such a case the only method of challenging an entry made by the revenue authorities is that provided for by S. 104-H of that Act. (*Blank and Chakravartti, JJ.*) Surja Kanta Jana *v.* Nishu Bala Debi. 51 C.W.N. 376.

———**S. 144**—*Jurisdiction of Court—When open to challenge.*

The decision of the Court which passed the decree in a suit between a landlord and a tenant as such is assailable only if it can be shown by reference to the papers that the decree related to a tenure or holding where none of the lands was within the jurisdiction of the Court which passed it, or related to more tenures than one, and the land comprised in one of the tenures was wholly outside the local limits of that Court's jurisdiction. (*Edgley and Clough, JJ.*) Krishna Chandra Dutta *v.* Radha Kanta Saha. I.L.R. (1947) 1 Cal. 486=228 I.C. 612=A.I.R. 1948 Cal. 111=1947 Cal. (Rul.) 112.

———**S. 146-A**—*Applicability and scope—If controls or affects S.* 65.

S. 146-A of the Bengal Tenancy Act contemplates a case where there are more than one tenant on the land; but it has no bearing on a case where a person other than a tenant, has acquired title, by purchase at a mortgage sale, before the sale in execution of the decree for rent is held. (*Mukherjea and Sharpe, JJ.*) Menajuddin *v.* Heronuddin Mullick. 225 I.C. 575=A.I.R. 1947 Cal. 137=51 C.W.N. 914=82 C.L.J. 363.

———**S. 146-A**—*Rent sale—What passes—Transferee of tenant not impleaded*

For the purpose of deciding whether in a rent execution sale the entire holding or merely the interest of the recorded or registered tenants passed by the sale, it will be necessary to determine whether the tenants impleaded represented the entire estate. If therefore the holding was a transferable holding, it will be necessary to decide whether the interest of the transferee was also purchased by the purchaser in the sale held in execution of the rent decree, apart from the question whether the landlord refused recognition of the transferee. (*Sharpe, J.*) CHITTAGONG URBAN CO-OPERATIVE BANK, LTD. *v.* AHMEDAR RAHAMAN. A.I.R. 1947 Cal. 398.

———**S. 146-A (3)**—*Scope of.*

It is now well settled that the four sub clauses of S. 146-A (3) of the Bengal Tenancy Act are not disjunctive but they are conjunctive, and the landlord, in order to show that the decree has the effect of a rent decree binding on all the co-sharer tenants, must prove the existence of all the conditions referred to in cls. (i) to (iv). (*Gopendranath Das, J.*) SYED AHAMMAD *v.* MAKKU MIA. A.I.R. 1948 Cal. 69.

———**S. 146-A (3) (i)**—*'Homestead'—Meaning.*

The mere fact that a co-sharer tenant owns a homestead in the village but he does not live there would not be regarded as sufficient compliance with S. 146-A (3) (i) of the Bengal Tenancy Act. The word 'homestead' is used there in the sense of residence or habitation of the co-sharer tenant. (*Gopendranath Das, J.*) SYED AHAMMAD *v.* MAKKU MIA. A.I.R. 1948 Cal. 69.

———**S. 147-A**—*Compromise decree contravening S. 29—If nullity.*

A compromise decree which is in contravention of S. 29 of the Bengal Tenancy Act is not a nullity, and must still be given effect to unless it could be displaced on any other ground. (*Biswas J.*) NIBARANCHANDRA NANDI *v.* AHAMADAR RAHMAN. 50 C.W.N. 166.

———**S. 148**—*Suit for rent—Whole holding not covered by plaint—Plaintiff, if entitled to decree for rent or money decree.*

Unless the holding is fully and properly included so as to make the whole holding covered by the plaint within the provisions of S. 148, B. T. Act, the plaintiff is not entitled to a decree for rent at all. The reasons for this are apparent from the whole scheme of the Act, since the rent decree involves a prospective liability for the whole holding to be sold. If a decree in the form of a rent decree were passed for lands less than the holding, obvious difficulties will arise in the administration of the Act. These considerations do not, however, prevent the plaintiff from being entitled to have a money decree for the amount of the rent claimed as arrears of rent in respect of the holding. (*Ormond, J.*) MANIRUDDIN GACHU *v.* BHUPENDRA NARAYAN ROY. 2 D.R. 291.

———**S. 148 (o)**—*Applicability—Condition—Landlord granting lease for term—Subsequent suit for arrears of rent due before lease—Decree—Assignment—Execution by assignee—Bar of.*

To bring a case within the mischief of S. 148 (*o*) of the Bengal Tenancy Act, it is necessary that (1) the decree assigned must be one for arrears of rent obtained by a landlord, and (2) the assignee must not have the landlord interest vested in him at the date when he makes the application for execution. If these two elements are fulfilled, then the mischief of Cl. (*o*) of S. 148 comes into operation. Where a landlord parts with the landlord's interest by way of lease for a term and subsequently institutes a suit for recovery of arrears of rent in respect of the period prior to the lease against the tenant and obtains a decree, and assigns the decree to another, the assisgnee seeking to execute the decree is not hit by the bar under S. 148 (*o*), Bengal Tenancy Act. The decree is not a rent decree obtained by a landlord as contemplated by and within the meaning of S. 148 (*o*). (*Mukherjea and Gopendranath Das, JJ.*) BHUDAB CHANDRA *v.* BRAJENDRA KISHORE. I.L.R. (1949) 1 Cal. 109=3 D.L.R. (Cal.) 35=A.I.R. 1948 Cal. 320=53 C.W.N. 267.

———**S. 149 (3)**—*Suit under—Limitation.*

The period of three months provided in S. 149 (3) of the Bengal Tenancy Act is not intended to provide a special limitation for a suit contemplated by that sub-section. A period of three months is the period within which the plaintiff, if he wants the money to be detained till the decision of the suit, has to obain an order to that effect. It does not provide a special time limit for the suit to be brought which will be governed by the ordinary law of limitation. (*Ahmad, J.*) BIR BIKRAM KISHORE *v.* ABDUL KAMAL. A.I.R. 1949 Dacca 16.

———**Ss. 149 (3) and 153**—*Suit under S. 149 (3)—Nature of—Appeal—Second appeal—C. P. Code, S. 102.*

A suit under S. 149 (3), Bengal Tenancy Act, is really in the nature of a rent suit, and if its decision rests on a question of title, an appeal is not barred under S. 153 of the Act.

What is contemplated by S. 149 (3) is a regular suit and the final adjudication order in a suit ends in a decree and so, there is a right of appeal. Sub-S. (3) also provides for an order in the nature of an injunction restraining payment out of the money pending the suit. There is no provision for any appeal against this order. But where a question of title as between two rival landlords is decided and the suit ends in a decree, an appeal lies in such a case.

A suit contemplated by S. 149 also bears the character of a suit for a declaratory decree. The plaintiff sues for a declaration that he is entitled to the rent deposited in Court and claims the money as a consequential relief. A suit under that section is not cognisable by a Small Cause Court under Arts. (8) and (19), Sch. II, Provincial Small Cause Courts Act. S. 102, C. P. Code, is, therefore, no bar to a second appeal in a suit of this nature. (*Ahmad, J.*) BIR BIKRAM KISHORE *v.* ABDUL KAMAL. A.I.R. 1949 Dacca 16.

———**S. 153**—*Order dismissing suit by landlord for rent for non-joinder of other co-sharers—Appeal, if competent.*

An appeal is competent from an order dismissing a suit by a landlord for rent on the ground that there are other co-sharer landlords who have not been joined as parties. A co-sharer landlord's suit under S. 148-A of the Bengal Tenancy Act requires the plaintiff to join the other co-sharers as defendants. If that is not done, the suit will be a mere suit for recovery of money. Further the order dismissing the suit decides, by necessary implication, a question as to the amount of rent payable by the tenant to the landlord within the meaning of S. 153 of the Act. (*Biswas, J.*) Bama Charan Gain *v.* Jitendra Nath Chakravarty. 51 C.W.N. 657.

———**S. 153**—*Order setting aside sale on ground of fraud and irregularity in conduct of sale— Appeal.*

An order setting aside a sale on the ground of fraud and irregularity in the conduct and publication of the sale passed by an officer specially empowered by the High Court is not appealable if the amount claimed in the suit does not exceed Rs. 50. Such an order does not decide a question relating to title to land, or to some interest in land, as between parties having conflicting claims thereto. (*Harries, C.J.*) Ardhendu Sekhar Chatterjee *v.* Kachem Sheikh. A.I.R. 1948 Cal. 75.

———**S. 153**—*"Question of amount of rent annually payable by tenant"—Question as to amount payable in money in default of payment of rent in kind.*

A question as to the amount payable in money in default of the payment of rent in kind is "a question of the amount of rent annually payable by a tenant" within the meaning of S. 153 of the Bengal Tenancy Act. (*Chakravarti, J.*) Tarangini Mitra *v.* Abhilash. I.L.R. (1946) 1 Cal. 510=50 C.W.N. 473=82 C.L.J. 125.

———**Ss. 153 and 149 (3)**—Suit under S. 149 (3)—Nature of—Appeal—Second appeal. *See* Bengal Tenancy Act, Ss. 149 (3) and 153. A.I.R. 1949 Dacca 16.

———**S. 153 (b)**—*Amount claimed in the suit—Meaning of—Decree passed under S. 144.*

The phrase "amount claimed in the suit" in S. 153 (*b*) of the Bengal Tenancy Act, must be read, in the case of a decree passed under S. 144, as meaning the amount claimed in respect of the tenancy for or in relation to which the decree in question was passed. The scheme of S. 144 appears to be that the Legislature only enables the landlord to combine a number of claims in one suit instead of leaving him to the ordinary procedure bringing separate suits; but by such provision the claims in respect of the different tenancies are not unified or consolidated and made one single claim. (*Chakravartti and Ellis, JJ.*) Kamini Mohan *v.* Mohan Lal. I.L.R. (1948) 1 Cal. 296=A.I.R. 1947 Cal. 422=52 C.W.N. 311.

———**Ss. 153, Explanation and 174 (3)**—Judgment-debtor making payment on decree-holder's undertaking that execution case would be dismissed—Sale held in execution—Application by judgment-debtor to set aside sale—Right of auction-purchaser to intervene—Appeal. *See* Bengal Tenancy Act, Ss. 174 (3) and 153, Expl. 50 C.W.N. 114.

———**S. 155**—*Notice not specifying amount of compensation—Validity.*

A notice served under S. 155 of the Bengal Tenancy Act specifying the breach and demanding payment of reasonable compensation without mentioning the amount of compensation, is quite sufficient. Even when a suit for ejectment is brought under S. 155, notice does not conclude the matter. It is not as though the notice is to be such that the figure stated therein is the final figure and the tenant must comply with the notice by paying the figure stated therein and that otherwise he will be evicted. The matter of what is really reasonable compensation if a suit is brought is left entirely to the Court and even then the tenant still has the option of paying that amount and avoiding ejectment. All that S. 155 requires, therefore, is a notice and an opportunity given to the tenant to settle the matter, as it were, out of Court. 29 C.L.J. 40, Expl. (*Roxburgh, J.*) Molla Abdul Aziz *v.* Shaikh Abdul Sabur. 54 C.W.N. 958.

———**S. 155**—*Parties—Ejectment suit on ground of misuse of land—Sub-tenant—If necessary party.*

In a suit under S. 155 of the Bengal Tenancy Act, the sub-tenants are not necessary parties. Cl. (*a*) of the S. 155 (1) is wide enough to cover a case where the tenant, by sub-letting causes unfitness to occur through the agency of the sub-tenants. Where the sub-letting is done without the permission of the landlord, the sub-tenants are trespassers and need not be impleaded, as a decree obtained against the lessee will bind the sub-tenants. (*Hindley, J.*) Asrabuddin *v.* Abul Fazal. 225 I.C. 337=A.I.R. 1947 Cal. 139.

———**S. 155**—*Suit for ejectment relating to damage not specified in notice—If can be entertained.*

A suit for ejectment in so far as it relates to any damage not referred to in the notice served under S. 155, Bengal Tenancy Act, cannot be entertained. (*Roxburgh, J.*) Molla Abdul Aziz *v.* Shaikh Abdul Sabur. 54 C.W.N. 958.

———**S. 158 (d)**—*Burden of proof—Purchaser of entire estate at revenue sale—Suit for assessment of rent—Proof of lands being mal lands—Onus.*

In a suit for assessment of rent by a purchaser claiming to be a purchaser of an entire estate at a revenue sale, the burden is on the plaintiff in the first instance to prove that the lands were mal lands of the estate; *i.e.*, that they were assessed to revenue at the time of the conclusion of the Permanent Settlement. (*Mitter, Ag. C.J. and Akram, J.*) Kamala Ranjan Roy *v.* Irkfan Sheikh. 230 I.C. 363=1947 Cal. (Rul.) 222=A.I.R. 1948 Cal. 14.

———**S. 159**—*Decree for arrears of rent—Sale in execution—When has effect of rent sale.*

In order that a sale in execution of a decree for arrears of rent may have the effect given to a rent sale under S. 159 of the Bengal Tenancy Act, it must be established that the decree for arrears of rent had the effect of a rent decree within the meaning of S. 65 of that Act, and, in the second place, the procedure in execution should have conformed to the provisions of Ch. XIV of that

Act, *viz.*, the charge created by S. 65 should have been enforced by a sale of the tenure or holding free from encumbrances. Where execution of a decree for arrears of rent passed on a compromise was levied against the tenure in arrears and the procedure that was followed was intended to put up to sale the entire tenure in arrears, a mere statement of the decree-holder in the compromise petition that certain interests were not incumbrances does not render the sale other than a rent sale. (*Gopendranath Das, J.*) Rabindra Mandal *v.* C. K. Nag & Sons, Ltd. A.I.R. 1948 Cal. 182.

———**S. 160 (c)**—*Scope—"Dwelling houses"—Structure, if must be permanent.*

The benefit of S. 160 (*c*) of the Bengal Tenancy Act cannot be extended to cover those lands on which no permanent works have been constructed. The expression "dwelling houses" does not merely mean a dwelling house in which the tenant has some permanent sort of residence, but refers to a structure which is permanent in character. (*Edgley and Latifur Rahman, JJ.*) Hem Prova Debi *v.* Sarat Chandra Basu. 51 C.W.N. 134=A.I.R. 1947 Cal. 269.

———**S. 161**—Niskar *tenancy created by tenure-holder—If an incumbrance.*

A *niskar* tenancy created by a tenure-holder is an incumbrance within the meaning of S. 161 of the Bengal Tenancy Act. Therefore, if it is not annulled by the rent sale purchaser, it subsists and is binding upon him in the same way as it would have been binding upon the tenure-holder who created it. (*Mukherjea and Sharpe, JJ.*) Amiya Pal *v.* Kartick Chandra. 226 I.C. 107=1946 Cal. (Rul.) 342=50 C.W.N. 519=A.I.R. 1946 Cal. 338=82 C.L.J. 149.

———**S. 163 (3) (c)**—*Registered cover returned with endorsement 'left'—Sufficiency of service.*

Under S. 163 (3) (*c*) of the Bengal Tenancy Act, no hard and fast rule can be laid down as to when the Court could accept service as sufficient, where the registered cover is returned unserved. Each case is to be decided on its own particular facts and circumstances. Where the judgment debtor comes with a definite case that he was not residing at the village to which the registered letter was directed, and he fails to make out that case, it will not do for him to rely on a mere endorsement "left" appearing on the registered cover, assuming it had been made by the postal peon who had taken out the letter for delivery, for the purpose of repelling the statutory inference of proper service. (*Biswas, J.*) Sita Nath Mondal *v.* Soleman Molla. 51 C.W.N. 650.

———**S. 164-A (1) (b) and (3)**—*"Purchaser"—Decree-holder purchaser at rent sale—Liability to deposit rent for period after suit resulting in rent sale—Second suit and decree for subsequent rent—If takes away liability to deposit such rent.*

The word "purchaser" in S. 168-A (1) (*b*) and (3) is not limited to stranger purchasers, but includes also a decree-holder purchaser. A decree-holder purchaser is therefore bound to deposit under S. 168-A (3) the rent accrued due for the period subsequent to the institution of the

rent suit in pursuance of the decree in which he has become the purchaser. He can, however, certify payment of the amount in lieu of deposit. His liability to deposit or to certify under S. 168-A (1) of the Act is not affected by the fact that he has already got a decree for rent for the subsequent period in a suit instituted after the first suit but before the rent sale. The only difference is that in such a case he would have to pay not the entire decretal dues but the amount actually payable as rent. (*Mukherjea and Sharpe, JJ.*) Amano Barmanya *v.* Adhar Chanra Mondal. I.L.R. (1946) 1 Cal. 664=224 I.C. 432=A.I.R. 1947 Cal. 330=1946 Cal. (Rul.) 257=50 C.W.N. 803.

———**S. 167**—*Notice of annulment—Court empowered to issue—Notice issued by Court to whose jurisdiction holding in question is assigned—Validity.*

S. 167 of the Bengal Tenancy Act requires the notice of annulment of encumbrance to be issued by the Court which has passed the rent decree. Where such Court is in existence, a notice issued by another Court to whose jurisdiction the place within which the holding in question is situated is assigned by reason of the assignment of business made by the District Judge under S. 13 (2) of the Bengal Assam and Agra Civil Courts Act, is an ineffective notice. (*Mitter and Chunder, JJ.*) Ram Kumar Moskara *v.* Gopi Krishna. 53 C.W.N. 284.

———**S. 168-A**—*Applicability—Composite decree directing execution of lease and also making decree for rent on basis of that lease.*

If the decree be a composite decree, directing the execution of an indenture, of patni lease and making a decree for a sum of money as rent on the basis that the lease will be executed, the decree-holder cannot separate the two so as to remove from the amount decreed its character of rent and then execute the decree against other properties of the judgment-debtor on the basis that it is not rent. S. 168-A of the Bengal Tenancy Act applies to such a decree. (*Chakravartti and Ellis, JJ.*) Rohini Kumar Roy *v.* Udaychand Mahatab. A.I.R. 1947 Cal. 437=82 C.L.J. 188.

———**S. 168-A**—Applicability—Decree for cesses—Cesses payable by rent-free holder—Bengal Cess Act, Ch. IV. [*See* Q.D. 1941-1945, Vol. I, Col. 358.] Sree Sree Iswar Jaychandee *v.* Manmatha Nath Das. I.L.R. (1946) 1 Cal. 181=223 I.C. 351=1946 Cal. (Rul.) 163=A.I.R. 1946 Cal. 88.

———**S. 168-A**—Applicability—Decree for sum of money obtained by Zemindar against darpatnidar girbidar—If one for rent—Bengal Patni Regulation, Cl. 13. [*See* Q.D. 1941-1945, Vol. I, Col. 358.] Uday Chand Mahatab *v* Bibhuti Bhusan Das. 222 I.C. 465=1946 Cal. (Rul.) 106=A.I.R. 1946 Cal. 35.

———**S. 168-A (1) (a)**—*Applicability—Decree with declaration of charge on patni interest—Execution by sale without attachment—Permissibility—"Attachment and sale"—Interpretation.*

It is significant that in S. 168-A, Bengal Tenancy Act, the relevant words are "attachment and sale" and not "attachment or sale". The words have been taken verbatim from S. 51 (*b*), C. P. Code, the latter part of the clause, namely, "by sale without attachment of any property" being not reproduced in S. 168-A, Bengal Tenancy Act. The omission of those words "by sale without attachment of any property"—is significant and it implies that it is only that mode of execution, namely, by attachment and sale, which is affected by the section. That being so, the section is no bar to the execution of a decree with declaration of a charge on the patni interest as no attachment would be necessary in execution of that decree. 50 C.W.N. 655, ref. to. 48 C.W.N. 344, expl. (*Lahiri and Guha, JJ.*) Naresh Chandra Roy *v.* Dhirendra Nath Dey.. A.I.R. 1950 Cal. 323=5 D.L.R. (Cal.) 103=54 C.W.N. 601.

———**S. 168-A**—Applicability—Patni tenures. [*See* Q.D. 1941-1945, Vol. I, Col. 358.] Udoy Chand Mahatab *v.* Ajit Kumar Roy. A.I. R. 1946 Cal. 48.

———**S. 168-A**—*Applicability—Suit for assessment of fair rent—Decree passed for use and occupation for period anterior to suit—If one for arrears of rent.*

Where in a suit for assessment of fair rent on the footing that the relationship of landlord and tenant exists between the parties, a decree is passed in favour of the plaintiff by which a certain sum is awarded to him for use and occupation of the land for a certain period anterior to the institution of the suit, the decree is one for arrears of rent within the meaning of S. 168-A of the Bengal Tenancy Act, and the plaintiff cannot, therefore, bring to sale property other than the holding in execution of the decree. (*Henderson, J.*) Girindra Nath Bose *v.* Surendra Nath Biswas. 223 I.C. 296=1946 Cal. (Rul.) 160=A.I.R. 1946 Cal. 318.

———**S. 168-A**—*Costs decreed in rent suit—Decree-holder, if may take out execution.*

Under S. 168-A, Bengal Tenancy Act, the purchaser is to deposit the rent, cess and interest decreed in the suit but he is not to deposit the costs awarded by the Court; the same has to be paid by the judgment-debtor tenant and for it the decree-holder may take out execution. (*R. P. Mookerjee and K. C. Chunder, JJ.*) Naresh Chandra Bose *v.* Bhupendra Narayan. 54 C. W.N. 243=A.I.R. 1950 Cal. 15=85 C.L.J. 10.

———**S. 168-A**—*"Decree for arrears of rent"——Decree two-thirds for rent and one-third for amount not constituting rent.*

A decree which is two-thirds for rent and one-third for amounts which do not constitute rent cannot be regarded as a decree for arrears of rent within the meaning of S. 168-A of the Bengal Tenancy Act but is a composite decree. The principle ***"de minimis non curat lex"*** cannot be invoked in such a case. (*Harries, C. J. and Sen, J.*) Pramatha Nath *v.* Dwarka Nath. I.L.R. (1949) 1 Cal. 158=A.I.R. 1948 Cal. 348.

———**S. 168-A**—*Decree for sale of other properties of judgment-debtor charged with payment of rent—Legality.*

S. 168-A, Bengal Tenancy Act, undoubtedly prohibits the execution of a rent-decree by attachment and sale of any property of the judgment-debtor other than the tenure or holding in arrears. But it does not bar any other form of execution that is permissible under S. 51, C. P. Code. A decree for the sale of other properties charged as collateral security for payment of the rent, which would not involve any attachment, is not barred under S. 168-A, Bengal Tenancy Act. I.L.R. (1944) 2 Cal. 340 and I.L.R. (1947) 1 Cal. 327, rel. on. (*Mukherjea and Chunder, JJ.*) Shyam Rangini Ray *v.* Ajindra Nath Tagore. I.L. R. (1949) 1 Cal. 165.

———**S. 168-A**—*Execution against part of tenure—Permissibility.*

Under S. 168-A of the Bengal Tenancy Act, a decree-holder need not bring the entire tenure to sale but can limit execution to a part of the tenure, S. 168-A (1) means that the decree-holder cannot proceed against any other property of the judgment-debtor or judgment-debtors, but he must confine himself only to the tenure or holding. That is the limit. Beyond that he cannot go. But within the limit of the tenure or holding, there is nothing to prevent him from further limiting the sale to the interest or interests of the judgment-debtor or judgment-debtors against whom he is proceeding, as this will be for the protection of tenants and will save tenants from harassment. [48 C.W.N. 172, appr.] (*Blank and K. C. Chunder, JJ.*) Ramdas Mukhopadhyay *v.* Uday Chand Mahatab. A. I.R. 1949 Cal. 228.

———**S. 168-A**—*Execution by arrest and detention of judgment-debtor—If barred.*

S. 168-A of the Bengal Tenancy Act does not bar any other form of execution available to the decree-holder, under the ordinary law, by which he can attempt to realise the decretal dues without attaching and putting up to sale any property of the judgment-debtor, other than the tenure or holding in arrears. It is, therefore, open to the landlord decree-holder to execute the decree by way of arrest and detention in prison of the judgment-debtor. (*Mukherjea and Sharpe, JJ.*) Monohar Lal *v.* Debendra Nath Das. I.L.R. (1946) 1 Cal. 145=50 C. W.N. 181.

———**S. 168-A**—*Execution of rent decree by appointment of Receiver—Permissibility—Defaulting tenure not sold—C. P. Code S.* 51.

S. 168-A of the Bengal Tenancy Act does not forbid the execution of a rent decree in any of the modes of execution mentioned in S. 51, C. P. Code, other than the attachment and sale of the judgment-debtor's properties, as, for example, execution by an appointment of Receiver, although the defaulting tenure is unsold and can be sold in execution of the decree. It is not always necessary that legal execution should be exhausted before an appointment of a Receiver by way of equitable execution can be obtained.

(Mukherjea and Das, JJ.) Midnapore Zemindary Co., Ltd. *v.* Kumar Chandra Sing. 52 C.W.N. 736=A.I.R. 1949 Cal. 63.

———S. 168-A—*Execution of rent decree by arrest of judgment-debtor—Permissibility—Limits—C. P. Code, S. 51.*

S. 168-A of the Bengal Tenancy Act does not debar a landlord decree-holder from invoking the modes of execution provided for in Cls. (*c*) and (*d*) of S. 51, C. P. Code, for the purpose of realising his decree for rent. His right to arrest his judgment-debtor must, however, be regulated or limited by what is contained in the proviso to S. 51. If it is not the decree-holder's case that the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court, or that he has, after the institution of the rent suit, dishonestly transferred, concealed or removed any part of his property or has committed any other act of bad faith in relation to his property, he must satisfy the Court that the judgment-debtor has had since the date of the decree sought to be executed by arrest or has now the means to satisfy the said decree or to pay a substantial part thereof. In calculating his means the value of his properties other than the tenure in default cannot be taken into account in a case which does not come within the proviso to S. 168-A (1) of the Bengal Tenancy Act. *(Mitter and Clough, JJ.)* Pratul Chandra Ghosh *v.* Naresh Chandra Bose. I.L.R. (1946) 1 Cal. 459=223 I.C. 320=1946 Cal. (Rul.) 161 =50 C.W.N. 655=A.I.R. 1946 Cal. 498=81 C.L.J. 302.

———S. 168-A—If in conflict with Bengal Patni Regulation, S. 17, proviso. [*See* Q.D. 1941-1945, Vol. I, Col. 361.] Uday Chand Mahatab *v.* Ajit Kumar Roy. A.I.R. 1946 Cal. 48.

———S. 168-A—*Landlord obtaining several rent decrees in respect of consecutive periods—Later decree put into execution first—Holding purchased by landlord himself—Subsequent execution of earlier decrees against other properties of tenant—Permissibility.*

If a landlord obtains several rent decrees in respect of consecutive periods and puts into execution the later decree first and purchases the holding himself, the liability of the tenant under the earlier rent decrees is not extinguished and the landlord is not debarred under S. 168-A of the Bengal Tenancy Act from executing those decrees against other properties of the tenant. *(Chakravartti, J.)* Abdul Mannan *v.* Madhabi Ranjan Chakraborty. I.L.R. (1949) 1 Cal. 62=52 C.W.N. 627=A.I.R. 1949 Cal. 93.

———S. 168-A—*Landlord obtaining two rent decrees in respect of two consecutive periods—Second decree put into execution first—Holding purchased by landlord himself—Subsequent execution of first decree against other properties of tenant—Permissibility.*

If a landlord obtains two rent decrees in respect of two consecutive periods and puts into execution the second decree first and purchases the holding himself, the liability of the tenant under the first rent decree is not extinguished, and the landlord is not debarred under S. 168-A of the Bengal Tenancy Act from executing that decree against other properties of the tenant. *(Chakravartti, J.)* Satish Chandra Chatterjee *v.* Atul Chandra Chakravarti. 52 C.W.N. 625=A.I.R. 1948 Cal. 333.

———S. 168-A—*Landlord purchasing patni holding in execution of rent decree—If can execute that decree for balance, against other properties of judgment-debtor.*

A landlord who has in execution of his rent decree purchased a patni holding, cannot execute for the balance of the decree against other properties of the judgment-debtor. 46 C.W.N. 684, foll. *(Harries, C.J. and Chakravartti, J.)* Radhaballav Jew Thakur *v.* Dharanidhar Banerjee. A.I.R. 1949 Cal. 303.

———S. 168-A—*Mandatory nature of—Duty of Court.*

S. 168-A of the Bengal Tenancy Act is a mandatory provision and imposes upon the Court a duty which has to be discharged whenever a rent sale takes place after the section has come into force. *(Mukherjea and Sharpe, JJ.)* Amano Baramanya *v.* Adhar Chandra Mondal. I.L.R. (1946) 1 Cal. 664=224 I.C. 432=1936 Cal. (Rul.) 257=A.I.R. 1947 Cal. 330=50 C.W.N. 803.

———Ss. 168-A and 3 (13)—*"Rent"—Amount payable by lessee direct to superior landlord and for Government revenue in addition to rent payable to lessor.*

Where under a lease the lessee has to pay a fixed annual rent to the lessor and also pay direct into the Treasury the Government revenue and to the superior landlord the rent payable to him by the lessor, and if default is made in paying rent to the lessor the latter would be entitled to get interest at 12 per cent. per annum but if default is made in payment of Government revenue or in the payment of rent payable to the superior landlord and if the lessor paid these dues then the lessor would be entitled to be repaid with interest at the rate of 24 per cent. per annum, and further default in payment of revenue and rent to the superior landlord of one instalment rendered the lease liable to be forfeited whereas non-payment of rent would not render the lease liable to be forfeited unless three years' rent was not paid.

Held, that the amounts payable by the lessee to the superior landlord and for Government revenue are not rent within the meaning of S. 168-A of the Bengal Tenancy Act. *(Harries, C.J. and Sen, J.)* Pramatha Nath *v.* Dwarka Nath. I.L.R. (1949) 1 Cal. 158=A.I.R. 1948 Cal. 348.

———S. 168-A—Scope—Section prevents execution and not passing of decree. [*See* Q.D. 1941-1945, Vol. I, Col. 361.] Usha Prova De *v.* Sachindra Kumar Basu. I.L.R. (1945) 2 Cal. 201.

———S. 168-A—*Scope—Successive execution proceedings in respect of different parts of the holding—If barred.*

S. 168-A, Bengal Tenancy Act, is not a bar to execution proceedings in which a part only of the holding is brought to sale first, and a later proceeding being to sell the remaining part of the holding, when the first sale does not fully satisfy the decree. (*Edgley and Clough, JJ.*) Krishna Chandra Dutta *v.* Radha Kanta Saha. I.L.R. (1947) 1 Cal. 486=228 I.C. 612=1947 Cal. (Rul.) 112=A.I.R. 1948 Cal. 111.

———**S. 168-A**—Surplus sale proceeds of patni sale—If can be attached in execution of decree for previous arrears of rent. [*See* Q.D. 1941-1945, Vol. I, Col. 362.] Manmatha Kumar Basu *v.* Priya Kumar Acharjya. I.L.R. (1945) 2 Cal. 662=A.I.R. 1949 Cal. 580.

———**S. 168-A**—Validity—Repugnancy to S. 51, C. P. Code—Government of India Act, S. 107 (1). [*See* Q.D. 1941-1945, Vol. I, Col. 362.] Udoy Chand Mahatab *v.* Ajit Kumar Roy. A.I.R. 1946 Cal. 48.

———**S. 168-A and Government of India Act (1935), Sch. VII, List II, Entries 2 and 21 and List III, Entry 4.**—*S. 168-A of the Bengal Tenancy Act, if* ultra vires *the Province of Bengal—S. 168-A of the Bengal Tenancy Act—If covered by Entries Nos. 2 and 21 of List II—Section if in conflict with Entry No. 4 of List III—Extent of applicability of the C. P. Code to decrees under Bengal Tenancy Act—Decrees to which S. 168-A Bengal Tenancy Act applies—Applicability of the Bengal Tenancy Act after the termination of the relationship of landlord and tenant.*

The words of Entry No. 21 of List II of Sch. VII of the Government of India Act clearly cover legislation in respect of rights in or over land and include the relation of landlord and tenant and the collection of rents. S. 168-A of the Bengal Tenancy Act is clearly a piece of legislation in respect of the right of a landlord and tenant with regard to rent which had accrued due in respect of the property let to the tenant and is therefore clearly covered by the words of Entry No. 21, Further, as the collection of rents is covered by Entry No. 21, the jurisdiction and powers of the Courts in respect of the collection of rents is covered by Entry No. 2 in the same list. As S. 168-A of the Bengal Tenancy Act clearly deals with the the powers and jurisdiction of the Court to get money paid to a decree-holder in respect of his decree for arrears of rents of agricultural lands, it is also covered by Entry No. 2 in List II.

It cannot be said that S. 168-A of the Bengal Tenancy Act is in conflict with Entry No. 4 of List III in that it restricted or affected the right of the decree-holder to have his decree executed as provided in S. 51 of the C.P. Code. The C.P. Code is made applicable to decrees passed under the Bengal Tenancy Act only because of S. 143 of that Act; that section while making provision for its application also provides in sub-section (2) that the C.P. Code shall apply only subject to the provisions of the Bengal Tenancy Act and S. 168-A being a valid piece of legislation, the C. P. Code can apply only subject to its provisions.

S. 168-A of the Bengal Tenancy Act would be applicable when a decree is for arrears of rent, whether having the effect of a rent decree or money decree.

The contention that no provision of the Bengal Tenancy Act can apply after the relation of landlord and tenant had ceased to exist is unsustainable. (*Spens, C.J., Mahomed Zafrulla Khan and Kania, JJ.*) Uday Chand Mahtab v. Samarendra Nath Mitra. (1947) F.L.J. 1=I.L.R. (1948) 1 Cal. 1=229 I.C. 68=51 C.W.N. (F. R.) 9=1947 M.W.N. 79=82 C.L.J. 1=I.L.R. (1947) Kar. (F.C.) 31=13 B.R. 318=(1947) F. C. (Rul.) 19=A.I.R. 1947 F.C. 19=(1947) 1 M.L.J. 258 (F.C.).

———**S. 168-A (1) (a)**—*Applicability—Decree with declaration of charge on putni interest—Execution by sale without attachment—Permissibility—"Attachment and sale"—Interpretation.*

It is significant that in S. 168-A, Bengal Tenancy Act, the relevant words are "attachment and sale" and not "attachment or sale". The words have been taken verbatim from S. 51 (*b*), C. P. Code, the latter part of the clause, namely, "by sale without attachment of any property" being not reproduced in S. 168-A, Bengal Tenancy Act. The omission of those words "by sale without attachment of any property"—is significant and it implies that it is only that mode of execution, namely, by attachment *and* sale, which is affected by the section. That being so, the section is no bar to the execution of a decree with declaration of a charge on the patni interest as no attachment would be necessary in execution of that decree. 50 C.W.N. 655, ref. to. 48 C.W.N. 344, expl. (*Lahiri and Guha, JJ.*) Naresh Chandra Roy *v.* Dhirendra Nath Dey. 54 C.W.N. 601=A.I.R. 1950 Cal. 323=5 D.L.R. (Cal.) 103.

———**S. 168-A (1) (a)**—Applicability—Tenancy expiring before section coming into force. [*See* Q.D. 1941-1945, Vol. I, Col. 364.] Udaychand Mahatab *v.* Mahima Ranjan Roy. I.L.R. (1945) 2 Cal. 550.

———**S. 168-A (1) (a)**—*Applicability—Tenancy expiring and becoming extinguished before coming into operation of section.*

In order to attract the application of the proviso to S. 168-A (1) (*a*), which was introduced into the Bengal Tenancy Act and came into force on 9th January, 1941, it is not necessary that the tenancy in question should have expired after the section had come into force. There is no justification for the view that the section does not apply to a case where the tenancy had already expired and had been extinguished before the section came into force. (*Chakravartti, J.*) Brojadulal Dhar *v.* Khoiruma Khatun Chowdhuranil 226 I.C. 604=1946 Cal. (Rul.) 403=A.I.R. 1947 Cal. 248.

———**S. 168-A (1) (a), Proviso**—Applicability—'Expires'—'Application'—Meaning of—Rent decree obtained in 1930—Tenure annulled in 1935 by purchaser of superior interest in revenue sale—Execution case filed between 1931 and 1939—Proving infructuous—Application for execution against judgment-debtor's other properties made in 1942—If maintainable. [*See* Q.D. 1941-1945, Vol. I, Col. 364.] Amrita Lal Chatterji *v.* Manindra Nath. I.L.R. (1945) 2 Cal. 482.

———S. 168-A (1) (a) Proviso—*Applicability—Purchase of holding by landlord at patni sale and expiry of tenancy.*

The proviso to S. 168-A (1) (*a*) of the Bengal Tenancy Act also applies to a case where the tenancy had expired by reason of a purchase of the holding by the landlord himself not in execution of the same decree, but at a *patni* sale or otherwise, the landlord in such a case would be entitled to the benefit of the proviso to S. 168-A (1) (*a*). (*Chakravartti, J.*) Brojadulal Dhar *v.* Khoiruma Khatun Chowdhurani. 226 I.C. 604=1946 Cal. (Rul.) 403=A.I.R. 1947 Cal. 248.

———S. 168-A (1) (a), Proviso—"Application"—Meaning of—If refers to first or original application. [*See* Q.D. 1941-1945, Vol. I, Col. 365.] Uday Chand Mahatab *v.* Mahima Ranjan Roy. I.L.R. (1945) 2 Cal. 550=222 I.C. 402=1946 Cal. (Rul.) 98=80 C.L.J. 244=A.I.R. 1946 Cal. 6.

———S. 168-A (1) (a), Proviso—"Application"—Meaning of—Tenancy expiring after section coming into force by sale in execution of another decree—Decree-holder applying for execution by sale of other properties before section coming into force—If debarred from benefit of proviso. [*See* Q. D. 1941-1945, Vol. I, Col. 365.] Lakshan Chandra Roy *v.* Birendra Kumar. I.L.R. (1945) 1 Cal. 556=221 I.C. 490=1946 Cal. (Rul.) 40.

———S. 168-A (1) and (2)—"*Attachment*"—*If includes order of attachment—Attachment and sale of property other than tenure in default after section coming into force—Order of attachment issued before—Legality of sale.*

The word "attachment" in sub-Ss. (1) and (2) of S. 168-A of the Bengal Tenancy Act has been used in the same sense, and it means actual attachment, as distinguished from the order of attachment. Accordingly a sale of property other than the tenure or holding in default by the executing Court is a nullity, where the actual attachment and sale took place after S. 168-A of the Bengal Tenancy Act had come into force, although the order of attachment had issued before. (*Mitter and Chunder, JJ.*) Shiba Bala Dasi *v.* Kanai Lal Mandal. I.L.R. (1949) 1 Cal. 267.

———S. 168-A (1), Proviso—*Landlord purchasing patni holding in execution of his rent-decree—If can execute subsequent decree for rent against other properties of judgment-debtor.*

A landlord who has purchased a patni holding in execution of his rent decree, can execute a decree for rent which accrued subsequently to the decree which let to the sale of the patni, against other properties of the judgment-debtor. 49 C.W.N. 620, foll. (*Harries C.J. and Chakravartti, J.*) Radhaballav Jiew Thakur *v.* Dharanidhar Banerjee. A.I.R. 1949 Cal. 303.

———S. 168-A (1) (a), Proviso—*Purchase by decree-holder at execution sale—Merger—Extinction of tenure.*

The purchase of the tenure by the decree-holder at the execution sale has the effect of extinguishing the tenure by merger, and the case comes within the proviso to S. 168-A (1) (*a*) of the Bengal Tenancy Act. [46 C.W.N. 684, 48 C.W.N. 220 and 48 C.W.N. 837, ref. to.] (*Mitter and Sharpe, JJ.*) Tarapada Roy *v.* Amano Barmonya. 83 C.L.J. 206.

———S. 168-A (1) (a), proviso—*Purchase of holding by co-sharer landlord in execution of rent decree—Term of tenancy, if expires.*

Where a co-sharer landlord obtains a rent-decree for his share of the rent in suit framed in accordance with the provisions of S. 148-A of the Bengal Tenancy Act and purchases the holding in execution, and the case comes within S. 22 (2) of the Act, the term of the tenancy expires on such purchase within the meaning of the proviso to S. 168-A (1) (*a*) of the Act. Another co-sharer landlord who has obtained a decree for his share of the rent for the period prior to such purchase is, therefore, entitled to attach and sell other properties of the judgment-debtor. (*Henderson, J.*) Harendranath *v.* Sakiraddi Gazi. I.L.R. (1946) 1 Cal. 43=50 C.W.N. 85=A.I.R. 1946 Cal. 234.

———S. 168-A (1) (b)—*Arrears of rent—If include arrears of cesses.*

Under S. 168-A (1) (*b*) of the Bengal Tenancy Act, the arrears of rent include arrears of cesses. (*Mitter and Clough, JJ.*) Bankim Chandra *v.* Gour Mohan. I.L.R. (1946) 1 Cal. 392=50 C.W.N. 261.

———S. 168-A (1) (b)—"*Decree-holder*"—*Meaning of—Rent decree under S. 148-A—Co-sharer landlord auction-purchaser—Liability to pay rent to other co-sharers.*

It is a general rule of construction that the same meaning should be given to the same word used in the different parts of the same statute, unless the context implies otherwise. As there is nothing contrary in the context, the phrase "decree-holder" in S. 168-A (1) (*b*), Bengal Tenancy Act, means the person or persons in whose favour the decree for rent had been passed and not the decree-holder who had applied for execution and at whose instance the tenure or holding had been sold.

Where therefore a rent decree had been passed in favour of several co-sharer landlords in terms of S. 148-A of the Bengal Tenancy Act and one of them executes the decree for his share of the rent and purchases the holding at the Court sale, the latter is liable under S. 168-A (1) (*b*) of the Act to pay the rent of the holding due to the other co-sharer landlords from the date of the institution of the rent suit till the date of the confirmation of the sale. (*Mitter and Akram, JJ.*) Purna Sashi Chaudhurani *v.* Narendra Kishore Ray. I.L.R. (1945) 1 Cal. 226.

———S. 168-A (1) (b)—*Deposit of arrears of rent due from date of suit up to date of confirmation of sale—Duty of auction-purchaser—Landlord obtaining decree against previous tenant for such arrears—Effect of.*

Under S. 168-A (1) (*b*) of the Bengal Tenancy Act, the auction-purchaser is bound to pay in Court as a condition to his sale being confirmed the arrears of rent which would include arrears of cesses for the period commencing with the date of the institution of the suit up to the confirmation of the sale. The fact that the landlord has already obtained decrees for arrears of rent and cesses for that period against the defaulting tenants is not material. Of course if the landlord has realised any amount under those decrees, he cannot claim the same against the auction-purchaser, for he cannot have the amount twice over. (*Mitter and Clough, JJ.*) Bankim Chandra *v.* Gour Mohan. I.L.R. (1946) 1 Cal. 392=50 C.W.N. 261.

——**S. 168-A (1) (b)**—*Failure of purchaser to pay up arrears of rent—Penalty—C. P. Code, O. 21, R.* 71.

The penalty for the failure of the purchaser to pay up the arrears of rent due to the decree-holder as required by S. 168-A (1) (*b*) of the Bengal Tenancy Act is contained in sub-S. (3) of that section, under which the sale should not be confirmed. The purchaser, merely on account of failure to make the deposit referred to in sub-S. (1) (*b*), is not liable to any further penalty such as is contemplated by O. 21, R. 71, C.P. Code. The default which the Legislature had in view under this rule was failure to make a deposit of the purchase money at the proper time under O. 21, Rr. 84 and 85. (*Edgely, J.*) Indra Narayan Kundu *v.* Nani Gopal Banerjee. 223 I.C. 117=1946 Cal. (Rul.) 150=50 C.W.N. 691=A.I.R. 1946 Cal. 426.

——**S. 168-A (1) (b)**—*Order allowing application for refund of deposit—Appeal—Revision..*

An application made by a third party auction-purchaser for a refund of a certain sum of money deposited under S. 168-A (1) (*b*) of the Bengal Tenancy Act has not the remotest connection with the execution, satisfaction or discharge of the decree which is being executed; nor is the auction-purchaser in any sense the representative of either of the decree-holder, or the judgment-debtor. An order allowing such an application is, therefore, not appealable. But the High Court can be moved in revision. (*Biswas and Chakravartti, JJ.*) Pannag Bhusan Deb Roy *v.* Saroj Bashini Devi. 51 C.W.N. 286.

——**S. 168-A (1) (b)**—*"Purchaser"—If includes decree-holder purchaser.*

The word "purchaser" in S. 168-A (1) (*b*) of the Bengal Tenancy Act includes the decree-holder purchaser. [48 C.W.N. 210, 48 C.W.N. 220 and 50 C.W.N. 803, foll., 49 C.W.N. 552 and 52 C.W.N. 627, ref. to.] (*Akram, C.J. and Shahabuddin, J.*) Srish Chandra Nandi *v.* Jagadish Lahiri. 1 D.R. 100.

——**S. 168-A (1) (b)**—*"Purchaser"—If includes decree-holder purchaser—Sale confirmed without decree-holder purchaser depositing subsequent arrears of rent—Adjustment of equities between parties.*

In S. 168-A (1) (*b*), Bengal Tenancy Act, a "purchaser" includes a decree-holder purchaser. A decree-holder purchaser has therefore to deposit the amount by which the bid offered may fall short of the decretal amount as also the costs of execution and the arrears of rent which have accrued due between the institution of the suit and the confirmation of the sale. The payment to be by deposit of money in Court in one capacity, *i.e.*, as purchaser and subsequent drawing out of the same would be in another capacity as decree-holder landlord. 48 C.W.N. 210, approved.

When the decree-holder himself is the auction-purchaser the payment of the subsequent arrears of rent which had accrued due is to be made to himself and the said decree-holder is entitled to an order confirming sale by either paying himself or on declaring that the amount due is wiped out. When a decree-holder auction-purchaser applies for the confirmation of the sale without either depositing the amount of the subsequent arrears or discharging the said dues formally he must be taken to have given up his right to claim such arrears at any subsequent stage. He must be deemed to have done what he was required to do before he could get an order confirming the sale. Under the circumstances when the attention of the executing Court is drawn long after the confirmation of the sale to the fact that the sale had been confirmed without the decree-holder auction-purchaser fulfilling the conditions laid down under S. 168-A of the Bengal Tenancy Act, all that the executing Court need do is to record an order that the total amount of rent, cess and interest which had accrued due up to the date of confirmation is deemed to be satisfied by the decree-holder auction-purchaser having applied for such confirmation and the confirmation having been made. In determining the equities between the parties the Court cannot overlook the time factor. If an order confirming the sale is passed by the Court and is allowed to remain unaffected for a long time, various persons may become interested in the said property on the basis of the order for confirmation being a valid and binding order. If such an order is to be set aside after the lapse of a long period various complications are bound to arise. (*R. P. Mookerjee and K. C. Chunder, JJ.*) Naresh Chandra Bose *v.* Bhupendra Narayan. 54 C.W.N. 243=A.I.R. 1950 Cal. 15=85 C.L.J. 10.

——**S. 168-A (1) (b)**—Retrospective effect. [*See* Q.D. 1941-1945 Vol. I, Col. 367.] Jogendra Chandra Ghosh *v.* Bhawani Charan. I.L.R. (1946) 1 Cal. 21.

——**S. 168-A (1) (b)**—*Time-barred rent—Auction-purchaser, if bound to deposit.*

Under S. 168-A (1) (*b*) of the Bengal Tenancy Act, the auction-purchaser has to deposit the entire rent payable to the decree-holder for the period between the date of the institution of the suit and the date of the confirmation of the sale, although a portion of it has become barred by limitation. (*Biswas and Chakravartti, JJ.*) Pannag Bhusan Deb Roy *v.* Saroj Bashini Devi. 51 C.W.N. 286.

——**S. 168-A (3)**—*Confirmation of sale without requisite deposit being made by auction-purchaser—Revision—C. P. Code, S.* 115.

If a Court confirms a sale of a tenure or holding without the requisite deposit being made by the auction-purchaser in terms of S. 168-A (1) (*b*) of the Bengal Tenancy Act, the High Court can interfere in revision under S. 115 (*c*), C.P. Code. (*Mitter and Clough, JJ.*) Bankim Chandra *v.*

Gour Mohan. I.L.R. (1946) 1 Cal. 392=50 C.W.N. 261.

——S. 168-A (3)—*Order confirming sale on application by decree-holder purchaser—"Legality" —Decree-holder not complying with sub-S. (3).*

An order confirming a rent sale on an application by the decree-holder auction-purchaser without requiring the decree-holder to satisfy the provisions contained in S. 168-A (3) of the Bengal Tenancy Act, is not without jurisdiction. When a decree-holder auction-purchaser applies for the confirmation of the sale without either depositing the amount of subsequent arrears or discharging the said dues formally, he must be taken to have thereby entered satisfaction by implication of the amount which had accrued due to him for the period up to the date of confirmation of sale. 54 C.W.N. 248, applied. (*Mookerjee and Mitter, JJ.*) Bhupendra Nath Mukerjee *v.* Jyosit Mookerji 54 C.W.N. 493=A.I.R. 1950 Cal. 485.

——S. 168-A (3)—*Sale not confirmed under—If must be set aside.*

If a sale is not confirmed under S. 168-A (3) of the Bengal Tenancy Act, it must automatically be set aside. (*Edgley, J.*) Ardhendu Narayan Singha *v.* Nirajakkha Mukherjee. 223 I.C. 174=1946 (Rul.) 154=51 C.W.N. 742= A.I.R. 1947 Cal. 27.

——S. 169—*Applicability—Surplus sale proceeds of rent sale—Suit to establish claim to—Bar of.*

S. 169, Bengal Tenancy Act, only regulates the procedure to be followed by the executing Court in distributing the surplus sale proceeds of a rent sale. It cannot however, bar a regular suit on title for establishment of a claim to any portion of the surplus sale proceeds. The surplus sale proceeds ought generally to go to the person to whom the tenancy belonged. Where in prior suit it was established that a person had acquired title by purchase to a specific share of the lands comprised in the holding which is sold at the rent sale, he would be entitled to a proportionate share in the sale proceeds and can establish it by a regular suit. S. 169 has nothing to do with such a claim and cannot bar the suit to establish such a claim. (*Mukherjea and Sharpe, JJ.*) Rameshchandra Dutta *v.* Tinkawari Saha. 225 I.C. 354=A.I. R. 1947 Cal. 96.

——S. 170—*Order for sale—Meaning of—Several persons making deposits—Priority as between them—Person first applying to make deposit prevented by act of Court—Position of.*

When S. 170 of the Bengal Tenancy Act speaks of an order for sale, it refers not to the order under S. 163 (1) fixing the date for the sale, but the initial order for execution of the decree by sale made under O. 21, R. 17, C. P. Code. That order is not extinguished automatically as soon as a deposit, purporting to be of the decretal dues and costs, is made, but subsists till a deposit is finally accepted by the Court. Consequently, so long as it subsists, all persons competent to deposit the decretal dues and costs, may, under the terms of the section, make independent deposits. When several persons, each competent to make a

deposit, make sufficient and time by deposits but at different times, the one making the first deposit must, on equitable grounds, be given preference and his deposit must be accepted. When the person first applying to make a deposit is prevented by an act of the Court from making his deposit first, his deposit, when made, must be deemed to be the first deposit. (*Akram and Chakravartti, JJ.*) Durga Das Kuthi *v.* Ram Dayal. I.L.R. (1946) 1 Cal. 365=222 I.C. 427=1946 Cal. (Rul.) 102=80 C.L.J. 323=50 C.W.N. 208=A.I.R. 1946 Cal. 239.

——S. 170 (3)—Locus standi *to deposit—Purchaser of interest in non-occupancy underraiyati holding and tenant of such holding—Joint deposit by both—Order for sale—If can be re-called—C. P. Code, O. 21, R. 1 (i) (a).*

Even after the amendment of 1928, Chap. XIV of the Bengal Tenancy Act, which comprises S. 170, does not apply to a sale of an underraiyati holding without a right of occupancy in execution of a decree for rent. Therefore, a purchaser of an interest in such a holding has no right to make a deposit under S. 170 (3) of the Act. A tenant of such a holding too has no right to make a deposit under that section, since it does not apply, but as a judgment-debtor he has always the right to pay the decretal amount into the executing Court under the provisions of O. 21, R. 1 (*i*) (*a*), C. P. Code. But if he makes the deposit jointly with the purchaser of an interest in the holding, it is not possible to credit him with the entire amount of the deposit and there is thus no sufficient deposit by a competent person on the basis of which the order for sale could be re-called. 39 C.W.N. 652 and I.L.R. (1941) 1 Cal. 409, appr. (*Chakravartti, J.*) Haranmoyee Debi *v.* Satchidananda Bhattacharjya. I.L.R. (1948) 2 Cal. 392.

——S. 171—*"Any person whose interests are affected by the sale"—If includes judgment-debtor—Judgment-debtor having other interests in property sold—Whether entitled to benefit of section.*

S. 170 of the Bengal Tenancy Act makes a clear distinction between a judgment-debtor and a person whose interests are affected by the sale, and this distinction is maintained in S. 171 as well which is really a continuation of S. 170 and not a separate provision. Accordingly the phrase "any person whose interests are affected by the sale" as used is S. 171, cannot and does not include a judgment-debtor. What S. 171 in fact does is that it lays down the legal effect of a deposit under S. 170 when it is made not by the judgment-debtor but by any person other than a judgment-debtor whose interests are affected by the sale. 38 C.W.N. 988, app. 15 C.W.N. 782, dist. A person who is in fact a judgment-debtor and who makes deposit under S. 170 cannot claim any of the rights provided for in S. 171, although he may have another interest as well which is likely to be affected by the sale. 41 C. W.N. 983, exp. (*Harries, C.J. and Chakravartti, J.*) Birajananda Banerjee *v.* Sitaram Chatterjee. 53 C.W.N. 151=A.I.R. 1949 Cal. 192.

———**Ss. 173 and 174 (3)**—*Application to set aside sale made under both sections—Order of dismissal—Appeal.*

Where an application to set aside a sale made jointly under both Ss. 173 and 174 (3), Bengal Tenancy Act, is dismissed by the trial Court, an appeal is competent so far as the same is directed against the order passed under S. 174 (3) of the Act. 46 C.L.J. 172, Expl. (*Mookerjee, J.*) Sailendra Nath Sen *v.* Sudhanta Charan. A.I.R. 1950 Cal. 166.

———**S. 174**—*Decision in application under—If* res judicata *in subsequent title suit.*

A decision in an application under S. 174 of the Bengal Tenancy Act that the applicant has no *locus standi* to maintain the application, cannot operate as *res judicata* in a subsequent suit against him for declaration of title and recovery of possession. The scope of this suit is not identical with the scope of the application for setting aside the rent sale on the ground of fraud and suppression of notices. Moreover the said application can neither be treated as a suit nor as a continuation of the suit. (*Akram, C.J.*) Upendrachandra Acharyya *v.* Pratapchandra Sutradhar. 1 D.R. 151=A.I.R. 1949 Dacca 1.

———**S. 174**—*Setting aside of sale—Serious under-valuation of property—Failure of Court and decree-holder to comply with requirements of O. 21, R. 66 C. P. Code—Substantial injury to judgment-debtor—Sale, if void—Question of limitation—If arises.*

Where a sale takes place at a serious undervalue occasioned by failure on the part of the Court and of the decree-holder to carry out their obligations under O. 21, R. 66, C. P. Code, read with S. 163 (2) of the Bengal Tenancy Act, and the judgment-debtor sustains substantial injury thereby, the sale is void and an application for setting aside the sale, though made far beyond the period of limitation cannot be rejected, as no question of limitation can arise in such a case. [49 C.W.N. 292 (P.C.), rel. on.] (*Amiruddin Ahmad, J.*) Tuli Bibi *v.* Aziz Ahmed. 1 D.R. 159.

———**S. 174 (3)**—*Application by raiyat against landlord auction-purchaser—Tenant taking settlement from landlord subsequent to application—If necessary party.*

An order setting aside a sale of a holding on an application by the raiyat under S. 174 (3) of the Bengal Tenancy Act against the landlord auction-purchaser, is binding on the tenant who takes settlement from the landlord after the application is made, as he is not a necessary party to the application. [39 C. 881, dist.; 62 I.C. 704, ref.] (*Das, J.*) Fatema Bibi *v.* Chota Khuki. I.L.R. (1949) 1 Cal. 365=53 C.W.N. 159.

———**S. 174 (3)**—*Application impugning order confirming sale as without jurisdiction—Second appeal.*

An application impugning an order confirming an execution sale as being without jurisdiction, is not covered by S. 174 (3) of the Bengal Tenancy Act but is within S. 47, C. P. Code. As the order passed thereon would operate as a decree, a second appeal clearly lies. (*Chakravartti, J.*) Nirmalabala Debi *v.* Provat Kumar Basu. 52 C.W.N. 659.

———**S. 174 (3)**—*Application under—Parties—Auction-purchaser and decree-holder.*

The auction-purchaser is the most necessary party to an application for setting aside a sale, the decree-holder being the other party who should also be brought on the record. (*Das and Das Gupta, JJ.*) Mihirlal *v* Panchkari. 54 C. W.N. 637=A.I.R. 1950 Cal. 520.

———**Ss. 174 (3) and 163 (3) (c)**—*Failure to issue concise statement to judgment-debtor—Sale, if liable to be set aside.*

The failure to isssue a concise statement to the judgment-debtor under S. 163 (3) (*c*) of the Bengal Tenancy Act is an irregularity which prevents him from paying the decretal amount into Court in order to avert the sale and is the direct cause of his property being sold for an inadequate sum. The sale is, therefore, liable to be set aside under S. 174 (3) of the Act. (*Henderson, J.*) Abdul Gafur *v.* Gura Mia. 50 C.W.N. 476=82 C.L.J. 156.

———**Ss. 174 (3) and 163, Expl.**—*Judgment-debtor making payment on decree-holder's undertaking that execution case would be dismissed—Sale held in execution—Application by judgment-debtor to set aside sale—Right of auction-purchaser to intervene—Appeal—C. P. Code, S. 47.*

The case of the judgment-debtor who applied to set aside an execution sale was that an agent of the decree-holder assured him that he could pay the decretal amount by instalments and that the execution case would be dismissed for default, and that relying on that assurance he made a payment but the decree-holder did not get the execution case dismissed and that the property was sold in execution of the decree.

Held, (*i*) that the matter came directly within S. 174 (3) of the Bengal Tenancy Act, and the auction-purchaser had a right to intervene and contest the application of the judgment-debtor; (*ii*) that the auction-purchaser had a right of appeal as the case was outside the Explanation to S. 153 of the Act in as much as the fraud, which consisted in the failure of the decree-holder to have the execution case dismissed for default, was extraneous to the proceedings in publishing and conducting the sale; (*iii*) that the auction-purchaser was not a representative of the decree-holder within the meaning of S. 47, C. P. Code. (*Henderson, J.*) Fatema Khatun *v.* Haran Barui. I.L.R. (1946) 1 Cal. 87=50 C.W.N. 114=230 I. C. 70=1947 Cal. (Rul.) 176=A.I.R. 1947 Cal. 132.

———**S. 174 (3)**—*Limitation for application—Extension of time—Fraud of auction-purchaser—Necessity for proof—Limitation Act, S. 18.*

In order to succeed in an application under S. 174 (3) of the Bengal Tenancy Act, if the application is made outside the period of limitation prescribed by law, the applicant must show that the auction-purchaser was himself guilty of the fraud which kept the applicant from the knowledge of his right to make the application or was accessory thereto. It is not sufficient to show that the decree-holder had beeen guilty of fraud. (*Lodge, J.*) Saila Bala Dasi *v.* Atul Krishna Mondal. 82 C.L.J. 9=A.I.R. 1948 Cal. 63.

———**S. 174 (3)**—*Limitation—Extension—Fraud of auction-purchaser—Need for proof—Limitation Act, S.* 18.

Before any extension of time can be given under S. 18 of the Limitation Act in an application for setting aside a sale under S. 174 (3) of the Bengal Tenancy Act, it must be proved that the auction-purchaser was either guilty of the fraud or accessory to the fraud that prevented the judgment-debtor from knowing of the sale. Proof of the fraud only of the decree-holder is not sufficient. 44 C.L.J. 565 and 53 C.W.N. 586, disappr. 166 I.C. 127, 82 C.L.J. 9 and 46 C.W.N. 403, appr. (*Das and Das Gupta, JJ.*) Mihirlal *v.* Panchkari. 54 C.W.N. 637=A.I.R. 1950 Cal. 520.

———**S. 174 (3) and (5)**—*Order dismissing application to set aside sale in default—Inherent power of Court to set aside order—C. P. Code, S.* 151.

As an order dismissing in default an application made under S. 174 (3) of the Bengal Tenancy Act to set aside a sale is appealable under S. 174 (5) of the Act, an application under S. 151, C. P. Code, to set aside the order of dismissal is not maintainable. [42 C.W.N. 128 and 42 C.W.N. 612, foll.; 41 C.W.N. 193, rel. on.] (*Harries, C.J.*) Bibhabati Debi *v.* Hrishikesh Agasti. 83 C.L.J. 162.

———**S. 174 (5)**—*Order dismissing for default application for setting aside sale—Appeal.*

An order dismissing an application for setting aside a sale for default amounts to an order refusing to set aside a sale, and so an appeal lies. 42 C.W.N. 128 and 612, approved. (*Das Gupta and Mitra, JJ.*) Subodh Chandra Mukherjee *v.* Sudhir Kumar Basu. 54 C.W.N. 106=A.I.R. 1950 Cal. 209.

———**S. 174 (5), Proviso**—*Deposit of money, after filing of appeal and before its preliminary hearing—If may be made—C. P. Code, O.* 41, *R.* 11.

The use of the word "admitted" in the proviso to S. 174 (5) of the Bengal Tenancy Act was intentional and the legislature provided for the deposit of the money to be in time if it was so done before the appeal is admitted by a judicial act of the Court. There is a clear distinction between registering the appeal or admitting the memorandum on the one hand and the admission of the appeal by a judicial act of the Court on the other. Ordinarily the first judicial act is when the Court hears the appeal for admission under O. 41, R. 11, C. P. Code. It is, therefore, competent for the judgment-debtor to deposit the required amount after the filing of the appeal and before it is set down for hearing under O. 41, R. 11, C. P. Code. [41 C.W.N. 1299, cons.] (*Mookerjee and Mitter, JJ.*) Sasadhar Ghose *v.* Hariharkar. 53 C.W.N. 694=83 C.L.J. 389.

———**S. 174 (5), Proviso**—*Deposit required under—If includes amount which purchaser is required to pay decree-holder under S.* 168-*A* (1) (b).

All that the appellant must deposit as a condition precedent to the entertainment of his appeal under the proviso to S. 174 (5), Bengal Tenancy Act, is "the amount recoverable in execution of the decree", and it cannot be said that the additional sum which the purchaser is required to pay to the decree-holder by reason of the provisions of S. 168-A (1) (*b*), that is to say, the rent which had become due to the decree-holder between the date of the suit and the date of confirmation of the sale, forms any part of such amount. (*Sharpe, J.*) Sarat Chandra Haldar *v.* Kagendra Nath Haldar. 5 D.L.R. (Cal.) 35.

———**S. 174 (5), proviso**—*Deposit—Time limit.*

The deposit required under the proviso to S. 174 (5), Bengal Tenancy Act, need not be made within limitation, but it could be made at any time before the appeal is admitted. 53 C.W.N. 694, foll. (*Harries, C.J.*) Sachindra Nath *v.* Jadunath. A.I.R. 1950 Cal. 156.

———**Ss. 174-A and 26-E**—*Sale confirmed by auction-purchaser practising fraud on Court—If nullity.*

A confirmation of a sale obtained as a result of fraud practised on the executing Court by the auction-purchaser in falsely representing that he was the sole landlord and that there were no co-sharer landlords and without any deposit of landlords fees as required by S. 26-E of the Bengal Tenancy Act is a nullity, and can be treated as a nullity by that Court without separate proceedings being instituted for setting aside the sale. (*Lodge, J*) Nibaran Chandra Das *v.* Brojendra Chandra. 51 C.W.N. 855.

———**S. 178 (3) (e)**—Applicability—Tenure holders. [*See* Q.D. 1941-1945, Vol. I, Col. 369.] Sarat Chandra Mitra *v.* Saradindu Mukherji. I.L.R. (1945) 2 Cal. 595=A.I.R. 1946 Cal. 18=80 C.L.J. 279.

———**S. 182**—*Applicability.*

S. 182 of the Bengal Tenancy Act can have no possible application to a case where a person has got tenure-holder's rights in the homestead land already and it cannot be argued that because he holds agricultural land in a contiguous village he would have occupancy rights in the homestead which is comprised in his tenure. (*Mukherjea and Blank, JJ.*) Hemangini Debi *v.* Kumudeswar Chakravarty. I.L.R. (1946) 1 Cal. 564=50 C.W.N. 413.

———**S. 182 (as amended in 1928)**—*Applicability—Actual use of land as homestead—If necessary.*

S. 182 of the Bengal Tenancy Act, as amended, by its terms, applies only to the homestead of a *raiyat* or under-*raiyat* which he may hold otherwise than as a part of his *raiyati* or under-*raiyati* holding and the language requires that the land should actually be used as a homestead or at least still be possessed of its homestead character when the section is sought to be invoked for its protection. (*Chakravartti, J.*) Kaliprosad Saha *v.* Naihati Jute Mills Co., Ltd. 50 C.W.N. 50=221 I.C. 561—A.I.R. 1946 Cal. 73.

———**S. 182 (as amended in 1928)**—*Applicability—Landlord, if must have status under Act*—Raiyat *acquiring rights of a* raiyat *in respect of homestead under old section—Position of.*

S. 182 of the Bengal Tenancy Act, as amended in 1928 requires that in order that the Bengal Tenancy Act may apply to a homestead held by a *raiyat* or an under-*raiyat* otherwise than as a part of his holding, the landlord of the homestead must have a status under the Act and such a one that the tenant may be a *raiyat* or under-*raiyat* under him. Where the same is not possible, the section does not attract the Act to the homestead at all. In the case of a *raiyat* who held his homestead otherwise than as a part of his holding when the old S. 182 was in force and thus acquired the rights of a *raiyat* in respect of his homestead tenancy, there being no question of any local custom or usage, his homestead will continue to be governed by the old section even after the amendment, if he is still holding it as before. The amended section would not apply and the fact that the landlord of the homestead has no status under the Bengal Tenancy Act would make no difference, in as much as the existence of such status was not a requirement under the old section and the rights accrued without it. The position would be the same if the *raiyati* holding is situated not in the same village as the homestead or a contiguous village but in some other village, since the limitation as to the village is also an addition made by the new section. (*Chakravartti, J.*) Kaliprosad Saha *v.* Naihati Jute Mills Co., Ltd. 50 C.W.N. 50=221 I.C. 561=A.I.R. 1946 Cal. 73.

———**S. 182 (as amended in 1928)**—*Applicability—Occupancy right acquired by raiyat under old section—Suit for ejectment brought by landlord after amendment on ground that he has no status under Bengal Tenancy Act.*

In a suit brought by the landlord after the amendment of S. 182 of the Bengal Tenancy Act by Act IV of 1928 to eject a raiyat who had acquired occupancy right by the operation of old S. 182 before the 1st January, 1929, when the amended section came into force, on the ground that the landlord had no status under the Bengal Tenancy Act.

Held, that the occupancy right which had been acquired by the tenant could not be taken away by the application of S. 182 as amended. [40 C.W.N. 599, expl.] (*Mitter and Chunder, JJ.*) Naihati Jute Mills Co., Ltd. *v.* Kaliprosad Saha. I.L.R. (1949) 1 Cal. 408=53 C.W.N. 82=A.I.R. 1949 Cal. 259=4 D.L.R. (Cal.) 98.

———**S. 182**—*"Contiguous"—Meaning of.*

The word "contiguous" may be explained as "touching in actual contact, next in space, meeting at a common boundary, bordering, adjoining".

Where there is no common boundary between two villages and there is even no point of contact between them, the two villages are not contiguous ones within the meaning of S. 182, Bengal Tenancy Act. (*Mookerjee, J.*) Indra Chand *v.* Tinkari Ghose. A.I.R. 1950 Cal. 170.

———**S. 182**—*"Holds"—Relevant time.*

The word "holds" in S. 182, Bengal Tenancy Act, indicates the point of time when the necessary ingredients are to be satisfied and that is when the dispute about the incidence of the tenancy of the homestead arises. 53 C.W.N. 82 and 40 C.W.N. 599, referred to. (*Mookerjee, J.*) Indra Chand *v.* Tinkari Ghose. A.I.R. 1950 Cal. 170.

———**S. 182 (as amended in 1928)**—*Homestead—Status of tenant—Determining factor.*

Under S. 182 of the Bengal Tenancy Act as amended by Act IV of 1928, a tenant would be a raiyat in respect of the homestead when the landlord of his homestead is either a proprietor of an estate or a tenure-holder, and would be an under-*raiyat* if his landlord is either a raiyat or an under-*raiyat*. The section makes the status of the landlord of the homestead the determining factor. (*Mitter and Chander, JJ.*) Naihati Jute Mills Co., Ltd. *v.* Kaliprosad Saha. I.L.R. (1949) 1 Cal. 408=53 C.W.N. 82=A.I.R. 1949 Cal. 259=4 D.L.R. (Cal.) 98.

———**S. 182 (as amended in 1928)**—*'Landlord'—If means original landlord or landlord for time being.*

The landlord contemplated by S. 182 of the Bengal Tenancy Act, as amended in 1928, is not the landlord who originally inducted the tenant into the homestead or was the landlord of the homestead at the time when the tenant first came to possess both homestead and a holding. The tenor of the amended section is that in cases where it applies, the position must be judged by reference to the landlord for the time being, except perhaps in cases where there has been a change in the landlord since the section became applicable and some such consideration as that a status once acquired by a tenant cannot be lost, intervenes. (*Chakravartti, J.*) Kaliprosad Saha *v.* Naihati Jute Mills Co., Ltd. 50 C.W.N. 50=221 I.C. 561=A.I.R. 1946 Cal. 73.

———**S. 182 (old and as amended)**—*Protection of tenant—Conditions.*

The use of the present tense "holds" in the clause "when a *raiyat* holds his homestead otherwise than as part of his holding" in the old as well as the amended S. 182 of the Bengal Tenancy Act, indicates that both the elements must be present at the time when the protection of the section is sought to be invoked by the tenant. He must be a *raiyat* at that time, that is say, have the arable lands, and must be using the other land for his residence. It is the co-existence of these two elements that would bring in that section. The tenant may have acquired the homestead before, but the moment he acquires later on a *raiyati* holding he comes within S. 182. [44 C.L.J. 302 and 40 C.W.N. 599, rel. on.]

It would follow that if the aforesaid two elements became dissociated later on, S. 182 would cease to be applicable from the moment when either of these two elements disappeared in relation to the tenant concerned. The moment when either the agricultural holding is sold away or when the tenant abandons his residence in the homestead land, he goes out of the old and also reference to the landlord for the time being of the amended S. 182 of the Act, for the language of both the old and the amended section in this respect is the same. [40 C.W.N. 182, diss.] (*Mitter and Chunder, JJ.*) Naihati Jute Mills Co., Ltd. *v.* Kaliprosad Saha. I.L.R. (1949) 1 Cal. 408=53 C.W.N. 82=A.I.R. 1949 Cal. 259=4 D.L.R. (Cal.) 98.

———**S. 182**—*Scope and effect—Nature of right in homestead.*

It is not correct to state that the raiyat or an under-raiyat acquires a right of occupancy in the homestead on his proving that he is a settled raiyat or the holder of a raiyati in the same village or in a contiguous one. It is not that the homestead itself becomes a raiyati holding. The effect of the provisions of S. 182, Bengal Tenancy Act, is not to create a transferable occupancy right in that homestead. The right is a personal one dependent on the proof of the existence of certain facts. Such personal rights continue to be available only so long as the conditions are satisfied. (*Mookerjee, J.*) Indra Chand *v.* Tinkari Ghose. A.I.R. 1950 Cal. 170.

———**S. 185 and Sch. III, Part I, Art. 2 (b)**—*Suit for rent—Limitation—Extension—Pendency of appeal before Privy Council against decision of High Court upholding defendant's plea of non-liability to pay rent—Limitation Act, S.* 9.

Although S. 185, Bengal Tenancy Act expressly makes S. 9, Limitation Act, inapplicable to suits specified in Sch. III annexed to the Act, limitation may be extended when the claim to recover the rent is either satisfied or extinguished or rendered legally unenforceable in consequence of a transaction to which the defendant is a party and the validity whereof is in controversy and awaits a final adjudication. Where, therefore, the defendant who had by an appeal to the High Court successfully upheld his plea of non-liability to pay rent to the plaintiff thereby compelled the plaintiff to file an appeal to the Privy Council for redress, he cannot be allowed to turn round and plead that the lapse of time occasioned by the said appeal had relieved him from his liability to pay the rent by the bar of limitation. 12 M.I.A. 242, 30 I.A. 177, 15 I.A. 211 and 59 I.A. 283, rel. on. (*G. N. Das and Das Gupta, JJ.*) Midnapore Zemindary Co., Ltd. *v.* Nabakumar Singh. A.I.R. 1950 Cal. 298.

———**S. 191**—*Applicability — Non-agricultural tenants.*

There is no reason why S. 191 of the Bengal Tenancy Act should not apply to non-agricultural tenants as well as to agricultural tenants. (*Biswas and Das, JJ.*) S. N. Chatterjee *v.* Auckland Jute, Co., Ltd. I.L.R. (1946) 1

Cal. 290=50 C.W.N. 116=A.I.R. 1946 Cal. 306.

———**S. 193**—*Suit for Jalkar rent—Right of appeal—If governed by S.* 153.

A Jalkar does not necessarily imply any right to the soil and a suit for the recovery of money payable under a lease merely conferring a right of fishing is not a suit for rent within the meaning of the Bengal Tenancy Act. But under S. 193 of that Act, the provisions of that Act that are applicable for recovery of arrears of rent must be applied *mutatis mutandis* for the recovery of the amount payable in respect of rights over fishery. The provisions of S. 193 are not limited merely to the procedural law but are wide enough to attract the provisions of S. 153 of the Act. An appeal valued at less than Rs. 100 in a suit for Jalkar rent is, therefore, not maintainable. 19 C.W.N. 514, 15 C.L.J. 52 and 6 C.L.J. 669, referred to. (*Mookerjee, J.*) Rati Kanta Halder *v.* Habibur Rahman. 84 C.L.J. 105.

———**Ss. 193 and 153**—*Suit for rent in respect of fishery rights—Second appeal.*

S. 193 of the Bengal Tenancy Act attracts not merely the procedural part but also the substantive part of the Act and as such the provisions of S. 153 are attracted to suits for recovery of rents in respect of rights over fisheries. Where, therefore, there is a clear conflict between the parties as regards the right to recover rent in respect of fishery rights and the lower appellate Court has decided the conflict in favour of one of them, a second appeal to the High Court is competent under the exception to the first part of S. 153. The words "land or some interest in land" in that exception must be read as meaning the subject-matter in respect of which the claim to recover rent is made. (*G. N. Das and Das Gupta, JJ.*) Rati Kanta Haldar *v.* Burro. A.I.R. 1950 Cal. 354.

———**Chap. XIV, (Ss. 158-B to 177)**—*"Rent decree"—Suit for rent by landlord—Purchaser of holding in earlier money sale not impleaded—Decree, if rent decree.*

In order to get a rent decree within the meaning of Chap. XIV of the Bengal Tenancy Act, it is necessary for the landlord to implead in his rent suit the purchaser of the holding at an earlier sale in execution of a money decree against the recorded tenants. [40 C.W.N. 683 and 6 C.W.N. 302, ref.] (*Akram, C.J.*) Upendrachanra Acharyya *v.* Pratapchandra Sutradhar. 1 D.R. 151=A.I.R. 1949 Dacca 1.

———**Sch. III, Art. 2**—*Applicability—Suit for patni rent—Limitation Act, Art.* 110.

The provisions of Art. 2 of Sch. III of the Bengal Tenancy Act and not of Art. 110 of the Limitation Act, applies to a suit for recovery of arrears of patni rent. 23 C. 191, foll.; 19 C.W.N. 1001 and 36 C.W.N. 833, rel. on; 41 C.W.N. 1001, Disappr.; 37 C. 747, Not Foll.; 45 C.W.N. 787, Dist.

Where the patni law is silent, the provisions of the Bengal Tenancy Act may be attracted for supplementing those provisions. There is no provision in the Patni Regulation as to the realisation of rent beyond one year and the Zamindar will be entitled to bring a suit for the realisation of the arrears as under the provisions contained in the Bengal Tenancy Act. 43 I.C. 996, 19 C. 504 and 5 P. 315, referred to. (*Mookerjee, J.*) UDAY CHAND MAHATAB *v.* DIBAKAR SEN. 85 C. L.J. 1=A.I.R. 1950 Cal. 134=54 C.W.N. 307.

———**Sch. III, Art. 2 (b)**—*Applicability—Suit by landlord who has parted with his interest.*

A landlord who has ceased to be a landlord cannot get the benefit of the special law of limitation as laid down in Art. 2 (*b*) of Sch. III, Bengal Tenancy Act. Therefore, a suit against a former tenant for arrears of rent brought by a landlord whose interest has ceased to exist, more than three years after the date on which the amount fell due, but within three years from the last day of the agricultural year in which the arrears fell due, is barred by limitation. 16 C.L. J. 360, Not. foll. 18 C.W.N. 747 (P.C.), referred to. (*Das Gupta, J.*) MONOMOHAN SINGHA ROY *v.* SANTOSH KUMAR DE. A.I.R. 1949 Cal. 640.

———**Sch. III, Part I, Art. 2 (b)**—Suit for rent—Limitation—Extension—Pendency of appeal before Privy Council against decision of High Court upholding defendant's plea of non-liability to pay rent. *See* BENGAL TENANCY ACT, S. 185 AND SCH. III, PART I, ART. 2 (*b*) A.I.R. 1950 Cal. 298.

———**Sch. III, Art. 3**—*Applicability—Dispossession by landlord—If necessary—Special limitation not originally pleaded but argued in Courts below—Plea, if must be decided.*

The special limitation embodied in Art. 3 of Sch. III of the Bengal Tenancy Act applies only to cases of dispossession of a tenant by a landlord.

Whatever may have been the manner in which the case for the defendants was originally shaped, the question of special limitation argued both in the Courts below as well as before the High Court must be considered, and it must be decided upon the facts established by the evidence and found by the Courts below. [35 C.W.N. 1143, foll.] (*Khundkar and Biswas, JJ.*) SARADINDU MUKHERJI *v.* RAM NARAYAN SAHA. I.L.R. (1945) 2 Cal. 623=A.I.R. 1949 Cal. 546.

———**Sch. III, Art. 3**—*Applicability—Sale of raiyati holding in execution of decree for rent against Hindu widow—Suit by reversioner for possession—Limitation Act, Art.* 141.

A suit by a reversioner for possession of a raiyati holding against a landlord who has purchased the holding in execution of a rent decree against a Hindu widow is governed, not by Art. 3 of Sch. III, Bengal Tenancy Act, but by Art. 141 of the Limitation Act. Dispossession implies a tortuous act. The dispossession of the widow by the defendant as auction-purchaser through the process of Court is a lawful act. As long as the widow is alive his possession is lawful. Retention of possession by him after the widow's death is unlawful but only by invoking a fiction, his continuance in possession after the widow's death can be held to be dispossession.

That fiction is not admissible. 48 C.L.J. 554 and 9 P. 634, rel. on. (*Mitter and Sharpe, JJ.*) MONIRUDDIN AHMED *v.* SARAT CHANDRA RAY. I.L.R. (1949) 1 Cal. 85.

———**Sch. III, Art. 3**—*Applicability—Suit by dispossessed mortgagee from tenant.*

A suit by a dispossessed mortgagee from a tenant is governed by Sch. III, Art. 3 of the Bengal Tenancy Act. 33 C.W.N. 1085, referred to. (*Akram, C.J.*) GAGAN CHANDRA *v.* GOLJAN BIBI. A.I.R. 1950 Dacca 1=2 D.R. 89.

———**Sch. III, Art. 3**—*Applicability—Suit by mortgagee of holding for foreclosure.*

Defendant No. 1 borrowed a certain sum of money from the plaintiff on executing a mortgage by conditional sale in 1925. It was stipulated between the parties that if repayment was not made within five years, the transaction was to be treated as one of absolute sale. In 1934, however, the landlords defendants Nos. 6 to 9 instituted a suit for rent against the defendant No. 1 and in execution of a decree therein purchased the occupancy holding of the defendant No. 1 in 1935 and took delivery of possession. They remained in *khas* possession till 1939 and thereafter settled it with defendants Nos. 2 to 5. The plaintiff thereafter brought the present suit for foreclosure in 1942.

Held, that the plaintiff's suit was governed by Art. 3, Sch. III of the Bengal Tenancy Act and as such was barred by limitation, having been brought more than two years after defendants Nos. 6 to 9 landlords obtained delivery of possession in execution of their rent decree and the defendants Nos. 2 to 5 obtained possession on the basis of their settlements from the landlords. (*Akram, C. J.*) KRISHNA DAS ACHARJYA *v.* NEAMUTULLA SIRKAR. 2 D.R. 92.

———**Sch. III, Art. 3**—*"Dispossession"—If includes dispossession through Court—Landlord auction-purchaser taking delivery of possession of holding in execution of rent decree—Suit by raiyat for possession after getting sale set aside—Limitation—Starting point.*

If a landlord takes actual possession of a holding as auction-purchaser in execution of a decree for rent obtained by him against the raiyat there is "dispossession" of the raiyat within the meaning of Art. 3, Sch. III of the Bengal Tenancy Act, and limitation for a suit by the raiyat to recover possession of the holding runs from the date when possession is so taken by the landlord, and not from a later date when the raiyat gets the sale set aside under S. 174 (3) of the Bengal Tenancy Act. On the setting aside of the sale it must be taken that the plaintiff's *raiyati* right continued from the beginning down to the date of the suit. [54 C. 450 (471), I.L. R. (1944) 1 Cal. 11, foll. 27 C.L.J. 528, dist.] (*Das, J.*) FATEMA BIBI *v* CHOTA KHUKI. I.L.R. (1949) 1 Cal. 365=53 C.W.N. 159.

———**Sch. III, Art. 3**—*Scope and applicability—Limitation Act, Art.* 142.

There is a material difference between the wording of Art. 142 of the Limitation Act and that of Art. 3 of Sch. III of the Bengal Tenancy Act. Art. 3 is not applicable except in a case where there has been some sufficiently active step of dispossession as distinct from mere continuance in possession by the landlord of the tenant. But Art. 142 refers to a case where the plaintiff, while in possession, has been either dispossessed or has himself discontinued his possession. The Article applies to a case where there may not have been any active dispossession by the defendant, but where the defendant has taken no positive action and it has been the plaintiff only on his side who has discontinued his possession. 51 C.L.J. 36, foll. (*Ormond, J.*) JOGENDRA MOHAN SAHA *v.* GOUR CHANDRA SAHA. 2 D. R. 296.

BENGAL VILLAGE CHAUKIDARI ACT (VI OF 1870), S. 14—*Applicability and scope—Zamindar having building as katcheri in village for collection of rents—Assessment of Zamindar to tax—Further assessment of manager, arulas and clerks, of Zamindar residing in buildings of Zamindar—Legality.*

Where a zamindar has a block of buildings in a village, part of which is used as his office, and the rest is in the occupation of the manager of his circle as his residence, and other blocks attached to it are occupied by the zamindar's arulas, clerks, etc., serving under the manager, the zamindar can be legally and properly assessed to chaukidari tax under the Bengal Chaukidari Act on the ground that he has a katcheri in the village for collecting rents. But the manager and the clerks, arulas, etc., cannot be legally assessed to tax as occupants of the blocks, in addition to the zamindar. The manager and other servants of the zamindar, not being permanent residents of the village and not having any house of their own, cannot be held to be "occupants" or in "occupation" of the buildings; they are in possession of the houses only as servants of the zamindar who is properly assessed to tax already. They are removable at the pleasure of the zamindar and they are bound to reside there as the servants of the zamindar to carry on the work of collection from the village or from the circle in which the village lies, and they cannot insist on staying in the houses if the zamindar orders otherwise. Hence the assessment of the manager and other servants of the zamindar is illegal and *ultra vires*. (*Manohar Lal, Ag. C.J. and Ray, J.*) B. S. HICKEY *v.* JAI NARAIN THAKUR. 25 Pat. 677=227 I.C. 248=13 B.R. 27=1946 Pat. (Rul.) 434=A.I.R. 1947 Pat. 197.

———**S. 14**—*Illegal assessment—Suit to declare* ultra vires—*Parties—Provincial Government—If proper or necessary party.*

In a suit to have it declared that the assessment of Chaukidari tax on the plaintiffs was illegal and *ultra vires* the provision of the Bengal Village Chaukidari Act, the Provincial Government is not a necesary or proper party defendant. The only proper defendant to such a suit is the panchayat who imposed the assessment. (*Manohar Lall, Ag. C.J. and Ray, J.*) B. S. HICKEY *v.* JAI NARAIN THAKUR. 25 Pat. 677=227 I.C. 248=13 B.R. 27=1946 Pat. (Rul.) 434=A.I.R. 1947 Pat. 197.

———**S. 54 and Sch. D, Form D**—*Requisition—Specification of details of land—Necessity for.*

A requisition under S. 54, Village Chaukidari Act, having regard to Form D of Sch. D, does not require to specify the details of the lands in respect of which arrears are claimed. (*G. N. Das, J.*) NRISINHA KUMAR SINHA *v.* SHYAM SUNDAR. A.I.R. 1950 Cal. 196.

———**S. 55**—*Salt of choukidari chakran land—Service of notification under S. 5, Bengal Land Revenue Sales Act—If necessary.*

In regard to sales of choukidari chakran lands under the provisions of S. 55, Village Choukidari Act, the service of a notification under S. 5, Bengal Land Revenue Sales Act, 1859, is not necessary. (*G. N. Das, J.*) NRISINHA KUMAR SINHA *v.* SHYAM SUNDAR. A.I.R. 1950 Cal. 196.

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919)—Union rate paid under—If an allowable deduction in computing profits of the business of an assessee under S. 10 (1) (ix) of the Income-tax Act. *See* INCOME-TAX ACT (XI OF 1922), S. 10 (1) (IX) AND (4). (1946) 1 M.L.J. 70 (P.C.).

———**Ss. 17-A and 17-B**—*Election of President—Jurisdiction of Court—Rules by Local Government taking away such jurisdiction—If* ultra *vires.*

Under Ss. 17-A and 17-B of the Village Self-Government Act the jurisdiction of the Courts to interfere with the election of members of a Union Board is expressly taken away. There is no such provision with regard to the election of Presidents. The proper inference, therefore, is that it was the intention of the legislature to preserve the jurisdiction of the Courts in connection with this matter. The rule-making power under S. 101 of the Act is conferred on the Local Government to carry out the purposes of the Act, not to enable them to defy the Legislature. When the jurisdiction of the Courts is preserved by the Act itself, it is not open to the Local Government to take it away by rules made under the power conferred by this section. If and in so far as they purport to do so, they are *ultra vires*. (*Henderson, J.*) KERAMATULLA AHMED *v.* HARI MOHAN ROY. 50 C.W.N. 10.

———**S. 17-C**—*Meeting held for election of President irregular—Effect.*

The election of a President of a Union Board at a meeting held in contravention of the rules made by the Local Government as to the time and place of the meeting, is irregular and not void in view of the provisions of S. 17-C of the Village Self-Government Act. (*Henderson, J.*) KERAMATULLA AHMED *v.* HARI MOHAN ROY. 50 C.W.N. 10.

———**S. 31**—*Applicability—Road or water passage over which public have right of way—Subsoil belonging to private individual—Union Board, if can have control over them.*

Under S. 31 of the Bengal Village Self-Government Act, the Union Board can have control over any road or water passage over which the public have a right of way but the subsoil under which belongs to a private individual. The section only draws a distinction between roads and waterways, subject to a public right of way and those not so subject and it is not making any distinction between public and private ownership of the underlying soil. It places all public passages by land or water, within a union, under the control of the Union Board, to whomsoever the soil underneath might belong. (*Biswas, Blank and Chakravartti, JJ.*) NIKHIL CHANDRA GHATAK *v.* DINGAMANIK UNION BOARD. I.L.R. (1946) 2 Cal. 509=226 I.C. 188=1946 Cal. (Rul.) 343=A.I.R. 1947 Cal. 41=81 C.L.J. 243=50 C.W.N. 778 (F.B.).

——**S. 41, Rr. 14 and 18**—*Warrant for arrears of two quarters and without previous publication of defaulters' list—Legality—Assault by defaulter—Offence—Penal Code, S. 332.*

Under the rules framed under the Bengal Villlage Self-Government Act, publication of the defaulters' list is a condition precedent to the issue of a warrant of distraint; nor can a warrant issue for the recovery of arrears of more than one quarter. Where therefore a warrant was taken out for execution in respect of arrears for two quarters and without publication of the defaulters' list previously, the warrant is illegal, and a person who assaults the chowkidar attempting to execute the warrant is not guilty of an offence under S. 332, I. P. Code. (*Henderson, J.*) AHMED SUBHAN *v.* EMPEROR. I.L.R. (1945) 2 Cal. 446=A.I.R. 1949 Cal. 487=1947 Cal. (Rul.) 208=48 Cr.L.J. 616=230 I.C. 326.

——**S. 91**—*Munsif executing decree of Union Court—Power to issue notice under O. 21, R. 16, C. P. Code.*

Under S. 91 (3) of the Bengal Village Local Self-Government Act, the Munsiff executing a decree passed by a Union Court has the same power as if he is executing a decree passed by himself. Hence he has jurisdiction to issue a notice under O. 21, R. 16, C. P. Code, when an application for execution is made by an assignee of the decree. (*Henderson, J.*) KULADA PRASAD DATTA *v.* KANAN BALA. 225 I.C. 524 =50 C.W.N. 162=A.I.R. 1946 Cal. 260.

——**S. 91 (2)**—*Construction and scope—Court contemplated by—Bengal, Agra and Assam Civil Courts Act, Ss.* 13 *and* 19 (2)—*Application of.*

S. 91 (2) of the Bengal Village Self-Government Act has in view the provisions of S. 13 of the Bengal, Agra and Assam Civil Courts Act by which the local limits of the jurisdiction of a particular Court are fixed and determined, it has not in view the provisions of S. 19 (2) of that Act. S. 91 (2) of Bengal Village Self-Government Act has reference to a particular Court of a Munsif within whose jurisdiction the union Court is situated as contemplated by S. 13 of the Bengal, Agra and Assam Civil Courts Act. The local limits of a Court's jurisdiction are fixed and determined under S. 13 of that Act and not by S. 19 (2), which merely confers additional powers upon particular Munsifs by which their jurisdiction is extended. Those addtional powers do not vest in the Court but vests only in the officers concerned and only so long as they are attached to and presided over the particular Courts. (*Mukherjea, J.*) SALIMADDIN *v.* DALILUDDIN. I.L.R. (1946) 2 Cal. 188=224 I.C. 525=1946 Cal. (Rul.) 260=50 C.W.N. 870=A.I.R. 1947 Cal. 131=82 C.L.J. 262.

——**S. 101—Rules 11 and 12**—*Meeting for election of President.*

It is clear from the proviso to R. 12 that R. 11 do not apply to a meeting convened for the election of President. (*Henderson, J.*) KERAMATULLA AHMED *v.* HARI MOHAN ROY. 50 C.W.N. 10.

——**S. 101, Rule 29, proviso (iii)**—*Meeting held for election of President failing for want of quorum—Whether can be be adjourned.*

If a meeting held for the election of the President of a Union Board fails for want of a quorum, there is no procedure for its adjournment for a stated period. Under R. 29, proviso (*iii*), if further steps are to be taken in the matter, another meeting has to be convened. (*Henderson, J.*) KERAMATULLA AHMED *v.* HARI MOHAN ROY. 50 C.W.N. 10.

BENGAL VILLAGE SELF-GOVERNMENT (AMENDMENT) ACT (X OF 1947), S. 9 (b)—*Meeting to elect new president presided over by circle officer—Irregularity, if committed.*

S. 9 (*b*) of Act X of 1947 which provides for the holding of a meeting to elect the President is silent on the question as to who is to preside. The situation has considerable affinity with the circumstances provided for in Rr. 30-32, and no irregularity is committed if the meeting is presided over by the Circle Officer. (*Roxburgh, J.*) ASHUTOSH CHAKRAVARTY *v.* MD. YAD HOSSAIN. A.I.R. 1950 Cal. 430.

BENGAL WAKF ACT (XIII OF 1934), S. 6—*Wakf-al-aulad—Amount payable to wakf and members of his family—How determined.*

Where there is no provision in the wakfnama for the payment of any salary to an *Imam* or a *Muezzin* and the wakif and the members of his family were discharging the duties of those offices gratis no deduction can be made on account of the salaries for those offices from the amount payable to the wakif and the members of his family, for the purpose of determining whether a wakf is a wakf-al-al-aulad as defined in S. 6 (12) of the Bengal Wakf Act. (*Khundkar, J.*) HAFIZ SYED MAHOMED HASHMI *v.* COMMISSIONER OF WAKFS, BENGAL. I.L.R. (1947) 1 Cal. 492=51 C.W.N. 267.

——**S. 40—A**ppointment of Mutwalli by Commissioner—If needs confirmation by Court. [*See* Q.D. 1941-1945, Vol. I, Col. 376.] MIRZA MONTAZALI *v.* BANWARI LAL. I.L.R. (1945) 1 Cal. 266.

——**S. 46-A**—*Decision of Commissioner—If may be revoked on originating summons—Calcutta High Court, O. S. Rules, Chap. XIII, para.* 1.

Under S. 46-A of the Bengal Wakf Act, a decision of the Commissioner of Wakfs as to the character of a wakf may be revoked or modified by the Calcutta High Court on its Original Side on an originating summons taken out under Chap. XIII, para. 1 of the Original Side Rules. A decree of that Court passed in a regular suit is not necessary for that purpose. (*Kundkar, J.*) HAFIZ SYED MAHOMED HASHMI *v.* COMMISSIONER OF WAKFS, BENGAL. I.L.R. (1947) 1 Cal. 492=51 C.W.N. 267.

———S. 53 (3)—*Certificate granted without enquiry—Value of.*

A certificate obtained from the Commissioner of wakf under S. 53 (3) of the Bengal Wakf Act is worthless when it is not obtained within six months from the date of the lease and it does not show that he made any enquiries into the matter or considered the lease to be proper and necessary but it merely contains a statement to the effect that he approved the lease. (*Edgley and Blank, JJ.*) WAHED BUX SARDAR *v.* HANIF SARDAR. 52 C.W.N. 10.

BENGAL WILLS AND INTESTACY REGULATION (V OF 1799), S. 4—Subordinate Judge—Power to order security. *See* BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887), S. 23—SCOPE. 225 I.C. 247.

BENGAL (AGRA AND ASSAM) CIVIL COURTS ACT. *See* BENGAL CIVIL COURTS ACT (XII OF 1887).

BENGAL (N. W. F. P. AND ASSAM) CIVIL COURTS ACT. *See* BENGAL CIVIL COURTS ACT (XII OF 1887).

BERAR ALIENATED VILLAGES TENANCY LAW, S. 43 (1)—*"Holding"—Meaning of.*

The term "holding" in S. 43 (1), Berar Alienated Villages Tenancy Law, cannot be construed as synonymous with "survey number". As soon as the assessment in respect of a survey number is apportioned between its different subdivisions, each sub-division is constituted into a separate holding within the meaning of S. 3 (3), Berar Alienated Villages Tenancy Law. 10 N.L.R. 129 and 18 N.L.R. 48, rel. on. (*Kaushalendra Rao, J.*) NEMICHAND *v.* RAMNIDH. **5 D.L.R. (Nag.) 171=1950 N.L.J. 632.**

———S. 48 (4)—*Applicability—Surrender by widow of permanent tenant to landlord—If transfer.*

A surrender by the widow of a permanent tenant in favour of the landlord under S. 36 of the Berar Alienated Villages Tenancy Law is not a "transfer" within the meaning of S. 48 (4) of that law. To be a "transfer", it must be in favour of a person other than the landlord. (*Sheode, J.*) RODYA CHANDU *v.* MT. SAM I.L.R. (1948) Nag. 418=A.I.R. 1948 Nag. 373=3 D.L.R. (Nag.) 16.

BERAR INAM RULES (1859)—*Certificate-holder—Removal—Power of Deputy Commissioner.*

There are certainly no provisions in the Inam Rules or Instructions for the removal of the name of a certificate-holder during his lifetime. But the certificate-holder is merely a functionary who represents the co-sharers in matters affecting the Inam, so far as Government interests are concerned. He is a creature of the Government by executive decision. The well-accepted principle that an authority which has the power to appoint to an office has also the power to dismiss the person so appointed can justifiably be applied in this case. The absence of a rule or instruction regarding removal of a certificate-holder cannot fetter the hands of the executive Government that is the Deputy Commissioner, in the first instance so as to prevent him from removing a certificate-holder for valid reasons. Such reasons exist in a case where the certificate-holder has been declared insane by the Civil Court. It is in the interests of the shareholders as well as of Government that a person totally and entirely incapacitated from fulfilling any of the functions of the certificate-holder should be removed, even as a new incumbent is appointed on the death of the previous holder. (*Jayaratnam F. C.*) KHWAJA SALAUDDIN *v.* KHWAJA MUZAFFARUDDIN. 1947 N.L.J. 605.

———*Construction of Inam Certificate—Reference to rules—Permissibility.*

In construing an Inam certificate, a reference to the Berar Inam Rules is permissible only in so far as it is necessary to resolve ambiguity or to fill in gaps where the certificate does not in terms provide for. (*Bose and Sen, JJ.*) SECRETARY OF STATE *v.* DATTATRAYA YAIEO. I.L.R. (1946) Nag. 766=1946 N.L.J. 635=A.I.R. 1947 Nag. 95.

———*Devolution and incidents of Inam estate—Primogeniture and impartibility.*

The devolution and interests of an Inam estate in Berar are regulated by the Inam Rules of 1859, but only in matters not expressly mentioned in the Sanad or certificate or other document evidencing the special terms of the grant in the particular case.

Inam villages are not necessarily held upon a tenure involving impartibility and primogeniture. That is a form of tenure which might be prescribed by the grant and, if the grant contemplated that certain personal services would continue to be performed or a certain/office to be enjoyed by the holder of the Inam land, it might be easy so to construe it, if its terms were ambiguous, but not where there is neither ambignity in the grant nor any special circumstance which should lead to a departure from the ordinary principles of Hindu law. 21 N.L.R. 185, disapproved. 21 N.L.R. 117 (P.C.), relied on. (*Lord Simonds.*) SHRINIVASRAO *v.* VINAYAKRAO. 75 I.A. 30. I.L.R. (1949) Nag. 1=A.I.R. 1949 P.C. 1=4 D.L.R. (P.C.) 49=1949 N.L.J. 273 (P.C).

———R. 2—*"Jagir" and "Inam"—Distinction between.*

The distinction between "Jagir" and 'Inam' lies in this that the term "Jagir" is applied to a grant of a village or group of villages while "Inam" means a lesser grant. But generally a Jagir is an Inam. (*Lord Simonds.*)

SHRINIVASRAO *v.* VINAYAKRAO. 75 I.A. 320=I.L.R. (1949) Nag. 1=A.I.R. 1949 P.C. 9=4 D.L.R. (P.C.) 49=1949 N.L.J. 273 (P.C.).

———R. 5—*Grant of inam "to the claimants and their lineal descendants in perpetuity"—Daughter's daughter—Whether lineal descendant—Shia Mahomedans.*

An inam for personal maintenance was granted "to the claimants and their lineal descendants in perpetuity". The parties were Shias and the question was whether a daughter's daughter was a lineal descendant.

Held, that the term "lineal descendant" included all descendants and was not restricted to male descendants, and that as under the Shia Law the daughter's daughter was as much an heir as a son's son, she was entitled to succeed to her share. (*Pollock and Sheode, JJ.*) JAINAB BEGUM *v.* FARYAZUDDIN. I.L.R. (1948) Nag. 71=A.I.R. 1948 Nag. 138=1947 N.L.J. 571.

———R. 5—*Inam for personal maintainance—Words "Released free for life of present incumbents and one quarter Jumma to their male issue in perpetuity"—Interpretation—Estate granted, if a freehold—"Male issue"—If includes adopted sons.*

An inam certificate issued in respect of a village which was till then enjoyed as a rent free jaghir recorded *N* and *K* as the first inamdars to be recognised by the British. It stated that the inam was "for personal maintenance" and made the following entry under the heading "Tenure and condition attached to the continuance of the grant":—"Released free for life of present incumbents and on quarter jumma to their male issue in perpetuity". It was contended for the Government that the word "release" must be read in conjunction with the words "to their male issue in perpetuity" which were words of restriction and limitation and that the estate could not be called a freehold as the usual heirs would not succeed but only the male issue. Overruling this contention.

Held, (*i*) the word "release" stood by itself and it was not "release to the male issue" or to any other class. It referred to government's part in the transaction and was absolute. The rest of the clause embodied the consideration for the release, that is to say, what was to be taken from the other side. The word "release" imported enfranchisement of the estate, and that carried with it the obligation to pay the revenue—the full revenue. The remaining words imported the privilege conferred notwithstanding the release and the privilege was that *N* and *K* were to hold revenue-free for their lives, and their male issues in perpetuity had the privilege of paying only a quarter Jumma. But the privilege went no further, and if any one else obtained the estate, whether by inheritance or by transfer, or otherwise, he would be liable to pay the full assessment. The freehold remained with all the incidents of a freehold, but the special privilege conferred on the person and class specified went the moment the estate passed out of their hands unless Government chose to continue it.

(*ii*) that the words "male issue" meant "issue male of the body" and did not include fictional sons or other descendants. (*Bose and Sen, JJ.*) SECRETARY OF STATE *v.* DATTATRAYA. I.L.R. (1946) Nag. 766=1946 N.L.J. 635=A.I.R. 1947 Nag. 95.

———Rr. 5 and 14—*Service grant—Whether attachable in execution of decree—Successor, if burdened with decree obtained against previous holder.*

When an *inam* is granted for the maintenance of the grantee in order to enable him to perform the services of kazi, and the grant is made in perpetuity conditional on the service, the grant is a service grant falling under R. 5 of the Berar Inam Rules. It is inalienable not only because that is the condition subject to which the grain is made as set out in R. 14 (2), but also on broader grounds based on public policy. In the case of a service tenure of this kind where the interest of the public are involved the property is not liable to attachment in execution of a decree. A successor is not burdened with a decree obtained against the previous holder so far as the grant is concerned. (*Bose, J.*) OMPRASAD *v.* SYED RAHIMADDIN.. I.L.R. (1946) Nag. 112=225 I.C. 163=1946 Nag. (Rul.) 199=1946 N.L.J. 56=A.I.R. 1946 Nag. 147.

———**R. 5 (2)**—*Appointment of certificate-holder—Daughter and sister's son.*

The appointment of a certificate-holder is largely discretionary in the absence of any positive statutory regulations governing succession. R. 5 of the Inam Rules is in the nature of an administrative rule, though the Rules generally may have the force of law. The daughter of the last certificate-holder has, in view of the eligibility of daughters to succeed in the absence of male lineal heirs, a better claim than a sister's son belonging to a different family. (*Jayaratnam, F.C.*) JAFARALI *v.* MT. SHAMSHADBI. 1948 N.L.J. 179.

BERAR LAND RECORDS AND SURVEY MANUAL, Vol. II, Ch. IV—*Crop statement—Correction—Procedure.*

In a village, when a survey number or a subdivision is cultivated by a person who is not its occupant, the name and status of the actual cultivator, the terms of the lease and the rent he pays to the occupant, are entered in Col. 5 of the crop statement. Such statement is not prescribed by the Land Revenue Code or the rules made thereunder; but by executive instructions issued by Government in Ch. IV, Vol. II of the Land Records and Survey Manual. As the patwari is not a revenue officer, the statement which is only an annual record cannot be treated as proceedings before a Revenue Officer under the Code. The correctness of an entry made in the statement can be challenged by the person aggrieved only by applying to the superior land records staff who can deal with the matter in their executive capacity. A revenue case cannot, however, be instituted on such an application. The Tahsildar would therefore be clearly acting without jurisdiction in admitting the application and starting a regular revenue case about it, and an order on appeal by the Sub-Divisional Officer would also be *ultra vires,* as no appeal is admissible. (*Bambawale.*) BALMUKUND *v.* ROIDMAL. 1950 N.L.J. 427.

BERAR LAND REVENUE CODE (1928)—Appeal—Entry by Deputy Commissioner in character roll of official—Jurisdiction of Board of Revenue. *See* C. P. LAND REVENUE ACT. 1950 N.L.J. 135.

———Crop statement—Correction—Procedure. *See* BERAR LAND RECORDS AND SURVEY MANUAL, VOL. II, CH. IV. 1950 N.L.J. 427.

———S. 4 (3)—*Temporary lease granted by S.D.O.—Deputy Commissioner, if competent to intervene administratively.*

A temporary lease of E class land granted by a Sub-Divisional Officer, is an administrative act against which no formal appeal lies to the Deputy Commissioner under the Berar Land Revenue Code. But under S. 4 (3) of the Code, all Revenue Officers in a District are subordinate to the Deputy Commissioner and the latter is competent to intervene administratively in any acts done by Subordinate Revenue Officers, if he thinks that there is any justification for doing so. (*Jayaratnam.*) TRIMBAKRAO *v.* WASUDEO. 1950 N.L.J. 172.

———S. 38—*Compulsory acquisition of land—Refusal by Deputy Commissioner to recommend to Provincial Government—Revision.*

The only authority which is competent to decide and declare that any land shall be compulsorily acquired under the provisions of the Land Acquisition Act is the Provincial Government. Failure to persuade a Deputy Commissioner to recommend to the Provincial Government to acquire some land under the Act is not a matter which is subject to appeal or revision under the Berar Land Revenue Code. The question involved is one of policy and a Deputy Commissioner's or Commissioner's refusal to forward to Government an application for the acquisition of private land is an executive decision which is the concern of the executive Government, and no revision application lies to the Tribunal. (*Jayaratnam, F.C.*) REKCHAND GOPALDAS *v.* GAJADHAR RODMAL. 1948 N.L.J. 510.

———Ss. 47 and 42—*Izara village*—Nistar *rights—Rights of tenants—Izardar, if prohibited from levying* nistar *dues—Berar Alienated Villages Tenancy Act, S.* 15.

The tenants in an Izara village have no *nistar* rights in the village. Ss. 42 and 47 of the Berar Land Revenue Code support the view that the Izardar is competent to impose dues on those tenants who utilise his "*poramboke*" (unculturable) land in the village for *nistar* purposes. The Izardar is not prohibited by S. 15 of the Berar Alienated Villages Tenancy Act from levying *nistar* dues from his tenants. (*Jayaratnam, F. C.*) RAMSINGH *v.* BALAJI. 1949 N.L.J. 102.

———S. 50—*Diversion of land to different purpose within same category—Imposition of premium—Enhancement of assessment—Permissibility.*

A premium cannot be imposed under sub-S. (4) and the assessment cannot be enhanced under sub-S. (2) of S. 50 of the Berar Land Revenue Code, if land is diverted from quarrying to the erection of a ginning factory—both these purposes falling within category (*c*) of sub-S. (1). (*Ramsden, F.C.*) GOVERNMENT OF THE C. P. AND BERAR *v.* GANESHDAS. 1946 N.L.J. 650.

———S. 53—Nazul *land—Land revenue—Revision—1894 Rules.*

In Berar *nazul* land is unalienated land. The rights of an occupant in unoccupied *nazul* sites are granted under S. 53 of the Berar Land Revenue Code and the rules framed thereunder. The land revenue payable on a plot is, as stated in R. 36 of the rules, liable to revision at settlement. According to the 1894 Rules, the revised assessment is not to exceed twenty per cent. of the rental of the land. The term "rental" is not the same as rent; it means the "letting value" of the land. (*Bambawale and Sanyal.*) BHARAT VANASPATI PRODUCTS, LTD., AKOLA, *In re.* 1949 N.L.J. 559.

———S. 53—*Order revising revenue—Appeal—Berar Board of Revenue Act, S.* 6.

From the date the Berar Land Revenue Code of 1928, came into force *nazul* lessees became occupants by the operation of S. 53 of the Code, even though the terms of the lease under which they held, did not expire on the date. As the liability of paying land revenue is attached to the rights acquired by the operation of S. 53, its revision which is also an incidental liability, can be ordered only under the code. An order revising such revenue is thus appealable to the Board of Revenue which derives its jurisdiction in such cases from S. 6 of the Board of Revenue Act read with item No. 11 of its Schedule stating the powers and functions of the Board. (*Bambawale and Sanyal.*) BHARAT VANASPATI PRODUCTS, LTD., AKOLA, *In re.* 1949 N.L.J. 559.

———S. 53—*Rules under—Nature of—Duty of executive officers—Sale proclamation not published 15 days before sale as required by R. 7—Validity of sale.*

The Rules under S. 53 of the Berar Land Revenue Code are statutory rules. Executive Officers are bound to comply strictly with the provisions of the Rules, and any discretion implicit in them must be used judicially and not arbitrarily or capriciously. A sale is invalid and liable to be set aside if the proclamation of the sale in the village in which the sale is held is not made 15 days before the sale as required by R. 7. (*Jayaratnam.*) FIROZUDDIN HUSNODDIN, *In re.* 1949 N.L.J. 232.

———S. 55 (1) (d)—*Lease granted by Provincial Government—Modification—Power of Commissioner.*

The Provincial Government has not delegated its power to grant leases under S. 55 (1) (*d*), Berar Land Revenue Code, to the Commissioner. Lessees from Government hold in accordance with the terms of the grant, within the meaning of the Crown Grants Act. These terms are determined by Government as lessor and are embodied in the indenture. The Commissioner has no power to modify a special condition of the lease which the Provincial Government alone as lessor could. (*Bambawale and Sanyal.*) GANGABAI MOHTA, *In re*. 1949 N.L.J. 465.

——**S. 55 (1) (d)**—*Temporary lease granted by Deputy Commissioner or Sub-Divisional Officer —Jurisdiction of Board of Revenue.*

Temporary leases of E class land are granted by Deputy Commissioners and Sub-Divisional Officers as agents of the State Government. The terms and conditions are governed by a contract and not by statutory rules under S. 55 (1) (*d*) of the Berar Land Revenue Code. Any dispute about these terms and conditions do not fall to be resolved by the Board. (*Jayaratnam.*) TRIMBAKRAO *v.* WASUDEO. **1950 N.L.J. 172.**

——**Ss. 58 (3) and 59 (1)**—*Powers of Deputy Commissioner—Sanction of lay out—Conditions not fulfilled*—Locus standi *to initiate proceeding.*

S. 58 (3), Berar Land Revenue Code, provides that in the case of land which is to be used as building sites conditions may be imposed "in order to secure that the dimensions, arrangement and *accessibility* of the sites are adequate for the health or convenience of occupiers or are suitable to the locality". S. 58 (3) read with S. 59 (1) of the code, gives adequate powers to the Deputy Commissioner to act in a case where the conditions imposed have not been fulfilled. Accessibility here does not mean mere accessibility to persons living inside the survey number, but also to all persons of the locality. Under S 59 (1), it is the Deputy Commissioner who has to act and he can act on the information supplied by any person who is affected and who is prepared to take the trouble to bring such defaults to his notice. (*Bambawale.*) WAMANRAO *v.* PURUSHOTTAM. 1949 N.L.J. 542.

——**S. 59 (4)**—*Discretion of Deputy Commissioner—Exercise of—Interference by Revenue Tribunal.*

The discretion conferred by S. 59 (4) of the Berar Land Revenue Code on the Deputy Commissioner is absolute, and it is, therefore, all the more necessary that it should be used with great caution. The discretion certainly cannot be used to destroy rights or titles which may have accrued in property unless some indisputable public good would thereby be served. When three lower Courts concurrently hold that the discretion should not be exercised in favour of the applicant in respect of his complaint, the Revenue Tribunal would need the strongest justification for interference. (*Jayaratnam, F.C.*) NATHMAL JOHARMAL *v.* AJIJKHAN. 1948 N.L.J. 364.

——**Ss. 63 and 110**—*Proceeding under S. 63—Propriety—Last owner having no known heirs—Person in actual possession entered in Record of Rights as "occupant on the strength of possession"—Note added to this entry that "it is not known how possession was secured."*

In a proceedings under S. 63 of the Berar Land Revenue Code, it was found that the last owner had no known heirs and that the person in actual possession was entered in the Record of Rights as "occupant on the strength of possession" and to this was added a note that "it is not known how possession was secured."

Held, that although under S. 110 (6) of the Code an entry in the Record of Rights should be presumed to be true until the contrary was proved, the Court could not ignore in the present case the implied doubt as to the title of the person in actual possession which was clearly shown by the entry itself and by the note accompanying it, and that in the circumstances of the case, action under S. 63 of the Code was inevitable. (*Ramsden, F.C.*) SHESHRAO RAJARAMJI *v.* SYED SADUDIN. 1946 N.L.J. 647.

——**S. 72 (1)**—*'Ante-alienation tenant'—Tenant paying enhanced rent by mistake—If protected.*

S. 72 of the Berar Land Revenue Code confers a special and privileged status which can only be claimed by those who have in fact been paying the assessed rent over the requisite period. The payment of an enhanced rent due not to fraud but to the unilateral mistake of the tenant's predecessors will not operate to give the tenant protection under the section as an ante-alienation tenant. (*Bose, J.*) MAHOMED ALIMULLAKHAN *v.* MARUTI JANU. I.L.R. (1948) Nag. 73=A.I.R. 1948 Nag. 404=1948 N.L.J. 458.

——**S. 73**—*Tenancy of antiquity—Commencement of tenancy unknown—Subsequent execution of fresh lease—Effect of.*

Although the commencement of the period of a tenancy is not known, where a fresh lease came to be executed subsequently, the tenancy is not one of antiquity within the meaning of S. 73 of the Berar Land Revenue Code. The execution of a fresh lease imports a surrender of whatever kind of tenancy was in being on the date of the lease and commencement of a fresh one from that date; and that holds good even if the previous tenancy was of a permanent nature. (*Bose, J.*) MAHOMED ALIMULLAKHAN *v.* MARUTI JANU. I.L.R. (1948) Nag. 73=A.I.R. 1948 Nag. 404 =1948 N.L.J. 458.

——**S. 76**—*Decree for ejectment—Decree not to be operative if defendant deposits arrears of rent before certain date—Appeal by defendant dismissed —Appellate Court silent as to extension of time—Date of payment, if postponed.*

The plaintiff obtained a decree of ejectment under S. 76 of the Berar Land Revenue Code. The decree, however, was not to be operative if the defendant deposited arrears of rent on or before a certain date. The defendant unsuccessfully appealed to the District Court and that Court extended the time for payment up to a certain date. The defendant preferred a second appeal to the High Court which was dismissed and no mention was made of any extension of time within which the decree would be of no effect if the arrears of rent were paid. The defendant deposited the arrears within two months of the decree of the High Court and more than two years after the expiry of the time fixed for payment by the District Court. The plaintiff ignored this deposit, applied for execution of the decree and obtained possession. On an application by the judgment-debtor under S. 47, C.P.Code, asking to be restored to possession on the ground that he was entitled to make the deposit within two months of the date of the decree in the High Court.

Held, that there was no statutory obligation under S. 76 of the Berar Land Revenue Code on the appellate Court to fix a fresh date for payment, and as the High Court was silent as to any extension of the period of time, the date of payment was not postponed, and that the mere filing of the appeal did not have the effect of extending time. (*Grille, C.J.*) JAIRAM NAGOJI *v.* KHAJA OBEDULLA. I.L.R. (1946) Nag. 925=A.I.R. 1947 Nag. 81=227 I.C. 34=1946 N.L.J. 483.

———**Ss. 111 and 192**—Correction of entry in Record of Rights—Suit for—Jurisdiction of Civil Court. [*See* Q.D. 1941-1945 Vol. I, Col. 381.] VISHWANATHAPPA *v.* KEDARNATH. I.L.R. (1945) Nag. 1003=222 I.C. 336=1946 Nag. (Rul.) 66.

———**S. 129**—*Order conferring right of way on "dhura"—Destruction of standing trees—Power of Revenue Court to order.*

A right of way on a "dhura" secured by a person under an order under S. 129 of the Berar Land Revenue Code is subject to all the other rights of the owners of the "dhura" on the land including trees standing on it. The trees, therefore, cannot be touched by him and the Revenue Courts have no powers to order their destruction. (*Jayaratnam, F.C.*) SADASHEO RAJARAM *v.* NARAYAN RAMJI. 1948 N.L.J. 178.

———**Ss. 140 and 157**—*Sale proceedings against dead person—Validity—Duty of Revenue Officers.*

The Revenue Officers concerned are charged with a duty to administer the Berar Land Revenue Code and to sell the property of the defaulter in accordance with that law. The sale thus made would be a judicial sale though not a sale made by a Court. The Revenue Officer can have no jurisdiction to sell the property of a person who does not figure as a defaulter in proceedings before him. Sale proceedings started against a dead person who was not even an occupant cannot under any provision of law be binding on the recorded occupant. Such a sale is a nullity and need not be set aside under S. 157 (2) of the Code. (*Deo, J.*) WASUDEO *v.* NAMDEO GANPATRAO. 1950 N.L.J. 441.

———**Ss. 146 and 159**—*Scope and applicability—Objection to jurisdiction of Court to sell.*

An objection which sets up a claim to the property which is proceeded against and challenges the jurisdiction of the Court to sell the property to liquidate some one else's debt, falls under S. 146 of the Berar Land Revenue Code, and the remedy of the aggrieved party under cl. (2) of that section is by way of a civil suit. But proceedings under Ss. 155-159 of the Code do not challenge a Court's jurisdiction to sell a certain property for the realisation of dues recoverable under the Code. Although the proviso to S. 159 empowers a Deputy Commissioner to set aside a sale *suo motu,* or on grounds other than those alleged in any application, this discretion clearly is exercisable when a sale which has been held is a valid sale which conforms to the law in every respect and cannot, therefore, be set aside unless the Deputy Commissioner has these discretionary powers. (*Jayaratnam, F.C.*) GHASIRAM *v.* HARI BABAN. 1948 N.L.J. 153.

———**S. 155**—*Interest of applicant in property sold pending adjudication in civil Court—Revenue Court, if justified in not confirming sale.*

There is no provision in S. 155 of the Berar Land Revenue Code, whereby disputed claims under that section can be referred to a civil Court. But the rejection of a claim leads to the irrevocable confirmation of the sale, with the passing of title to a stranger. The admission of the claim merely restores the *status quo,* and if the claim is denied by the defaulter the claimant can seek his remedy in civil Court while the property is still intact. Where there are strong *prima facie* grounds for holding that the applicant under S. 155 of the Code has an interest in the property sold and he has already brought his claims before the civil Court for adjudication, the Revenue Court will be fully justified in staying its hands by not confirming the sale. (*Jayaratnam, F.C.*) KRISHNARAO *v.* BALKISANDAS. 1948 N.L.J. 511.

———**Ss. 155 (1) and 157 (2)**—*Revenue Sale—Setting aside of—Right of reversioner.*

A reversioner is not entitled to make the necessary deposit under S. 155, Berar Land Revenue Code, and have a sale held on default by a widow in payment of arrears of revenue set aside. The words "or holding an interest therein by virtue of a title acquired before such sale" occurring in S. 155 (1) of the Code do not include reversioners. The remedy of a reversioner alleging that there was fraud, is in the Civil Courts under S. 157 (2) of the Code. (*Jayaratnam.*) PRALHAD *v.* SHANKAR. 1950 N.L.J. 149.

———**Ss. 159 and 24**—*Irregularities in publication of sale proclamation—Substantial injury to debtor—Sale, if liable to be set aside.*

Failure to post the proclamation of sale at the places prescribed in S. 24 of the Berar Land Revenue Code is alone sufficient to render the sale void. Where in addition to this there are other serious irregularities, *viz.,* non-mention of the time at which the sale is to be held, endorsement about service of processes made not by the peon or by the patel, sale list wrongly stating that land sold belongs to a person other than the debtor, the cumulative effect of all the irregularities is to cause substantial injury to the debtor. The proviso to S. 159 of the Code gives wide powers to the Revenue Officer to set aside a sale and the case is eminently a fit one in which that power should be exercised. (*Bambawale.*) NAMDEO *v.* ABHIMAN. 1950 N.L.J. 14.

———**S. 159, proviso**—*Order confirming sale—Review—Legality.*

A Sub-Divisional Officer (who is empowered for this purpose as a Deputy Commissioner) has power under the proviso to S. 159 of the Berar Land Revenue Code to set aside a sale if he "has reason to think that the sale ought to be set aside" notwithstanding that no application has been made under S. 155 or S. 156 and after recording his reasons in writing "at any time before making an order confirming the sale". The words "before making an order" mean, in such a case, "instead of making an order"; and for sufficient reasons he can, even after confirmation, go back on that order in review, as if the sale had not been confirmed. (*Ramsden, F.C.*) GIRDHARILAL *v.* NAMDEO. 1947 N.L.J. 78.

——**S. 159, proviso**—*Scope and effect.*

It is a mistake to view the provisions of S. 159 of the Berar Land Revenue Code—the substantive clause and the proviso—as set in opposition to, or conflicting with, each other. "The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail." In other words, all the relevant provisions should be read together and, if so construed together, the result is as follows, even if all the mandatory provisions relating to the publication and conduct of the sale, the raising of objections, etc., have been complied with, still if the case falls within the four corners of the proviso, the sale may be set aside, if the Deputy Commissioner or higher authority is satisfied that it ought to be set aside. The real and the only limitation on the use of the proviso is that the Deputy Commissioner *must have reason to suppose that the sale ought to be set aside.* That reason must be sound and valid and any tendency to override the mandatory provisions of the law without sufficient cause would be severely discouraged by the Courts. (*Rau, F.C.*) RAGHU *v.* WAMAN. 1946 N.L.J. 31.

——**S. 159, proviso**—*Setting aside sale—When justified.*

The proviso to S. 159 of the Berar Land Revenue Code is not intended to enable officers to set aside sales on merely suppositious and speculative grounds. Only exceptional circumstances can justify the exercise of the extraordinary powers conferred by the proviso. Where none such exist, the first half of S. 159 enjoining that the sale shall be confirmed comes into operation. (*Rau, F.C.*) VITHAL *v.* ABDUL WAHAB. 1946 N.L.J. 41.

——**Ss. 173, 177 and 54**—*Joint family property—Mortgage by manager for necessity—Foreclosure decree—Members losing all interest in whole of survey number—If entitled to pre-empt.*

Under Ss. 173 and 177 read with S. 54 of the Berar Land Revenue Code, a person seeking the right to pre-empt must have an interest in the survey number. If he has parted with that interest or if his interest has been parted with authority by another, he ceases to be a co-occupant and has, therefore, no right of pre-emption. Where, therefore, a field belonging to a joint Hindu family is mortgaged by the manager of the family for family necessity, and in a suit on that mortgage a final decree for foreclosure which is binding on all the other members is passed, the other members who have lost all interest in the whole of the survey number because of that decree can no longer be considered co-occupants and therefore have no right of pre-emption, that right being conferred under the Code only upon persons who remain co-occupants despite the transfer sought to be pre-empted. I.L.R. (1944) Nag. 848, approved. I.L.R. (1942) Nag. 325, Expl. (*Bose, C.J.*) GYANDEO KUNBI *v.* BRIJLAL AGARWAL. I.L.R. (1949) Nag. 901=1949 N.L.J. 351=A.I.R. 1949 Nag. 339.

——**Ss. 173 and 179**—*Occupants having undivided interest in survey number—Whether can exercise right of pre-emption jointly and claim priority on strength of their joint interest.*

The basic principle of pre-emption under the Berar Land Revenue Code is that it is an individual right of an occupant and can be exercised by him for himself and in his own right. It is not a joint right in favour of several occupants and cannot be exercised by them jointly and in joint interest even though the interest which they hold in the survey number may be undivided. Two or more occupants cannot thus form a group and exercise the right of pre-emption jointly and cannot claim priority on the strength of their joint interest in the survey number. It is therefore that S. 173 of the Code has declared a person having the right of an occupant jointly with others to be an occupant so that, if he desires, he may be able to exercise the right of pre-emption for himself. The Code does not permit a decree for pre-emption being passed in favour of more persons than one, as is clear from S. 179 (2). (*Padhye, J.*) MAHADEO VYANKATI *v.* ABBASBHAI. I.L.R. (1947) Nag. 599=A.I.R. 1948 Nag. 134=1947 N.L.J. 452.

——**Ss. 173, 176 and 183**—*"Person"—Hindu coparcenary—Transfer of portion of coparcenary property by father-manager for binding purpose—Minor son, if entitled to pre-emption.*

A Hindu coparcenary or undivided family, so long as it functions as such, must be regarded as but one entity covered by the expression "person" mentioned in S. 173 of the Berar Land Revenue Code. Though in that section a special definition for the purpose of Ch. XIV has been given to enlarge the definition of "occupant" given earlier in S. 54, a consideration of the other sections would show that the result of S. 173, is not to make every member of an undivided Hindu family which owns a survey number or a subdivision or a portion of either an occupant. So, where the coparcenary or the undivided family owns a survey number or a portion of it, it is the family or the coparcenary which has the right of an occupant either in its sole right or jointly with another. As the entire coparcenary or undivided family is one occupant when a transfer is effected which is binding on the coparcenary or the family, no member of the coparcenary or of the family merely by virtue of such membership can be regarded as the other occupant entitled to pre-empt. So, if the father-manager sells a portion of the coparcenary property by a valid sale binding on his minor son's interest therein, the minor son has no right of pre-emption. Where, however, the *karta* or other coparcener cannot be held to be transferring the property of the entire coparcenary as such but is to be regarded as effecting only a transfer of his own undivided interest, different considerations may arise. I.L.R. (1942) Nag. 325, overruled.

(*Hemeon, A.C.J., Kaushalendra Rao and Deo, JJ.*) Ratanlal *v.* Ashok. I.L.R. (1950) Nag. 726=5 D.L.R. Nag. 194=A.I.R. 1950 Nag. 259=1950 N.L.J. 404 (F.B.).

———**Ss. 173 to 186**—*Provisions relating to pre-emption—If exhaustive.*

Chapter XIV of the Berar Land Revenue Code contains the provisions relating to pre-emption. Whatever be the origin and the basis of the law of pre-emption in Berar, S. 174 (1) emphasises that the rights conferred by the chapter are to be enforceable *only in the manner and to the extent* provided in that chapter. So the Code is exhaustive with respect to matters about which it makes provision. (*Hidayatullah and Rao, JJ.*) Govindsa *v.* Sk. Ismail. I.L.R. (1949) Nag. 933=A.I.R. 1950 Nag. 22=1950 N.L.J. 1.

———**S. 174**—*Plaintiff—Pre-emptor selling field which entitled him to pre-emption, after Appellate Court's decree and before deposit of pre-emption price—Right of pre-emption—If lost.*

For the plaintiff pre-emptor to succeed, he must establish his right to pre-empt at the time when the sale took place, at the time when the suit is brought and at the time of the decision of the suit in the trial Court. It matters little whether that Court actually dismisses or decrees his suit. If, therefore, the plaintiff sells the field which entitled him to sue for pre-emption after the Appellate Court's decree in his favour and before the deposit of the pre-emption price, he does not lose his right of pre-emption. 45 A. 709, foll. (*Mangalmurthi, J.*) Mahomed Khan Jalal Khan *v.* Sheikh Hussain. I.L.R. (1949) Nag. 696=A.I.R. 1949 Nag. 358=1949 N.L.J. 386.

———**S. 174 (3)**—*Party having prior claim to pre-empt taking active part in bringing about sale—Right of pre-emption, if extinguished.*

The fact that a party having a prior claim to pre-empt has taken an active part in bringing about the sale, does not raise a presumption of waiver of his right of pre-emption. Even if he has agreed in writing to the sale before it was made, his right of pre-emption would not be extinguished if another person who has an inferior right of pre-emption refuses his consent to the sale, as is clear from the proviso to S. 174 (3) of the Berar Land Revenue Code. There is therefore no reason why an implied consent not in writing should be more effective than a consent in writing. (*Pollock, J.*) Kazi Syed Kariruddin *v.* Mt. Meherunnisa Begam. I.L.R. 1947 Nag. 341=230 I.C. 471=A.I.R. 1948 Nag. 19=1947 N.L.J. 230.

———**S. 174 (3)**—*Scope and effect—Right of pre-emption—If can be waived after its accrual.*

Under S. 174 (3) of the Berar Land Revenue Code, right of pre-emption will not arise if there is written consent prior to the sale. This provision does not affect the application of the general rule of estoppel and waiver after the right of pre-emption has accrued. There is nothing in the code which prevents a pre-emptor from waiving his right of pre-emption after it has arisen. 4 Luck. 421 (P.C.), ref. to. (*Sen, J.*) Mathura Das *v.* Onkar. I.L.R. (1949) Nag. 771=4 D.L.R. (Nag.) 189=A.I.R. 1949 Nag. 387=1949 N.L.J. 468.

———**S. 174 (4)**—*Co-occupant's suit for pre-emption—If can be defeated by another co-occupant with superior right of pre-emption purchasing the property from the stranger purchaser.*

A field was held by three occupants, *A*, *B* and his nephew *C*. *B* sold 2 acres out of the field by two sales to *X*, a stranger, whom he put in possession. *K* filed a suit against *X* for pre-emption of the two acres. While the suit was pending *X* sold the land to *C* who then contended that he had a superior right of pre-emption as he was more nearly related to *B*, which he exercised and therefore the suit cannot be maintained against him.

Held, the suit could not by virtue of S. 174 (4) of the Berar Land Revenue Code be defeated by a subsequent sale of the interest of the vendee to another co-occupant even if such co-occupant had equal or preferential right of pre-emption. The right of pre-emption cannot be pleaded by way of defence. The lawful course open to *C* was to file a suit as required by S. 174 (1) on the basis of *B*'s original sale to *X* and not by raising a defence on the basis of re-acquisition of the interest from the stranger purchaser. (*Niyogi, J.*) Krishnabai *v.* Madukhar Sitaram Deshmukh Maratha. I.L.R. (1946) Nag. 758=225 I.C. 276=1946 N.L.J. 463=A.I.R. 1946 Nag. 367.

———**Ss. 176 and 180**—*Notice to co-occupant mentioning price and name of purchaser—Co-occupant not complying with it—Actual sale in favour of different person and for higher price—Co-occupant, if loses right of pre-emption.*

All that is necessary to be mentioned by the co-occupant in his notice under S. 176 (1) of the Berar Land Revenue Code is his intention to sell his interest and the price at which he is willing to sell. There is no statutory obligation cast upon the co-occupant to specify the person in whose favour he proposes to sell and in the absence of such a statutory obligation, it is quite open to him to sell the property to a person not named in the notice, if the co-occupant on whom the notice is served does not comply with it. If the sale is made within a reasonable time after the notice for a consideration which is not less than that mentioned in it, the co-occupant on whom the notice is served loses his right of pre-emption. If the vendor chooses to accommodate the vendee by agreeing to the payment of consideration in instalments, there is no reason to suppose that the vendee has paid a smaller amount. The provisions of S. 180 read with those of S. 176 of the Code cannot be construed to mean that the actual sale, which the occupant makes, must be in favour of the same person and for the same price as mentioned in the notice. (*Pollock and Shevde, JJ.*) **Dnyandeo Kisan *v.* Abdul Wahabkhan.** I.L.R. (1948) Nag. 820=1948 N.L.J. 399=A.I.R. 1949 Nag. 116=4 D.L.R. (Nag.) 62.

——**S. 176**—*Sale executed pursuant to decree for specific performance of contract of sale—Pre-emption right, if arises.*

A right of pre-emption arises in the case of a sale executed in pursuance of a decree for specific performance of a contract of sale. Such a sale is the result of an act of parties, as the assistance of the Court is only sought to enforce the contract already arrived at between the parties. 27 N.L.R. 392 and 1924 Nag. 327, foll. 4 N.L.R. 138 and 28 N.L.R. 11, Dist. (*Sen, J.*) MAROTIRAO *v.* SAKHARAM. I.L.R. (1949) Nag. 714=1949 N.L.J. 463=A.I.R. 1949 Nag. 342 =4 D.L.R. (Nag.) 161.

——**Ss. 176 and 183**—*Sale in pursuance of decree based on award of arbitrator—If voluntary or involuntary—Right of pre-emption, if arises.*

An owner of a Survey number and his creditor referred their disputes to arbitration. A decree in terms of the award was passed after contest directing the execution of a sale-deed in respect of the survey number in favour of the creditor in satisfaction of his debt. The creditor obtained delivery of possession of the survey number through Court. A co-occupant of the survey number applied for pre-emption.

Held, that the sale in the case did not flow from any contract between the parties, that it was solely within the power of the arbitrator to determine the amount of debt due to the creditor and also to lay down the mode of satisfaction, and that in the circumstances the sale was involuntary and did not give rise to a right of pre-emption. 28 N.L.R. 11, rel. on. (*Sen, J.*) JAMNADAS RAMGOPAL *v.* RAMCHANDRA MANSARAM. I.L.R. (1949) Nag. 746=4 D.L.R. (Nag.) 177=A.I.R. 1949 Nag. 365=1949 N.L.J. 404.

——**S. 177**—Lahan-gahan *mortgage—Mortgagee obtaining foreclosure decree—If subject to pre-emption by co-occupant.*

A *lahan-gahan* mortgage is a mortgage by conditional sale within the meaning of S. 177 of the Berar Land Revenue Code, even when a personal covenant is added, and a mortgagee who succeeds in obtaining a decree for foreclosure on such a mortgage is subject to the condition of pre-emption by a co-occupant. The Transfer of Property Act has no application to the pre-emption chapter of the Berar Land Revenue Code, and the definition of "mortgage by conditional sale" in that Act is not to be imported in the interpretation of S. 177 of the Code. (*Grille, C. J. and Hidayatullah, J.*) JAINARAYAN *v.* MOTIRAM. I.L.R. (1948) Nag. 327=2 D.L.R. 776 =A.I.R. 1949 Nag. 34=1948 N.L.J. 195.

——**Ss. 177 and 183**—*Mortgage by conditional sale—Mortgage giving mortgagee option of selling or foreclosing—If amounts to.*

A mortgage which confers on the mortgagee an option to sell or to foreclose is a foreclosure mortgage, particularly when the mortgagee elects to treat it as such and forecloses. Such a mortgage must therefore be considered to be one by conditional sale within the meaning of Ss. 177 and 183 of the Berar Land Revenue Code.

(*Vivian Bose, A.C.J. and Mudholkar, J.*) GOVARDHAN *v.* MUKHARAM. I.L.R. (1945) Nag. 465=4 D.L.R. (Nag.) 157=1949 N.L.J. 290.

——**Ss. 182 and 183**—*"Fair consideration"—Determination of—Considerations.*

Under the Berar Land Revenue Code, the pre-emptor has to pay the "fair consideration" and not the market-value. The market-value is only relevant to determine the fair consideration. In arriving at a proper figure, it must be borne in mind that pre-emption is basicalley a right of substitution. The pre-emption is entitled to be substituted for he purchaser. If that is done, then clearly all he has to do is to pay the price the purchaser was willing to pay. Where property is sold with the object of wiping out old debts, then the consideration for pre-emption is not the nominal value of the debts, but the then market-value. (*Bose, J.*) GOKULDAS *v.* NAMDEO. I.L.R. (1946) Nag. 465=223 I.C. 570=1946 Nag. (Rul.) 135=1946 N.L.J. 295=A.I.R. 1947 Nag. 156.

——**Ss. 182 (4) and 183 (2)**—*"Fair consideration"—Determination of—Market value—Relevancy.*

The "fair consideration" contemplated by S. 182 (4), Berar Land Revenue Code, is not the same as the market-value, and the expression must be construed similarly in S. 183 (2) of the Code. The market-value, though not the criterion, is however relevant in determining the fair consideration. *Prima facie* the market-value is the fair consideration and it is for the party alleging that it is not so to plead and prove that there are circumstances to suggest that it is not the fair consideration. I.L.R. (1937) Nag. 469 and I.L.R. (1946) Nag. 465, referred to. (*Sen, J.*) MARUTI GAJMALJI GARDE *v.* AMRIT. I.L.R. (1950) Nag. 39=5 D.L.R. (Nag.) 88.

——**S. 182 (3)**—*Notice under S. 175 served on pre-emptor—Limitation for suit—Transfer by vendor to third party subsequent to notice—Effect of.*

S. 182 (3) of the Berar Land Revenue Code is unambiguous and mandatory. If a notice has been served on the pre-emptor in accordance with S. 175 of the Code, the period of limitation for a suit for pre-emption is two months from the date of such service. A pre-emptor after receipt of a notice is not concerned with the subsequent steps that the co-occupant may take. He must conform to the procedure laid down in S. 182 (2). The vendor cannot defeat his rights of pre-emption if he complies with S. 182 (2). The result of compliance is to keep alive the rights of pre-emption while non-compliance leads to loss of the rights. Any transfer made by the vendor to a third party subsequent to the notice will be set aside if the pre-emptor has carried out the obligation under S. 176 (2) of the Code. 9 I.C. 333, Dist. (*Sen, J.*) NANA RAOGI *v.* BABULAL. I.L.R. (1949) Nag. 761=4 D.L.R. Nag. 162=A.I.R. 1949 (Nag.) 341=1949 N.L.J. 368.

——**S. 182**—*Pre-emption suit—Scope of enquiry—Plaintiff alleging that lease by vendor recited in sale-deed is bogus and lessee is benamidar for purchaser—Lessee, if necessary party.*

If in a suit for pre-emption under S. 183 of the Berar Land Revenue Code, the plaintiff alleges that the recital in the sale-deed regarding a lease deed executed by the vendor is untrue, and is introduced by the vendee with a view to defeating the rights of the pre-emptor, that the lease is bogus and that the purchaser himself is in possession the lessee being merely a benamidar, the Court has jurisdiction to hold an inquiry into the genuineness or otherwise of the lease-deed in the suit itself instead of driving the plaintiff to another suit. Inasmuch as the lessee is a necessary party to such an inquiry, the plaintiff is entitled to join him as a party. (*Puranik, J.*) MARUTIRAO GOVINDARAO *v.* NATHMAL JODHRAJ. I.L.R. (1947) Nag. 124=229 I.C. 513=1947 Nag. (Rul.) 127=A.I.R. 1947 Nag. 229=1947 N.L.J. 120.

———**Ss. 183 and 176**—*Auction sale of survey number belonging to Co-operative Bank—Acceptance of highest bid—No sale-deed executed—Purchaser executing lease-deed—Transaction—If amounts to sale—Right of pre-emption—If arises—Co-operative Societies Act, S.* 18.

A survey number belonging to a Co-operative Bank was advertised for sale by auction and the highest bid was accepted. The Registrar of Co-operative Societies approved of the sale. Everything necessary for the completion of a sale was done except the drawing up, signing and registering of a sale-deed. But after that, instead of executing a sale-deed, the purchaser executed what he called a "lease deed" in favour of the Bank whereby he undertook to pay the price in six equal yearly instalments, and obtained possession of the field. A co-occupant of the survey number sued for pre-emption alleging that the so-called lease was a mere blind and that the transaction was in reality an oral sale.

Held:—Though there could be an oral sale for the purposes of S. 176 of the Berar Land Revenue Code, such a sale was precluded in the present case because the Bank, being an incorporated body, could not conduct an oral transaction. In the absence of any special rule, in the constitution of the Bank, the only way in which a transfer could be effected by it was by a resolution and the affixing of the seal to the deed. Living persons could of course be authorised to act on its behalf if its constitution so permitted and those persons could make oral sales provided that lay within the ambit of their authority, but no such auhority was established in the present case. In the circumstances the transaction could not be called a transfer by sale within the meaning of S. 176 and, therefore, no right of pre-emption arose under S. 183 of the Code. S. 176 only applied when there was an actual sale and a mere agreement to sell was not enough even when there was a right to specific performance. (*Bose and Hidayatullah, JJ.*) ONKAR LAXMAN *v.* NAMDEO BHAGWAN. I.L.R. (1949) Nag. 699=5 D.L.R. (Nag.) 19=1949 N.L.J. 422.

———**S. 183**—*Right of pre-emption—When arises—Fictitious sale-deed—If gives rise to such right.*

According to the scheme of the Berar Land Revenue Code, only a bilateral transaction such as sale, mortgage, lease and exchange gives rise to a right of pre-emption in favour of a co-occupant; a unilateral transaction such as gift does not give rise to such a right. Moreover, in order to give rise to a right of pre-emption under S. 183 of the Code, what is necessary is a transfer of right in the property which is the subject-matter of a suit for pre-emption. There is no transfer of right in the property in the case of a fictitious or sham transaction. The title to the property remains where it was, that is, in the alleged vendor in spite of such a fictitious sale-deed and no right of pre-emption can arise as long as the title remains in the original holder. Under S. 183, a pre-emptor is substituted in place of the purchaser which necessarily means that he gets that title in the property which the purchaser got by virtue of the transaction in his favour. The pre-emption would be infructuous and the pre-emptor would get no title in property if he pre-empts the alleged purchaser in whose favour an entirely sham or a fictitious sale-deed was executed by the original holder. As the law stands it is not the mere existence of a sale-deed which gives rise to a right of pre-emption but it is the transfer of interest in the property which can only be effected by a genuine and valid transaction. (*Padhye, J.*) KISANLAL *v.* BHIKA GANGARAM. I.L.R. (1948) Nag. 474=A.I.R. 1948 N. 171=2 D.L.R. 478 =1947 N.L.J. 521.

———**Ss. 183 and 174 (3)**—*Suit for pre-emption—Oral consent of pre-emptor given before sale—If defeats suit—Plea of estoppel—Purchaser, if can set up.*

In a suit under S. 183, Berar Land Revenue Code, oral consent of the pre-emptor given before the sale cannot defeat the right of pre-emption. The code provides two ways in which the intending purchaser can assure himself that the right of pre-emption would not be exercised. He may either secure the prior written consent of all the occupants of the survey number as required by S. 174 (3) or insist that the vendor shall serve a notice under S. 176 (1) read with S. 175. If instead of following either of the courses provided by the Code the intending purchaser approaches the pre-emptor direct and is content with his oral consent, he is proceeding on a path of his own choice. The insistence on consent in writing is to avoid uncertainty involved in the determination of doubtful pleas of oral consent based on conflicting and possibly perjured testimony. The legislature took pains to evolve a system which, if adhered to, will eliminate delays, doubts and difficulties. To hold oral consent given before a sale a sufficient defence to a claim of pre-emption would be to encourage the disregard of the system introduced by the Code without securing any corresponding gain.

The purchaser who settles his bargain with the vendor and buys property relying on the prior assurance of the pre-emptor that he will not pre-empt cannot successfully set up the plea of estoppel in a suit under S. 183 of the Code. The pre-emptor who, even before an agreement of sale, assures the purchaser that the former will not pre-empt, is not making any representation about any fact, but is making a representation of his present intention not to do something *de futuro*, which is revocable. A representation of intention, true or false, cannot give rise to estoppel. 13 R. 256 (P.C.) and A.I.R. 1937 Nag. 400, referred to. (*Hidayatullah and Rao, JJ.*) GOVINDSA *v.* SK. ISMAIL. I.L.R. (1949) Nag. 933=A.I.R. 1950 Nag. 22=1950 N.L.J. 1.

———S. 183—*Suit for pre-emption—Person having right suing jointly with stranger—Stranger's claim subsequently withdrawn—Pre-emptor's right, if forfeited.*

Where a person having a right of pre-emption sues jointly with a stranger not having such right, and the stranger's claim is withdrawn or sought to be withdrawn, the person having the right of pre-emption does not forfeit his right. The mere association of a stranger with him is not sufficient to nullify entirely his claim. 28 P.R. No. 83 p. 338 approved. (*Grille, C.J.*) FAKIRA PANDU *v.* NARAYANDAS. I.L.R. (1949) Nag. 350=4 D.L.R. (Nag.) 124=A.I.R. 1949 Nag. 344=1949 N.L.J. 107.

———Ss. 183 and 174—*Suit for pre-emption—Purchaser of property after accrual of pre-emption right, joined as party—If entitled to appeal—C. P. Code. S. 96.*

A person who has purchased property after the right of pre-emption has accrued to the pre-emptor, if made a party to the suit for pre-emption, has *locus standi* to file an appeal against the decision of the Court and challenge the price of pre-emption fixed by it. Since S. 96, C. P. Code, makes every original decree appealable, the purchaser who is adversely affected by the decree has a right of appeal. There is nothing in S. 174 (4), Berar Land Revenue Code, which takes away from such purchaser this right. (*Mudholkar, J.*) GULABCHAND *v.* DOMA. I.L.R. (1949) Nag. 776=5 D.L.R. (Nag.) 48=A.I.R. 1950 Nag. 61=1949 N.L.J. 544.

———S. 183—*Transfer contemplated by—Sale of part of mortgaged property in full satisfaction of mortgage debt as scaled down by Debt Conciliation Board—If gives rise to right of pre-emption—Price of pre-emption.*

A sale of a part of the mortgaged property in favour of the mortgagee in full satisfaction of the mortgage debt as scaled down by the Debt Conciliation Board, is a transfer of the kind contemplated by S. 183 of the Berar Land Revenue Code, and gives rise to a right of pre-emption. 1941 N.L.J. 623, foll. 1 L. 109 and 18 I.C. 957, Dist.

For purposes of pre-emption, the market value of the property is the amount of the debt as scaled down and not its paper value. I.L.R. (1946) Nag. 465, ref. to. (*Bose and Sen, JJ.*) KASHINNATH APPA *v.* RAMJI NANAJI. I.L.R. (1949) Nag. 625=1949 N.L.J. 285.

———S. 183—*Unrecorded occupant—Right to pre-emption.*

In S. 183 of the Berar Land Revenue Code, occupant does not merely mean recorded occupant, and "all the other occupants in the survey-number" have a right to pre-empt the interest transferred whether they are recorded occupants or not. (*Mangalmurthi, J.*) VITHU *v.* THAKURDAS. I.L.R. (1949) Nag. 307=A.I.R. 1949 Nag. 414=1949 N.L.J. 398.

———S. 194 (2) (g)—*Maharki Rules, R. 2—Village Mahar—Eligibility of woman.*

The appointment of a mahar has to be made in accordance with the custom of village subject to the provisions of R. 2 of the Maharki Rules framed under S. 194 (2) (*g*) of the Berar Land Revenue Code. According to R. 2, a woman is not eligible for the post of a village mahar. She cannot, therefore, either be appointed to work as village mahar or can have the right of appointing a substitute. (*Bambawale.*) BANI *v.* MARYA. 1950 N.L.J. 225.

———S. 194 (2) (g)—*Rules under—Rr. 4 and 5—Order of Tahsildar regarding appointment of mahar—Appeal, revision and review.*

An order passed by the Tahsildar, whether under R. 4 when the patel does not make an appointment within one month of the vacancy occurring and the Tahsildar appoints a *mahar* directly, or under R. 5 when on receiving the patel's report intimating an appointment he revises the appointment so made *suo motu* or on an application made revises or maintains such an appointment, is an original order passed under the rules by a "revenue officer". The order so passed, can, therefore, not only be reviewed by that officer but an appeal or a revision will also lie against it. 1948 N.L.J. 59, overruled. (*Bambawale and sanyal.*) MOTIRAM *v.* MAHADEO. 1949 N.L.J. 556.

———S. 194 (2) (g)—*Rules under—R. 5—Appointment of Kamdar Mahar—Order of Tahsildar—Whether may be contested before Revenue Tribunal—Government of India Act, S. 296 (1).*

A Kamdar Mahar, although he has certain customary rights to appointment is a paid servant of Government, whose appointment is made by the Patel of the village subject to the control of the Tahsildar acting in his executive capacity of a Revenue Officer and not as a Revenue Court. A Patel, not being a Revenue Officer, does not initiate a revenue case when he appoints a Kamdar Mahar and any subsequent orders or proceedings founded on such an order cannot contain an "original order" such as is contemplated in S. 32 (1) of the Berar Land Revenue Code. In this view of the matter the Tahsildar's order under R. 5 of the rules made under S. 194 (2) (*g*) of the Code must be regarded as final and cannot be contested before the Revenue Tribunal. This Tribunal has jurisdiction under S. 296 (1) of the Government of India Act to entertain appeals or revise decisions in revenue cases only. (*Jayaratnam, F.C.*) MARUTI MANKYA *v.* TUKARAM RAGHO. 1948 N.L.J. 59.

———S. 194 (2) (g)—*Rules under—R. 8—Appointment of Kamdar Mahar.*

It is not merely the custom of the village, but an *established* custom which has to be taken into account in appointing Kamdar Mahars (*Jayaratnam, F.C.*) MARUTI MANKYA *v.* TUKARAM RAGHO. 1948 N.L.J. 59.

BERAR PATELS AND PATWARIS LAW (1900)—*Cases decided after* 1905—*Principle of* res judicata—*Applicability.*

It cannot be held that patelki cases decided after the publication of the Resolution of 1905 should not be reopened, no matter how wrong the decisions may be. The principle of *res judicata* as ordinarily understood and as laid down in S. 11, C.P. Code, is not applicable in its entirety to the Patels and Patwaris Law. The view that judicial decisions take effect-from the date on which they are given and do not have retrospective effect is incorrect. The theory in respect of overruled decisions is, not that overruled decisions made law, which is changed by the later decision, but that the earlier decisions, being a mistake, never were the law, but that the law is and has always been as expounded in the later decision. 1943 N.L.J. 289, 294 and 562, overruled. (*Burton, Fin and Rau, F.C.*) Gulabrao *v.* Mahadeo. 1946 N.L.J. 59.

———*Patelki proceedings—Principle of* res judicata—*Relaxation in applications.*

The relaxation of the rigid application of the principle of *res judicata* in patelki proceedings does not mean that all rejected, random or hypothetical claims should be admitted as genuine and previous orders and decisions in favour of other parties completely ignored. (*Jayaratnam, F.C.*) Govinda Amrit *v.* Waghu Shripat. 1948 N.L.J. 390.

———*Patelki succession case—Previous decision regarding seniority of branch*—Res judicata—*Principle, when may be relaxed.*

If a previous decision in a patelki succession case on an issue in regard to the seniority of a branch taken on a genealogical tree was erroneous and not in accordance with facts, there can be no objection to a full investigation of the matter on a later occasion when that tree is relied on by a party. But the decision previously taken must be patently erroneous on the face of it, or the subsequent evidence produced must/prove that the evidence previously relied on was based on inherently unreliable or mistaken data. If the contention could have been raised on the previous occasion when there was a possibility of securing reliable evidence in regard to it, the case is not one in which the general principle of *res judicata* can be relaxed. (*Jayaratnam, F.C.*) Manchit Rao Daulat Rao *v.* Subrao. 1947 N.L.J. 601.

———*Revenue Court—Power of review—C. P. Code, S.* 114 *and O.* 47, *R.* 1.

The Berar Patels and Patwaris Law does not provide for review. Therefore a review application before a Revenue Court is admissible only under the provisions of S. 114 and O. 47, R. 1, C. P. Code. Under these provisions no review can lie if the applicant bases his case on a decision in the Civil Court secured subsequent to the passing of the order of the Revenue Court. (*Bambawale and Sanyal.*) Vithu *v.* Laxman. 1949 N.L.J. 532.

———**S. 4-A**—*Appointment of substitute Patwari—Duration of appointment.*

BERAR PAT. AND PATW. LAW (1900), S. 5.

The appointment of a substitute Patwari under S. 4-A of the Berar Patels and Patwaris Law is not for his life but for the life of the *malik*. Rule XII (1) must be read as referring to the life of a *malik*. (*Brave, F.C.*) Vishnu Ganesh *v.* Sunderrao. 1947 N.L.J. 416

———S. 5—*Appointment of patel—Long term officiation in junior branch—It gives latter prescriptive right to exclusion of senior branch.*

When there is no specific waiver on the part of members of the senior branch, long term officiation in the junior branch give the latter a prescriptive and total right to the patelki to the exclusoin of the senior branch 1946 N.L.J. 126, ref. to. (*Bambawale.*) Madhukar Pamrao *v.* Trimbak Pandurang. 1949 N.L.J. 461.

———S. 5—*Division of watan—Permissibility.*

It is well settled that a watan cannot be divided except with the consent of the parties. (*Burton and Rau, F.C.*) Vyankatesh *v.* Vishnu. 1946 N.L.J. 297.

———S. 5—*Patelki cases—Doctrine of* res judicata—*How far applicable.*

The doctrine of *res judicata,* as understood and applied in the Civil Courts, is not applicable in its entirety to certain classes of Patelki succession cases. A previous adverse decision, like any decision, must rest on two things, (*a*) the facts and (*b*) the underlying principle, namely the *ratio decidendi* in the case. If a decision had been previously based on the *facts* in dispute between two families who were constantly contesting the succession to a *Patelki* it is clear that that decision, based as it was on questions of fact relating to that Patelki, cannot be subsequently revised except on very exceptional grounds. The decision on questions of fact is binding on the parties and operates as *res judicata* between them or their successors in the sense in which the rule is understood in civil law. It is recognised that Government is, in a sense, a third party in Patelki succession cases. But in so far as the facts are concerned, Government is not a party. In Patelki succession cases two principal considerations constitute the *ratio decidendi* of the decisions. The first may be termed the legal reason which is based on the law or rules or instructions having the force of law which govern Patelki appointments. The second is public policy, administrative or political. The doctrine of *res judicata* cannot in the nature of things apply to the *ratio decidendi* of old decisions in Patelki succession cases, because public policy in a matter which so intimately affects village administration must change with changing times and circumstances according to the needs of administration. Rules or instructions may have spent themselves. Government which, in the background of these cases, is the third party cannot therefore be held bound by any argument based on the analogy of *res judicata* because the principle can have no application in the circumstances stated, and also because there are three parties interested in the cause in different ways. The Revenue Tribunal will therefore consider itself, free to revise previous decisions when the *ratio decidendi* of those decisions in later succession cases have ceased to have force or validity. But an adverse decision still remains an adverse decision, and may have operated over a long period of time and created a position so firm that it cannot be lightly broken up. Public policy or equity may demand that that decision should be carried through. Facts must therefore receive procedence over theory. In each case the weight of conflicting considerations must be carefully assessed. (*Jayaratnam, F.C.*) YESHWANTA *v.* NAMDEO. 1948 N.L.J. 200.

———S. 5—*Patelki succession case*—Locus standi *of legal representative of deceased Patel.*

A Patel holds office for life and a Patelki office is not property. With the Patel's death succession to the office opens out afresh. As the *Watan* belongs to the family as a whole and not to an individual a legal representative of a deceased Patel has no *locus standi* as such in a Patelki succession case. (*Jayaratnam, F.C.*) SESHARAO JANRAO *v.* RUSTAM. 1948 N.L.J. 180.

———S. 5—*Succession to Patwari watan office —Adoption of daughter's son among Maharashtra Brahmins of Berar—Revenue Court, if may recognise its validity.*

The Revenue Court can, subject to the decision of Civil Court, recognise the validity of the adoption of a daughter's son among the Maharashtra Brahmin community of Berar, for purposes of succession to a patwari *watan* office. (*Jayaratnam, F.C.*) LAXMAN DEVIDAS *v.* HARIHAR GANGADHAR. 1948 N.L.J. 381.

———Ss. 5 (3) (a) and (b) and 16—*Scope and Effect.*

The provisions of S. 5 (3) (*a*) and (*b*) of the Patels and Patwaris Law are not entirely disturbed by S. 16, but only to the extent that the claims of the lineal descendants and coparceners of the dismissed officer may be disregarded by the Deputy Commissioner. The right of the remaining members of the family for appointment in preference to outsider is not affected, and will be governed by the provisions of S. 5 (3) (*a*) and (*b*) of the Law. (*Bambawale.*) KISAN HARI *v.* WASUDEO GOVIND. 1949 N.L.J. 446.

———S. 5 (3) (a)—*Succession to* patelki *office —Dasiputra of deceased patel.*

S. 5 (3) (*a*) of the Patels and Patwari Law speaks of "the law of inheritance" applicable to the family. As the *dasiputra* of a deceased patel is in law his heir, he is entitled to succeed him in preference to the nephews of the deceased. (*Jayaratnam, F.C.*) MAHADEO VITHOBA *v.* GULAB RAO VISHWANATH. 1948 N.L.J. 76.

———S. 5 (3) (c)—*"Male relative of the late incumbent"—Interpretation.*

The words "male relative of the late incumbent" in S. 5 (3) (*c*) of the Berar Patels and Patwaris Law, must be interpreted to mean just what they say, *viz.*, a male relative according to the law of interitance applicable to the family. (*Burton, F.C.*) RENUKABAI *v.* VYANKATESH. 1945 N.L.J. 595.

———S. 6—*Applicability—Kata village in Basim taluq of Akola District.*

Kata village in Basim taluq of Akola District is a *Palampat* village and, therefore, the provisions of S. 6 of the Berar Patels and Patwari Law would apply to the appointment of the malik patel of that village. (*Bambawale.*) RAJARAM *v.* GULABRAO. 1950 N.L.J. 53.

———S. 6—*Appointment of patel—Discretion of Jahgirdar*

The jahgirdar is the proprietor (though not absolute proprietor) of his village and the law intends that as such he should have some discretion in the matter of the appointment of the patel of his village. He is not bound to appoint the next man in succession to the late incumbent if he can satisfy the Deputy Commissioner that there are good grounds for passing him over; he can then nominate another member of the watan family. (*Rau, F.C.*) KHWAJA GHULAM DASTAGIR *v.* PANDURANG. 1946 N.L.J. 50.

———S. 6—*Palampatdar—Whether malik patwari of village.*

S. 6 of the Patels and Patwaris law is self-contained so far as Palampat villages are concerned. The Palampatdar makes his nomination under that section in his capacity as Palampatdar and not as malik patwari of the village. He may in common parlance be malik of the village but he is not the watandar malik patwari of the village. (*Jayaratnam, F.C.*) DATTATRAYA JAIKRISHNA *v.* B. T. DESHPANDE. 1948 N.L.J. 62.

———S. 6—*Patwari's emoluments—Liability of all co-sharers.*

A patwari's emoluments are in the nature of village expenses, and all co-sharers must share these expenses in the same way as they share in the profits of the village. The village expenses cannot be saddled on a single co-sharer simply because he has been appointed certificate-holder. (*Jayaratnam.*) MAHADEO *v.* GUNWANT. 1949 N.L.J. 324.

———S. 6 (1) and (2)—*Jagirdari village—Certificate-holder—If automatically becomes patel—Removal of permanent patel—Right of new certificate-holder.*

S. 6 (1) of the Berar Patels and Patwaris Law contemplates that the Jagirdar (*i.e.*), the certificate-holder nominates the patel on the occurrence of a vacancy. A certificate-holder, by virtue of that position only, cannot automatically become patel. He can nominate himself, and after inquiry he may be appointed patel.

A permanent patel appointed under S. 6 (2) of the Law can only be removed for misconduct. A new certificate-holder cannot, on his appointment, claim to have him removed. (*Jayaratnam.*) VITHOBA SAKHARAM *v.* SYED SUJAUDDIN. 1949 N.L.J. 388.

———S. 6-A—*Malik and Patel losing his rights in village—Right of his substitute to continue in office.*

The difference between an Izara village held in proprietary right and one held in Patelship right is clear. The latter corresponds to a *khalsa* village with special provisions relating to the nomination of the Patel by co-sharers. In a proprietary village similar provision exists when there are co-sharers but the nominee or sole proprietor has a dual capacity. His position is very analogous to that of a lambardar in a C. P. village. Although there are no express provisions the Rules imply that the position of "Malik and Patel" in a proprietary Izara vilage is inseparable. A Malik and Patel is entitled to alienate his village and his rights in the village are liable to be attached and sold or foreclosed as in a Malguzari village in the C. P. He cannot therefore retain one right and lose the other. A substitute nominated by the "Malik and Patel" cannot continue to hold office after the "Malik and Patel" loses his entire rights in the village. On a succession in the office of "Malik and Patel" it is open to the new "Malik and Patel" to retain the substitute in office or to appoint a deputy of his own choice subject to the approval of the Taluqa Officer. (*Jayaratnam, F.C.*) AMIRBI *v.* BALIRAM DAULATRAO. 1948 N.L.J. 174.

———S. 7—*Appointment of patel—Patelki watan shared by several families—Right to provide officiators—Custom—Previous decision* Res judicata.

Though a *watan* is capable of being shared by the several sub-divisions of a single family or by several families, the right to provide officiators is the sole privilege of the sub-division of the family or of the family which received recognition for the purpose at the commencement of the British Administration in the Hyderabad Assigned Districts and this recognition is the nucleus of the custom according to which all appointments to the office will have to be made. The law does not contemplate giving to all persons entitled to a share in the *watan* the right to officiate or to their families the right to provide officiators. A previous decision on facts as to the right of a particular family to provide officiators operates as *res judicata*, if it is not erroneous and no evidence is adduced in subsequent cases to indicate that the evidence on which that decision was based was inherently incorrect or unlawful. (*Jayaratnam*) GANPAT *v.* BALKRISHNA. 1949 N.L.J. 495.

———S. 7—*Appointment of patel—Selection of member of junior branch with approval of senior branch—If bars claim of senior branch for ever.*

The selection of a representative of a junior branch to the patelki on the ground that the senior branch could not at the time produce a qualified representative does not bar the claim of the senior branch at the occurrence of the next vacancy. It is well-known law that, other things being equal, seniority should prevail. An act of fraternal piety or self-effacement on the part of a member of the senior branch in supporting the claim of a member of junior branch on prior occasions when vacancy occurred, cannot be regarded as a formal waiver of the claim of himself and his descendants for ever. (*Rau, F. C.*) DEVIDAS *v.* NARAYAN RAO. 1946 N.L.J. 126.

———S. 7—*Appointment of patel—Seniority, if conclusive evidence of rightful claim.*

Seniority is not by itself conclusive evidence of a rightful or just claim to succeed to Patelki office. Where a representative of a junior branch has kept alive the claim for over half a century, that branch has a greater claim to recognition. (*Jayaratnam, F.C.*) PRABHAKAR *v.* GULABRAO. 1949 N.L.J. 100.

———S. 7—*Claim abandoned for 50 years—Attempt at revival—If should be viewed with caution.*

Failure to press a claim by not appealing against adverse orders, or failure, even, to put forward a claim owing to adventitious circumstances may not entirely extinguish that claim, but if the history of the *patelki* shows that a debatable claim had been virtually abandoned over a period of nearly fifty years it is only just to the other interests concerned in the *patelki* that any attempt by persons, professing to belong to other branches of the family, to revive such a claim should be viewed with considerable caution. (*Jayaratnam, F.C.*) NAMDEO RAOJI *v.* RUPRAO. 1948 N.L.J. 499.

———S. 7—*Combined patelki and patwaripan—Rotation between two families—Proper arrangement.*

A watan is always regarded as impartible and it cannot be partitioned by the revenue authorities without reference to the parties concerned. Where in the case of a combined patelki and patwaripan rotation is ordered between the two branches of the watan family. The best and most appropriate method of working the rotation is by an arrangement by which during each term of officiation one claimant is patel and the other patwari, their positions being interchanged every ten years. This will ensure smooth working, because both parties know that they will have to exchange places at the beginning of the next decade. (*Greenfield and Rau, F.C.*) UTTAMRAO *v.* VISHWASRAO. 1946 N.L.J. 70.

———S. 7—*Death of person in office without heir—Scheme of rotation—If comes to an end.*

If a person in office dies without a visible or apparent heir who could take his place in the scheme of rotation, the scheme of rotation ceases to exist. There is no provision in the Patels and Patwaris Law which provides for a scheme of rotation being kept alive or being considered to be kept alive indefinitely to provide for the possible contingency of an heir being available or being made available at a later date. (*Burton, F.C.*) WASUDEO *v.* MADHAO. 1945 N.L.J. 560.

———S. 7—*Enquiry into claim of family to rotation—Failure to move Resident in revision against prior adverse order—Value of.*

In an enquiry into the claim of a family to rotation in the office of patelki, weight should not be given to a failure of the family to move the Resident to exercise his revisional powers against a previous adverse order of the Commissioner. A distinction should be drawn between the failure to exercise a right of appeal, and the failure to move a higher Court in revision. In the former case there is a definite right of which no use has been made. In the latter, the applicant has no right even to have his application considered. (*Greenfield, R.A.*) BAPUJI *v.* RAMCHANDRA. 1945 N.L.J. 567.

———S. 7—*Patelki succession—Rotation claim by collateral descendants made after 80 years of single officiations.*

In a rotation claim which has been raised after single officiations spread over a period of nearly 80 years, collateral descendants of original officiators are hardly entitled to serious consideration. They may never, in any event, have been entitled to succeed to their collateral ancestors. Direct descendants are in an entirely different position because they would seek to revive a right which can be traced directly upwards. A collateral's claim cannot be subjected to verification, because the claim, even if it existed at the top, may very well have been broken at several points on line of descent and may have never existed at some points or may have ceased to be tenable at some other point. It would be a farce to introduce rotation between two units vaguely connected collaterally with the original officiators. Rotation must mean revival of a state of things which in actual fact had concrete existence in the past, by bringing back into the picture replicas of those who held office then. (*Jayaratnam, F. C.*) GANGARAM *v.* LAXMAN. 1948 N.L.J. 526

———S. 7 (1)—*Order appointing patwari based on misconception—When can be reconsidered—Principle of* res judicata.

Although the principle of *res judicata* does not apply in its entirety to cases under the Patels and Patwaris Law, the Tribunal is always reluctant to unsettle previous decisions. It will not interfere with an order appointing a person as a patwari for life under S. 7 (1) of the Patels and Patwaris Law, although it is based on a misconception of fact and law, when it has not been set aside in appeal or revision and has been in force for ten years. The proper course is to wait till a permanent vacancy occurs either by his death or otherwise. (*Burton and Rau, F.C.*) VYANKATESH *v.* VISHNU. 1946 N.L.J. 297.

———S. 8 (1), Proviso (5)—*Substitute Patwari appointed for life—If can be granted leave to take up another appointment—Deputy Commissioner transferring him to another post—Malik, if can seek his removal.*

The proviso to S. 8 (1) of the Patels and Patwaris Law which contemplates the grant of leave up to a maximum period of one year applies by virtue of the provision of S. 8 (5) to substitute patwaris appointed for life under Rule XII (1). But it would be stretching the meaning of the words in the proviso "temporarily unable to perform his duties personally" to an illogical extent to grant leave to a patwari in order to enable him to take up another appointment. The Deputy Commissioner has therefore, no authority to transfer a substitute patwari to another post unless he resigned from the post of substitute patwari. The Malik cannot, however, take advantage of the Deputy Commissioner's mistake and seek his removal from a post to which he was appointed for life. (*Jayaratnam, F.C.*) VENKAT DEORAO *v.* PANDURANG. 1948 N.L.J. 570.

———S. 8 (3) and (4) and Rule XII (iii)—*Appointment of substituted patel—Period of service—Patel obtaining declaration that he is unfit for further personal service owing to "infirmity of mind and body".*

Under S. 8 (3) of the Berar Patels and Patwaris Law, a malik patel can be declared unfit for further personal service owing to "infirmity of mind and body". The words "infirmity of mind and body" clearly convey the meaning that the person so afflicted has become disabled to work in person for the rest of his life. If a malik patel obtains a declaration that he is unfit for further personal service on the ground of infirmity of mind and body, and nominates his substitute, he cannot subsequently seek to remove that substitute on the ground that he has become fit to discharge his duties. A declaration once made is final and irrevocable, and a patel who applies to be relieved from personal service on the ground of infirmity of mind and body must obviously "intend to do so for the rest of his life. The provision of Rule XII (iii) were never intended to apply to any one who had been declared to have become disabled by infirmity of mind or body" to perform the duties of patel. (*Jayaratnam*) NARAYAN *v.* KESHO. 1949 N.L.J. 249.

———S. 14—*Patelki Watan—Scheme of rotation—Permanent forfeiture of title of one of participating families—Effect of—Their rights, if pass to other families in full.*

When rotation is introduced in a village there is no division of the watan. What is recognised is the evenly balanced claims of two or more families, or of two or more sub-divisions of a family, to the equal participation in the fruits of the watan. The watan is one and indivisible. It is obvious that if one of the participating families is wiped out by permanent forfeiture under S. 14, Berar Patels and Patwaris Law, the other or others is simply left in full enjoyment of the fruits of the watan. There is no such thing as half a patelki watan. There can be half enjoyment of a whole watan, but there is no such thing as full enjoyment of half a watan, because the conception of a watan does not contemplate the existence if a truncated watan. (*Jayaratnam.*) WAMAN *v.* NAMDEO. 1950 N.L.J. 210.

———S. 16 and R. 28—*Appointment of temporary substitute patel—Need for consulting malik patel.*

S. 16 of the Berar Patels and Patwaris Law applies to all temporary vacancies whether of a *malik patel* or *patwari* or of a substitute *patel* or *patwari*. R. XXVIII of the rules framed under the Berar Patels and Patwaris Law gives powers even to the Tahsildar in the absence of instructions from the Deputy Commissioner to appoint a *patel* or *patwari* temporarily so that the village work may not suffer. Though it would be better to consult the *malik patel* before appointing a temporary substitute *patel,* the fact that he was not formally consulted is not an irregularity which would vitiate the proceedings. (*Bambawale.*) ONKAR SAMPAT *v.* DEO RAO VITHOBA. 1950 N.L.J. 276.

BERAR PAT. AND PATW. LAW (1900), S. 21.

——S. 21 and R. X—*Appointment of substitute—Person belonging to different rotatory branch—Preferential claim over outsider nominated by* Malik.

A person belonging to a rotatory branch of a Patelki family cannot claim to work as substitute of an unqualified *Malik* of the *other rotatory* branch in preference to an outsider nominated by the *Malik*. So long as rotation exists the two branches are distinct entities and a member of one branch cannot claim to officiate as substitute in . vacancy reserved for the other branch on the ground that he belongs to the parent *watan* "family". For instance, a *Malik* of one branch cannot nominate a substitute from the other branch when a qualified member of his own branch is available. Similarly when no qualified member of his own branch is available, he is entitled to nominate an outsider of his choice. The fact that there is rotation is a "special reason" within the meaning of those words in R. 10 to reject the claim of a member of the parent family, but of a different rotatory branch, in favour of a nominee of the *Malik* of other branch even though the nominee may be an outsider. (*Jayaratnam.*) MAHADEO RAJARAM *v.* NATHU. 1950 N.L.J. 156.

——S. 21—*Rules under, R.* 11—*Appointment of Patwari—Survey and Manual—Need for passing.*

R. 11 requiring a patwari to qualify in Manual and Survey comes into operation only after his appointment. (*Bambawale.*) TRIMBAK *v.* NILKANTHRAO. 1950 N.L.J. 214.

BERAR REVENUE BOOK CIRCULAR 14

—*Land acquired by Government subsequently relinquished and settled—Appeal to Tribunal—If lies.*

No appeal lies to the Revenue Tribunal in a case in which land acquired by Government is subsequently relinquished and settled under the instructions contained in Berar Revenue Book Circular 1-4. (*Jayaratnam, F.C.*) RAMBHAU PUNJAJI *v.* SHAHA MURALI. 1948 N.L.J. 63.

BHOPAL (COURTS) ORDINANCE (1950), S. 46 (3)—*Existing Civil Court—Meaning.*

The term "Existing Civil Court" in S. 46 (3) of the Bhopal (Courts) Ordinance means Courts other than the High Court of Bhopal as provided in S. 44 of the Ordinance. Therefore only those existing rights are saved which are created in the form of a right to appeal from an order or decree passed by any Court other than the High Court of Bhopal. Where the decree appealed against is that of a single Judge of the Bhopal High Court, S. 46 (3) of the Ordinance would not apply. (*Tribeni Saran, A.J.C.*) MADAR BAX *v.* SHEIKH HASHIM. 5 D.L.R. Bhopal 6.

BIHAR ACTS, ETC.

Abolition of Zamindaries Act (XVIII of 1948).

Abolition of Zamindaries (Repeal) Act (IX of 1950).

Agricultural Income-tax Act (VII of 1938).

Agricultural Income-tax Amendment Act (IV of 1944).

BIHAR ACTS, ETC.

Bakasht Disputes Settlement Act (XIII of 1947).

Buildings (Lease, Rent and Eviction) Control Act (III of 1947).

(Chota Nagpur and Sonthal Parganas District Validating) Regulation (I of 1941) and (IV of 1942).

(And Orissa) Co-operative Societies Act (VI of 1935).

Cotton Cloth Control Order (1943).

Cotton and Yarn Dealers Licensing and Control Order.

Court of Wards Act (IX of 1879).

Court of Wards Manual (1941).

Criminal Law (Industrial Area) Amendment Act (1943).

District Board Electoral Rules (1937).

Essential Foodgrains (Possession and Storage) Order, (1943).

Essential Articles Control (Temporary Powers) Ordinance (1946).

Excise Act.

Excise Manual.

(And Orissa) Food and Drugs Adulteration Act (II of 1919).

Foodgrains Control Order (1942).

(And Orissa) General Clauses Act (1917).

Hindu Women's Right to Property (Extension to Agricultural Land) Act (VI of 1942).

House Rent Control Order (1942).

Kerosene Oil Control Order (1948).

(And Orissa) Local Self-Government Act (III of 1885).

Maintenance and Restoration of Order (Indemnity) Act (III of 1943).

Maintenance of Public Order Act (V of 1947).

Maintenance of Public Order Ordinance (IV of 1949).

Money Lenders Act (III of 1938).

Money-Lenders (Regulation of Transactions) Act (VII of 1939).

(And Orissa) Municipal Act (VII of 1922).

(And Orissa) Natural Calamities Act (I of 1934).

Paper Dealers Licensing Order (1945).

Prevention of Food Adulteration Act (V of 1948).

Preventive Detention Ordinance (II of 1950).

Private Forests Act.

Private Irrigation Works Act (V of 1922).

(And Orissa) Public Demands Recovery Act (IV of 1914).

Public Security Measures Act (VI of 1947).

Regulation (III of 1872).

Rent Control and Eviction Act (III of 1947).

Restoration of Bakasht Land and Reduction of Arrears of Rent Act (IX of 1938).

Sales-Tax Act (VI of 1946).

Sales-Tax Rules (1944).
Surcharge on Court-Fees Act (XXV of 1948.
Tenancy Act (VIII of 1885).
(And Orissa) Village Administration Act (III of 1922).
Village Collective Responsibility Act (VI of 1943).

BIHAR ABOLITION OF ZAMINDARIES ACT (XVIII OF 1948)—Scope—Suit to declare invalid and for injunction to prevent it being brought into force—Maintainability after repeal of Act. *See* BIHAR ABOLITION OF ZAMINDARIES REPEALING ACT, 1950. 5 D.L.R. (Pat.) 113.

BIHAR ABOLITION OF ZAMINDARIES REPEALING ACT (IX OF 1950)—*Scope—If* ultra vires—*Suit instituted before Act to declare Bihar Abolition of Zamindaries Act,* 1948, *unconstitutional and for injunction—Maintainability after Act IX of* 1950—*Principles—Government of India Act* (1935), *S.* 107—*Applicability.*

It is true that an unconstitutional law has no validity whatever and that rights which it may purport to take away from individuals continue to exist to the same extent as they would have existed if the law had never been enacted. On the other hand a law is not an unconstitutional law unless and until it has been so decided by judicial tribunal competent to pronounce on its validity. Unless and until a question as to its validity is directly raised and a Court has no option but to decide it, the Courts must proceed on the assumption that the law is a valid law. When the impugned law is, however, repealed by an Act before the Courts decide upon its validity, the position is as if the repealed Act does not exist and it is unnecessary to pronounce on its validity or otherwise, unless the repealing Act itself is invalid. The effect of a valid repeal is as if it never existed except as to transactions past and closed. The Act being no longer in the statute book, no judicial intervention is called for with regard to something which does not exist.

The Bihar Abolition of Zamindaries Repealing Act (1950) is *intra vires* the Provincial Legislature; and the effect is that the Government of Bihar is debarred from taking any action under the Abolition of Zamindaries Act, 1948, which is repealed. That being so, the question as to whether the Abolition Act of 1948, was or was not an unconstitutional law becomes a question of purely academic interest. A suit for a declaration that the Bihar Abolition of Zamindaries Act, 1948, was an invalid and unconstitutional law and for an injunction restraining the Government of Bihar from bringing it into operation, instituted by a Zamindar before the coming into operation of that Act, becomes unnecessary on the passing of the Bihar Abolition of Zamindaries Repealing Act, 1950, since the latter Act deprives the plaintiff of his cause of action on which he has sued, and the suit has therefore to be dismissed on that ground.

It cannot be said that the Repealing Act of 1950 is null and void because the legislative body or authority which has purported to repeal the

Act of 1948, is not the same as that which enacted that Act. On the other hand the Legislature which has repealed the earlier Act is the same legislature as enacted it, namely, the legislature consisting of His Majesty and of the Bihar Legislative Assembly and the Bihar Legislative Council. Assent to the Bihar Abolition of Zamindaries Act, 1948, was of course given by the Governor-General, while assent, to the Repealing Act of 1950, was given by the Governor of Bihar only. It does not, however, follow that the criterion or test as to whether a law is or is not constitutional is to see whether it has been assented to in the name of His Majesty by the one representative of His Majesty (the Governor-General) or the other representative (the Governor). In each case the criterion is and must be whether the provincial law deals with a matter enumerated in the concurrent legislative list and, if so, whether it contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with regard to that matter.

S. 107, Government of India Act, 1935, does not apply when there is no repugnancy. The Repealing Act of 1950, does not create any repugnancy; on the other hand it removes the repugnancy, if any, created by the earlier Abolition Act, 1948, the latter Act itself not being either a Dominion law or an existing law as defined in S. 311. The absence of the assent of the Governor-General to the Repealing Act of 1950, does not therefore invalidate that Act which has been enacted by the proper legislative authority of the Province, namely, the two chambers and His Majesty represented by the Governor. (*Shearer and Das, JJ.*) KAMESHWAR SINGH *v.* PROVINCE OF BIHAR. 29 Pat. 252=5 D.L.R. (Pat.) 113=31 P.L.T. 113.

BIHAR AGRICULTURAL INCOME-TAX ACT (VII OF 1938), S. 2 (a)—*Agricultural income—Purchase of holding by assessee in execution of his rent decree—Purchase price—Whether income received by assessee.*

If the assessee in execution of his decree for arrears of rent puts the tenant's holding up to sale and purchases it himself, setting off the purchase price against the decretal dues, the effect of this transaction is not merely to increase his capital assets. Notionally the assessee receives the purchase price of the holding and with that money purchases the holding. In these circumstances, the entire sum must be held to be income received by the assessee. Not the whole of it, however, is agricultural income. Interest on arrears of rent does not fall within the definition of agricultural income. (*Agarwala, C.J. and Meredith, J.*) RAM RANBIJAYA PRASAD SINGH *v.* PROVINCE OF BIHAR. A.I.R. 1950 Pat. 76.

———**S. 2 (a)**—*Agricultural income—Rent distribution and mutation fee—Damages recovered from trespassers—Assessability.*

Amounts received by an assessee as rent distribution fee and mutation fee on the transfer of a part of the holding must be included in the assessable income of the assessee under the Bihar Agricultural Income-tax Act, because they are agricultural income. Similarly amounts received by the assessee as damages against trespasses in wrongful possession of portions of his land also constitute assessable income under the Act. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. 26 Pat. 121=(1947) I.T.R. 360=231 I.C. 325=A.I.R. 1947 Pat. 279=13 B.R. 532 (S.B.).

——S. 2 (a)—"Agricultural income"—Trust created by assessee in respect of estate for liquidation of debts—Assessee also member of Board of trustees—Income applicable to discharge of debts—If agricultural income in hands of assessee. *See* BIHAR AGRICULTURAL INCOME-TAX ACT, S. 11. (1947) I.T.R. 477.

——S. 2 (a) (1)—*Applicability—Sale of holding for arrears of rent and costs—Re-settlement of lands with tenants or stranger—Liability of landlord to assessment—Extent of.*

Where a landlord obtains a decree for arrears of rent for agricultural land and purchases the holding himself in execution of the decree and then re-settles the land either with the old tenant or with a new one for exactly what was due from the old tenant *plus* cost, if it is found that in the assessment year any particular sum has been realised or deemed to be realised by the sale, then that amount, after a proper deduction for costs, must be held to be taxable as agricultural income; but if on the other hand the particular sum is found to be salami received on account of the settlement with the tenant or the stranger, then that amount will not be taxable. (*Manohar Lall and Meredith, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. 1949 I.T.R. 170=A.I.R. 1949 Pat. 486.

——S. 2 (a) (1)—*Arrears of rent and cess and interest—Decree for—Execution sale—Purchase of holding by landlord—If receipt of agricultural income—Interest on arrears—Character of.*

Where the assessee landlord obtains a decree for arrears of rent and cess in respect of agricultural lands and interest thereon, and in execution therefor brings the tenant's holding to sale and purchases the holding himself at the sale, it must be held that he receives agricultural income to the extent to which the amount of the decree represents rent and cess, but not to the extent of the interest on the arrears. Interest on arrears of rent is not agricultural income as defined in the Act.

It cannot be said the assessee by the purchase of the holding is only in receipt of capital assets and not in receipt of income. (*Agarwala, C.J. and Meredith, J.*) RAM RAN VIJAYA PRASAD SINGH *v.* PROVINCE OF BIHAR. 1949 I.T.R. 164.

——S. 2 (a)—*Crops raised by assessee but not sold in year of assessment—Determination of value.*

Where the assessee himself cultivates the land and raises crops on it but does not sell them in the year of assessment, and the market price of the crops varies from time to time during the period that he retains them owing to changes in the market rate, the value of the crops must be determined by the assessing authority by the average rate and not by the controlled rate which prevailed at the time the crops were harvested. (*Agarwala, C.J. and Meredith, J.*) RAM RANBIJAYA PRASAD SINGH *v.* PROVINCE OF BIHAR. A.I.R. 1950 Pat. 76.

——S. 2 (a) (1)—*"Malikhana"—If agricultural income liable to assessment.*

Income received as malikhana and paid by Government under Regulation VII of 1882, is not agricultural income assessable to tax under Bihar Act VII of 1938, unless it is established that it is rent, or income derived from land or that the land in respect of which the payment was undertaken is being used for agricultural purposes (1948) I.T.R. 330, appl. and foll.; 7 W.R. 336; 9 W.R. 102; 10 W.R. 302; 12 W.R. 498; 10 Cal. 1112; 8 C.L.J. 300; 51 All. 439; 50 Cal. 322; 62 I.A. 207; (1940) I.T.R. 378, ref. (*Agarwala, C.J. and Meredith, J.*) MAHARAJA PRATAP SINGH BAHADUR *v.* PROVINCE OF BIHAR. 27 Pat. 1018=A.I.R. 1950 Pat. 86=1949 I.T.R. 202.

——S. 2 (a) (1)—*Salami—If agricultural income.*

Salami cannot be treated as agricultural income unless the Agricultural Income-tax Officer can find definite facts establishing it to be such income. Where the assessee landlord is taxed on the decretal amount (arrears of rent) deemed to be realised by him when he himself purchases the holding in execution if he settles the holding upon *Salami* equal to the decree-amount then to tax him over again on the same amount as *salami* would amount to double taxation. 8 I.T.R. 550; 9 I.T.R. 313; 1949 I.T.R. 160, rel. on. (*Manohar Lall and Meredith, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. 1949 I.T.R. 170=A.I.R. 1949 Pat. 486.

——S. (2) (m)—*"Person"—Board of Trustees—Liability to income-tax.*

A Board of Trustees is a "person" as defined by S. 2 (*m*) of the Bihar Agricultural Income-tax Act, and as such is liable to be charged income-tax on its agricultural income in accordance with the Act. (*Agarwala, Ag. C. J. and Manohar Lall, J.*) PROVINCE OF BIHAR *v.* RANI BHUBNESHWARI KUER. 26 Pat. 577=A.I.R. 1948 395=2 D.L.R. 508=(1947) I.T.R. 477.

——S. 5, Proviso—*Applicability—Assessment on income for 1943-1944—Benefit of proviso, right to—Amendment Act IV of 1944—Effect of.*

The assessment on the assessee was made in September, 1945, in respect of the income for the previous year, 1943-1944, namely for the period commencing 15th September, 1943, and ending 2nd September, 1944. Proviso to S. 5 of the Bihar Agricultural Income-tax Act, which would have saved the assessee from assessment was deleted by the Amendment Act IV of 1944, which came into force on 14th March, 1944. The assessee claimed the benefit of the proviso on the ground that the bulk of his income on which assessment was made accrued prior to 14th March, 1944, and that he could not be assessed without giving retrospective effect to Act IV of 1944.

Held, (i) that the previous year having ended in September, 1944, and the assessment made for a financial year which began after the deletion of the proviso to S. 5 (financial year, 1944-1945) commencing 1st April, 1944, the assessee was liable to tax as the proviso was deleted before the beginning of the financial year;

(ii) that the calculation was to be made upon the income of the previous year not upon the taxable income of the previous year, and it made no difference at all whether during that year, which is used as the basis of calculation, the assessee was a taxable person, the important question being whether he was a person liable to tax during the financial year for which the assessment was made.

(iii) that no question arose as to whether Act IV of 1944 was retrospective. (*Agarwala, C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* RAMCHARITAR MAHTON. 1949 I.T.R. 161=A.I.R. 1949 Pat. 471.

——**Ss. 6 and 7**—*Claim for deduction of land revenue and cess—When to be made.*

A vague claim for deduction of the amount of land revenue and cess paid in respect of the lands the income from which is sought to be assessed to agricultural income-tax, cannot be entertained or considered at the stage of revision before the Board of Revenue (*Swanzy.*) PRASAD SINGH *v.* PROVINCE OF BIHAR. 12 B.R. 99.

——**S. 6 (a)**—*Land revenue paid on estate yielding agricultural and non-agricultural income—Right to deduct whole revenue.*

Where an assessee pays land revenue to Government in respect of land yielding agricultural income, the assessee is entitled to claim a deduction of the whole amount of the revenue so paid under S. 6 (*a*) of the Bihar Agricultural Income-tax Act. It is not permissible for the Income-tax Department to dissect the lands comprised in the estate and then find that so much of the land is yielding agricultural income and the remainder non-agricultural income, and to apportion the land revenue on that basis. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. 26 Pat. 121=(1947) I.T.R. 360=A.I.R. 1947 Pat. 279=231 I.C. 325=13 B.R. 532 (S.B.).

——**S. 6 (a)**—*"Revenue"—Agricultural income-tax—Right to deduct in computing net income.*

The word "revenue" in S. 6 (*a*) of the Bihar Agricultural Income-tax Act is limited to land revenue only and does not comprise all revenues as defined in S. 136, Government of India Act (1935), and hence an assessee is not entitled to deduct agricultural income-tax paid for the previous year in computing the net income for the current year for which he is liable to be taxed. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* RAI SHAMBHU LAL BOSE. 26 Pat. 137=(1947) I.T.R. 176=A.I.R. 1947 Pat. 277=231 I.C. 313=13 B.R. 525 (S.B.).

——**S. 6 (g)**—*Applicability—Repairs of power house, estate buildings, palace stables, elephant line, etc.—Claim to deduct—Sustainability.*

Repairs of power house, estate buildings, palace stables, elephant lines, etc., in an estate are required for the collection of rent and the assessee is therefore entitled to claim a deduction of the expenses incurred in respect of these items. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. 26 Pat. 121=(1947) I.T.R. 360=A.I.R. 1947 Pat. 279=231 I.C. 325=13 B.R. 532 (S.B.).

——**S. 6 (1)**—*Construction—"For the benefit of the land", etc.—Interpretation of.*

Manohar Lall and Shearer, JJ.—There is no justification for adding the word "wholly" before the words "for the benefit of the land—or for the purpose of derving such agricultural income" in S. 6 (*i*) of the Bihar Agricultural Income-tax Act. Where the assessee has constructed buildings upon his agricultural holding for the residence of his employees, *viz.*, Manager, Assistant Manager, Legal Secretary Financial Secretary, etc., it must be held that the buildings are for the benefit of the land or for the purpose of deriving such agricultural income and therefore the assessee is entitled to an allowance of the whole depreciation in respect of those buildings. The mere fact that they are also available for the use and are being used actually for earning non-agricultural income of the assessee is no ground for splitting up the depreciation and allowing a part only which is attributable to the agricultural income. The whole claim ought to be allowed.

Meredith, J.—The words "purchased or constructed for the benefit of the land from which such agricultural income is derived, or for the purpose of deriving such agricultural income from such land" should be interpreted as meaning "constructed wholly or mainly for such purposes." The Income-tax Officer is therefore justified in apportioning the charges on the basis of the portions found to be attributable to the agricultural and non-agricultural income. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* KAMAKHYA NARAYAN SINGH. 26 Pat. 187=(1947) I.T.R. 346=A.I.R. 1947 Pat. 371=2 D.L.R. 76 (S.B.).

——**S. 6 (k) and (j)**—*Applicability—Decree for arrears of rent of estate—Receiver authorised to raise loans charged on income to pay off decree—Interest on loans raised—If income or permissible deduction from income.*

Where in a compromise in respect of a decree for arrears of rent, a receiver is authorised to raise loans to discharge the decree debt, such loans being made a first charge on the income of the estate against which the decree was made, and the receiver, having paid interest on such loans, the interest on the loans is sought to be deducted under S. 6 (*k*) and (*j*) of the Bihar Agricultural Income-tax Act;

Held: that the interest due on loans raised for the payment of the debts is income of the estate and as such assessable in the hands of the receiver. (1933) I.T.R. 135, dist. (*Agarwala, C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* KHETRA MOHAN KUNAR. 27 Pat. 1153=(1949) I.T.R. 286=A.I.R. 1949 Pat. 418.

———S. 7 (1)—*Construction and scope—Option under—If qualified—Assessee exercising same —If can be deprived of option on failure to furnish cess-valuation papers—S.* 44.

For purposes of the option under S. 7 (1) of the Bihar Agricultural Income-tax Act, the law contemplates all land under *khas* cultivation as falling into two classes—land assessed to rent and land not assessed to rent, both of which are provided for. No third alternative is provided.

The wording of S. 7 (1) does not qualify the option in any way and the option is given subject to no conditions whatever. It is wrong to hold that an assessee, having exercised his option, can be deprived of it merely because certain information is not furnished. The Income-tax Officer is not entitled to call for cess-valuation papers, as such papers are not papers which can be called for under S. 44 of the Act, and an assessee cannot be deprived of his option merely because he fails to produce cess-valuation papers. (*Agarwala, C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* RAMNAGAR ESTATE. 27 Pat. 1008.

———S. 8—*Claim to exemption under—Conditions of.*

In order to claim exemption under S. 8 of the Bihar Agricultural Income-tax Act, the assessee must show in each year that he had finally set apart a sum for charitable and religious purposes. He will not be exempt from payment of agricultural income-tax under S. 8 beyond what he has actually spent on religious and charitable objects consistent with the purpose of the trust. (*Fazl Ali, C.J., Manohar Lall and Sinha, JJ.*) PROVINCE OF BIHAR *v.* HARIBHAJAN DAS. 25 Pat. 156=226 I.C. 258=1946 Pat. (Rul.) 366=12 B.R. 717 =27 P.L.T. 228=(1946) I.T.R. 292=A.I.R. 1946 Pat. 297.

———S. 8—*Deductions—Charitable purposes—Allowances to students and cost of supplying blankets—Deduction of—Annuities payable to wives and daughters of late owner—If can be deducted.*

Allowances paid to students and amounts spent in respect of blankets supplied, being for a charitabls purpose, are deductible from the total income under S. 8 of the Bihar Agricultural Income-tax Act. But annuities paid to the wives and daughters of the last owner of the estate, which are charged on the estate, cannot be deduced from the total income. The whole scheme of the Act is to provide convenient machinery for collection of the tax and for this purpose the tax is assessed on the person who holds the land, whether agricultural income derived from that land is his income or the income of others. (*Swanzy*) MANGALRAJ KUMARI *v.* PROVINCE OF BIHAR. 12 B.R. 119.

———Ss. 8 and 25—*Reference to High Court Finding of public trust—Balance in hands of assessee found below assessable limit—Reference—If justified.*

Where there is a clear finding of the Income-tax officer that the trust income goes exclusively to the beneficiary and is spent on the objects of the trust, the income of the trust property is not assessable, because, the finding amounts to a finding that the trust is a public trust. Where, further, the balance after deducting the trust income is below the assessable limit of the assessee, the Board of Revenue will not state a case for the opinion of the High Court. (*Godbole.*) BAIJNATH PRASAD *v.* PROVINCE OF BIHAR. 12 B.R. 663.

———S. 10, Proviso—*Applicability—Hindu family consisting of two brothers and their first cousin.*

To attract the application of the proviso to S. 10 of the Bihar Agricultural Income-tax Act, there must either be two or more brothers in existence at the time of the assessment, the family consisting of them and their sons, or the family must consist of a man and his sons and the sons of his brother or brothers. It is not sufficient if the family consists of any two brothers. A Hindu joint family consisting of two brothers and their first cousin (two branches descended from the same ancestor) is not 'family' to which the proviso applies, because the earliest surviving members are not brothers. (*Agarwala, A.C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* GAJENDRA NARAIN SINGH. 27 Pat. 104=A.I.R. 1949 Pat. 84=1948 I.T.R. 56.

———S. 11—*Scope—Assessee owning two estates creating trust in respect of one for liquidation of debts—Assessee also member of Board of Trustees—Assessment of income from trust estate and other estate in one assessment—Legality—"Agricultural income"—S.* 2 (*a*).

A trustee cannot be assessed in one assessment both on the income which is derived from the trust estate, of which he is in possession, and also on his individual income which has nothing to do with the income of the trust estate.

The assessee, Rani *B*, owning two estates *A* and *T*, created in 1941 a trust in respect of the *T* estate, vesting the entire estate in a Board of Trustees, of which she herself was a member, with the object of liquidating her debts, of paying some allowances to defendants, and of making certain allowances for religious and public purposes. The Agricultural Income-tax Department assessed Rani *B* on the amalgamation of income for both estates.

Held, (1) that the assessee was entitled under S. 11 of the Bihar Agricultural Income-tax Act to have the income of the *A* estate assessed separately from the income of the *T* estate, and the Board of Trustees were entitled to have the income from estate *T* assessed separately from the income which the Rani derived from estate *A;*

(2) that for the purpose of ascertaining the rate applicable to the assessee's income from the *A* estate, the Income-tax authorities are not entitled to add to that income the income from *T* estate;

(3) that if that part of the income of the trust which was applicable to the discharge of her debts, is to be regarded as her income, it was not "agricultural income" as defined by S. 2 (*a*) of the Act. (*Agarwala, Ag. C. J. and Manohar Lall, J.*) PROVINCE OF BIHAR *v.* RANI BHUR-

Neshwari Kuer. 26 Pat. 577=A.I.R. 1948 Pat. 395=2 D.L.R. 508=(1947) I.T.R. 477.

——**S. 11**—*Scope—Individual holding separate powers of attorney from different proprietors—If holds the land under S. 11 of the Act.*

An individual, holding separate powers of attorney from different proprietors regarding their respective specific shares in the estate cannot be said to be holding the land within the meaning of S. 11 of the Bihar Agricultural Income-tax Act (1938). The aggregate of the incomes in the hands of the person holding the powers of attorney will not be liable to assessment under that section. The language of S. 11 strongly suggests that it was meant to apply to those cases where land is held by a trustee or some one whose position in relation to the land is similar to that of a trustee though there is no express reference to trust property in the section. (*Fazl Ali, C.J., Manohar Lal and Sinha, JJ.*) Province of Bihar *v.* F. R. Hayes. 25 Pat. 233=226 I.C. 355=1946 Pat. (Rul.) 377=12 B. R. 732=(1946) I.T.R. 326=A.I.R. 1946 Pat. 361=27 P.L.T. 328.

——**S. 17 (3)**—*Construction—Option of assessee under. 7 (1)—Time for exercise of—Return under S. 7 (1) (b)—Subsequent return under under S. 7 (1) (a) before assessment—Right of assessee to claim option.*

S. 17 (3) of the Bihar Agricultural Income-tax Act clearly allows an assessee to file a return, if he has not already filed it or to file a revised return, if he has filed a return already, provided the assessment had not been by that time for the year of assessment 1940-1941. The assessee filed a return on 14—11—1941, based on the actual receipts and expenditure in the accounting period. On 26—5—1941, a notice was served on the assessee by the Income-tax Officer to submit accounts and other evidence in support of the return. In the meantime on 23—5—1941, the assessee applied to the Income-tax Officer, asking that the previous return filed by him might be treated as cancelled and that he may be permitted to adopt the method of assessment as laid down in S. 7 (1) (*a*) of the Bihar Agricultural Income-tax Act in view of the option allowed under S. 7 (1) of the Act. The Income-tax Officer refused this application on the ground that the assessee had already exercised his option by filing the original return under S. 7 (1) (*b*) and could not be permitted to change it.

Held, that the assessment not having been made on 23—5—1941, when the assessee filed his second return, the assessee was within his rights in insisting by his revised return that he should be assessed under S. 7 (1) (*a*) of the Act, and S. 17 (3) of the Act gave the assesee such a right. (*Fazl Ali, C. J., Manohar Lall and and Sinha, JJ.*) Government of Bihar *v.* Motihari Estate Ltd. 25 Pat. 161=226 I.C. 391=12 B.R. 744=27 P.L.T. 213=(1946) I.T.R. 267=A.I.R. 1946 Pat. 353.

——**Ss. 24, 25, 26 and 27**—*Scope and effect of—Powers of Board to revise—Llimits to—Limitation for exercise of such power—Assessment reduced on appeal—Subsequent restoration by*

Board of original assessment after expiry of period specified in Ss. 26 and 27—Jurisdiction.

In view of S. 26 of the Bihar Agricultural Income-tax Act, the Board of Agricultural Income-tax is not competent to set aside over a year after the end of the financial year for which tax has been assessed, an order passed on appeal reducing the assessment and to restore the original assessment. Though no period of limitation is fixed under S. 24, the powers of the Board under that section are necessarily limited and are subject to the other provisions of the Act, *viz.,* Ss. 26 and 27, which fix time limits. (1933) I.T.R. 135, dist.; 61 I.A. 10; (1934) I.T.R. 71, exp.; (1935) I.T.R. 488; (1936) I.T.R. 287; (1940) I.T.R. 222; (1927) 2 I. T.R. 372, ref.; 8 Lah. 847; 2 I.T.C. 342; (1936) I.T.R. 287; (1938) I.T.R. 414; (1940) I.T.R. 222; (1943) I.T.R. 340; (1944) I.T. R. 89; 1944 Bom. 153, rel. on. (*Agarwala, C. J. and Meredith, J.*) Province of Bihar *v.* Khetra Mohan Kunar. 27 Pat. 1153=(1949) I. T.R. 286=A.I.R. 1949 Pat. 418.

——**S. 24 (1)**—*Jurisdiction of Board under—Reference to High Court when case is before Privy Council—Competency.*

Where no final decision can be given by the High Court in a case, because it is before the Privy Council, the Board of Agricultural Income-tax will not state a case to the High Court, though, under S. 24 (1) of the Bihar Agricultural Income-tax Act, the Board can call for the record of any case and pass proper orders. If the case is decided by the Privy Council in the petitioner's favour the Board will then call for the record in order to pass orders in conformity with the decision of the Privy Council. (*Lee.*) Jagdish Chandra Deo *v.* Province of Bihar. 12 B.R. 679.

——**S. 25 (1) and (2)**—*Scope—Board of Agricultural Income-tax—Power of to make reference to High Court* suo motu *after termination of proceedings against assessee.*

No reference lies to the High Court at the instance of the Board of Agricultural Income-tax under S. 25 (1) of the Bihar Agricultural Income-tax Act, when the assessment proceedings against the assessee have already terminated and there is no pending proceeding under the Act in the course of which the question referred could arise. The scheme of the Act clearly shows that after an assessment has been made or after any proceeding under the Act has terminated, the assessee alone has the right given to him to ask for a reference to the High Court under S. 25 (2). If the assessee moves the Board under S. 25 (1), the latter may in its discretion make a reference to the High Court. A series of incompetent proceedings are not proceedings under the Act; even assuming that they are proceedings under the Act, if those proceedings have terminated, the Board has no power to move under S. 25 (1) of its own motion. No remedy is provided in the Act to the Agricultural Income-tax authorities unless a reference is made to the High Court in the course of proceedings which may be pending either before the first officer or before the appellate or revisional officers. (*Fazl Ali, C.J., Manohar Lall and Sinha, JJ.*) PROVINCE OF BIHAR *v.* GURU MAHADEVASHRAM. 223 I.C. 162=1946 Pat. (Rul.) 156=1946 P.W.N. 233=12 B.R. 330=A.I.R. 1946 Pat. 295=(1946) I.T.R. 775 (F.B.).

———**S. 25 (2)**—*Form of reference under—Abstract question divorced from facts—Propriety of reference.*

Abstract questions divorced from the facts of the particular case should not be submitted by the Board of Agricultural Income-tax to the High Court. (1933) 1 I.T.R. 113, ref. (*Manohar Lall and Meredith, JJ.*) PROVINCE OF BIHAR *v.* MAHARANI JANKI KUER. (1949) I.T.R. 170=A.I.R. 1949 Pat. 486.

———**S. 25**—*Question of law—Assessee setting up payment of Owelty—Failure to prove value of lands apart from value of houses, etc.—Reference—If justified.*

Where the assessee pleads that he has paid some "owelty" money but does not prove how much of the amounts represents the value of the houses and how much represents the value of extra-agricultural land there is no point in law to be referred to the High Court for decision. (*Godbole.*) AKSHAN KUMAR MANDAL *v.* PROVINCE OF BIHAR. 12 B.R. 718.

———**S. 25 (2)**—*Question of law—Whether road was constructed for the purpose of deriving agricultural income.*

The question whether a road was constructed on the estate of the assessee for the purpose of deriving agricultural income within the meaning of S. 6 (*i*) of the Bihar Agricultural Income-tax Act, so as to entitle the assessee to claim depreciation allowance in respect thereof, is a question of fact, and the finding of the Income-tax Department on the point is conclusive. (*Manohar Lall, Meredith and Shearer, JJ.*) PROVINCE OF BIHAR *v.* KAMAKHYA NARAYAN SINGH. 26 Pat. 187=(1947) I.T.R. 346=A.I.R. 1947 Pat. 371=2 D.L.R. 76 (S.B.).

———**S. 25**—*Question of law—Wrong reading of facts—Reference—If justified.*

Where the Commissioner of Agricultural Income-tax does not accept the case of the assessee or of the department, but arrives at a finding of facts not set up or alleged by either party, it cannot be said that there is a quesion of law to be referred to the High Court. A wrong reading or interpretation of the facts is not a point of law. (*Godbole.*) AKSHAY KUMAR MANDAL *v.* PROVINCE OF BIHAR. 12 B.R. 718.

———**S. 44**—Cess-valuation papers—Right of Income-tax Officer to call for. *See* BIHAR AGRICULTURAL INCOME-TAX ACT, S. 7 (1). 27 Pat. 1008.

———**R. 3 (1) (ii)**—*Scope and effect—Paddy not sold but used in feeding staff—Calculation of price—Average price—Dryage—Allowance for.*

Where paddy is not sold but used to feed the staff of the assessee throughout the whole year; its value has to be calculated, under R. 3 (1) (*ii*) of the Rules under the Bihar Act (VII of 1938) at the average price for the whole year and not at the lowest price during the year. Reasonable dryage has also to be allowed. The percentage of dryage depends upon the climate and has to be ascertained by local inquiry. (*Lee.*) BRAJDEO NARAIN SINGH *v.* PROVINCE OF BIHAR. 12 B.R. 712.

BIHAR AGRICULTURAL INCOME-TAX (AMENDMENT) ACT (IV OF 1944)—Scope—If retrospective—Assessment for fasli year ending September, 1944, on basis of Amendment Act—Legality. *See* BIHAR AGRICULTURAL INCOME-TAX ACT, S. 5, PROVISO. (1949) I.T.R. 161.

BIHAR BAKASHT DISPUTES SETTLEMENT ACT (XIII OF 1947), Ss. 3 and 6—*Reference to board of arbitrators—Absence of notification in Gazette—Effect.*

The word "notification" in S. 3 of the Bihar Bakasht Disputes Settlement Act, means a notification in the Gazette. The foundation of the power of the Provincial Government under S. 3, or of the District Magistrate under S. 14, is the publication of a notification in the Gazette and until such a notification is published, a reference of a dispute to a board of arbitrators, although purporting to be under the Act, is not in law under the Act so as to attract the provisions of S. 6. (*Agarwala, C. J. and Narayan, J.*) BIJOYANAND SINGH *v.* DOMA DUSADH. 27 Pat. 768=A.I.R. 1949 Pat. 263=50 Cr.L.J. 533=30 P.L.T. 125.

———**S. 3**—Reference under—Proceedings on—Nature of—Injunction to restrain prosecution. *See* C. P. CODE, O. 39, R. 2. 5 D.L.R. (Pat.) 186.

———**Ss. 5 and 6**—*Reference not under Act—Jurisdiction of Board.*

S. 5 of the Bihar Bakasht Disputes Settlement Act, does not affect the provisions of S. 6 which operate to stay proceedings under S. 145, Cr. P. Code, only when a dispute is referred to a board under the Act. Unless the dispute is referred under the Act, S. 5 does not and cannot confer jurisdiction on a board of arbitrators to settle the dispute. (*Agarwala, C.J. and Narayan, J.*) BIJOYANAND SINGH *v.* DOMA DUSADH. 27 Pat. 768=A.I.R. 1949 Pat. 263=50 Cr.L.J. 533=30 P.L.T. 125.

———**S. 8 (4)**—*Scope and effect.*

The orders of a board of arbitrators are only valid if the board is acting within jurisdiction in the matter of a dispute referred to it under the Act. Where there is no reference under the Act by reason of the omission to publish a notification under S. 3, S. 8 (4) does not operate to validate the decision of the board. (*Agarwala, C.J. and Narayan, J.*) BIJOYANAND SINGH *v.* DOMA DUSADH. 27 Pat. 768=A.I.R. 1949 Pat. 263=50 Cr.L.J. 533=30 P.L.T. 125.

BIHAR BUILDINGS (LEASE, RENT & EVICTION) CONTROL ACT (III OF 1947)—*Definition of tenant—If retrospective.*

The definition of the word "tenant" in the Bihar Act III of 1947 or the Bihar Ordinance II of 1946 is not retrospective in its operation. (*Agarwala, C.J., Meredith and Ramaswami, JJ.*)

Kishoral Lal *v.* Debi Prasad. A.I.R. 1950 Pat. 50=31 P.L.T. 14 (F.B.).

——*Retrospective operation.*

S. 11 (1) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, which says that a tenant shall not be liable to be evicted even in execution of a decree shows beyond all doubt that the intention of the Legislature was to make the Act retrospective. (*Imam and Narayan, JJ.*) Sant Kuer *v.* Ganesh Choudhary. 27 Pat. 695=A.I.R. 1949 Pat. 137.

——Scope—If retrospective. *See* Bihar House Rent Control Order, (1942). 27 Pat. 1.

——*Scope—Jurisdiction—Civil Court—Claim to eject tenant.*

Whether the claim of a landlord to eject a statutory tenant on the ground that he requires the premises in good faith for his own use or for the use of his descendants, is or is not a *bona fide* one, is a matter which, under the Bihar Buildings (Lease, Rent and Eviction) Control Act, is for the controller and the civil Court has no jurisdiction to decide it. (*Shearer and Bennett, JJ.*) Dharamshila Lall *v.* Bibi Amna. 26 Pat. 693=A.I.R. 1948 Pat. 269=29 P.L.T. 217=2 D.L.R. 945.

——**S. 1 (3)**—*If* ultra vires—*Ordinance VI of 1949, amending S.* **1 (3)**—*Validity.*

Per Full Bench (Meredith, J., *contra*) :—The Bihar Buildings Control Act, 1947, has been validly enacted, and S. 1 (3) of the Act is not *ultra vires* and the Ordinance VI of 1949 has validly amended S. 1 (3) with retrospective effect.

Per *Meredith J.*:—S. 1 (3) of the Bihar Buildings Control Act is *ultra vires*, but its provision is quite clearly severable and the Act can stand without it. Therefore the Act itself, except for this provision, is a valid Act and is in force. Cl. 3 of Ordinance VI of 1949 is *ultra vires*, but it is also severable and does not affect the validity of Cl. 2. (*Agarwala, C.J., Meredith and Ramaswami, JJ.*) Kishori Lal *v.* Debi Prasad. A.I.R. 1950 Pat. 50=31 P.L.T. 14 (F.B.).

——**S. 1 (3) and Proviso**—*Scope—If* ultra vires.

The delegation made in S. 1 (3) of the Bihar Act III of 1947, and that in the proviso to S. (1) (3) are *intra vires* and not *ultra vires* the Legislature. Having regard to the provisions of the Ordinance of 1949, the Act is a valid piece of legislation whose duration is five years from its commencement. 4 D.L.R. (F.C.) 158 cons.; S. A. No. 201 of 1948 (dated 29-10-1949), foll. (*Reuben and Das, JJ.*) Dasrathi Rai *v.* Kali Charan Ghose. 5 D.L.R. (Pat.) 239.

——**S. 11**—*Applicability—Tenant at will—Execution of a decree against—If barred.*

S. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act only bars the execution of a decree obtained against a tenant who is in possession of a building for which he is liable to pay rent. A person who is merely a tenant-at-will is not a tenant within the meaning of S. 11 (1), read with S. 2 (*b*) of the Act, and in the case of such a tenant, execution of a decree against him is not barred by S. 11. I.L.R. (1948) 1 Cal. 146, ref. (*Ramaswami and Narayan, JJ.*) Jamuna Prasad *v.* Bengal Iron Co., Ltd. A.I.R. 1950 Pat. 523.

——S. 11—*Decree for possession—Jurisdiction of Civil Court—If barred.*

Per Full Bench: The Civil Courts have no jurisdiction, in view of the provisions of S. 11 of the Bihar Buildings Control Act, to grant a decree for possession in cases covered by the Act.

Per *Meredith, J.*:—S. 11 (2) bars any suit for the ejectment of a tenant after 15th March, 1947, but it does not and cannot bar a suit based on trespass. If the defendants are able to show that they are not trespassers but tenants of some sort, then clearly the suit will fail. But that will be because the plaintiff has failed to establish his allegations, and not because the Court has no jurisdiction. (*Agarwala, C.J., Meredith and Ramaswami, JJ.*) Kishori Lal *v.* Debi Prasad. A.I.R. 1950 Pat. 50=31 P.L.T. 14 (F.B.).

——**S. 11**—*Pleadings—Plea of bar under—When to be raised—Plea not raised in suit—If open in execution*—Res judicata—*Estoppel against statute.*

A plea of the bar to eviction based on S. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, can be raised even in the executing Court, though not raised in the suit. So long as the condition precedent to the eviction of a tenant, as enacted by S. 11, has not been fulfilled, it is not open to the landlord to put his decree into execution to eject the tenant, who has a valuable right secured to him to remain in occupation until the procedure prescribed by S. 11, is availed of and an order for eviction on the grounds specified is obtained from a Court specially constituted. Hence the omission of the tenant to raise the plea in the title suit against him will not debar him from raising the plea in execution under S. 11, Expl. 4, C. P. Code. S. 11 of Bihar Act III of 1947, steers clear ot any bar of constructive *res judicata*. There is no bar of estoppel against a statute. *Res judicata* is a species of estoppel, *i.e.*, estoppel by judgment. Hence even *res judicata* cannot bar the rights of a tenant to avail of the special protection given to him by statute under S. 11 of Bihar Act III of 1947. 26 Pat. 693; 27 Pat. 695, ref. (*Sinha and Rai, JJ.*) Bhagwati Prasad Sah *v.* Radha Kishun Sah. A.I.R. 1950 Pat. 354=5 D.L.R. (Pat.) 210.

——**S. 11**—*Scope and effect of—Order of eviction—Application for execution—Suit for rent of period subsequent to order—If bar to execution of order on ground of waiver—New tenancy, if created.*

The protection afforded by S. 11 of Bihar Act III of 1947 cannot avail a tenant against an order of eviction passed under the Act itself. Under the Act the tenant or lessee is still a tenant even after the tenancy has terminated, and even after the passing of an order under S. 11, for his eviction, so long as he continues in his possession of the premises. The order for eviction does not terminate his tenancy, and a suit filed against him for recovery of rent for the period subsequent to the order of eviction does not bring a new tenancy into existence, so as to debar the Court from executing the order of eviction; such suit does not operate as a waiver of the right of eviction as indicating an intention to continue the tenancy. 2 P.L.J. 595, ref. (*Reuben and Das, JJ.*) Dasrathi Rai *v.* Kali Charan Ghose. 5 D.L.R. (Pat.) 239.

———S. 11 (1)—*Applicability—Monthly tenant—Failure to pay rent—Ejectment—Liability to.*

A tenant from month to month who has failed to pay rent and who has never expressed his willingness to pay rent is not protected from eviction under S. 11 (1) of Bihar Act III of 1947. (*Manohar Lall and Imam, JJ.*) Shiveshwar *v.* Parmeshwar. 27 Pat. 1=A.I.R. 1949 Pat. 355.

———S. 11 (1) and (2)—*Applicability—Jurisdiction of Controller—Order of eviction—Conditions of—Deposit of full rent due or remedy of breach by tenant—Effect of.*

A tenant cannot be held to have incurred the liability to be evicted under S. 11 (1) of Bihar Act (III of 1947) unless he has failed or is not willing or is unable to pay the rent due from him. If the tenant brings into the Court of the controller all the rent due from him up to date, there is no longer the fact of non-payment of rent in existence; or if the tenant has committed a breach of a condition of the tenancy and the decree of the civil Court evicting him is founded upon that ground and the breach is such as can be remedied and has been remedied by the tenant, the reason for which the controller is empowered to pass the order of eviction ceases to exist, and therefore the power conferred upon the controller by S. 11 (2) to evict the tenant ceases to exist, and he acts *ultra vires* in making the order of eviction. There is nothing to prevent a tenant from depositing in the Court of the controller all the rent due from him before the order of eviction is actually made, and ousting the jurisdiction of the controller to pass the order of eviction. 54 Cal. 485, 15 Mad. 125, ref. (*Manohar Lall and Mahabir Prasad, JJ.*) S. K. Shaw *v.* Rai Brij Raj Krishna. 28 Pat. 390=4 D.L.R. (Pat.) 126=A.I.R. 1949 Pat. 474=30 P.L.T. 183.

———S. 11 (1), (2) and (3)—Relative scope and distinction—Order for eviction for non-payment of rent fixing date—Failure of tenant to comply with and appeal by him—Offence. *See* Bihar Buildings (Lease, Rent and Eviction) Control Act, S. 20. 5 D.L.R. (Pat.) 31.

———S. 11 (3)—*"Buildings"—Meanings.*

"Buildings" as used in S. 11 (3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, include buildings for non-residential purposes. (*Sinha and Mahabir Prasad, JJ.*) Balmakund *v.* Hari Narain. 27 Pat. 273=29 P.L.T. 371=A.I.R. 1949 Pat. 31=3 D.L.R. (Pat.) 33.

———S. 11 (3)—*"Occupation"—Meaning of.*

"Occupation" in S. 11 (3) of the Bihar Buildings (Lease, Rent and Eviction) Control Act (1947), is not restricted in its operation to residential purposes only, but also includes occupation by storing wares, *e.g.*, in a godown. (*Sinha and Mahabir Prasad, JJ.*) Balmakund *v.* Hari Narain. 27 Pat. 273=29 P.L.T. 371=A.I.R. 1949 Pat. 31=3 D.L.R. (Pat.) 33.

———S. 17—*Appeal—Order under S. 17 by Civil Court—Appeal and second appeal.*

An order of a Civil Court under S. 17 of Bihar Act III of 1947 is appealable under S. 47, C. P. Code. The words "as if such order were a decree of such Court" are unqualified and must be construed properly in their context. 32 Cal. 1130; 40 All. 89, Dist. (*Sinha and Ramaswami, JJ.*) Brindaban Bihari Lal *v.* Badri Prasad. 27 Pat. 925=1949 D.L.R. (Pat.) 9=A.I.R. 1949 Pat. 335.

———S. 17—*Applicability—Order for eviction under House Rent Control Order, 1942—Execution by civil Court—Absence of—Notification under S. 1 (2) of Ordinance* II *of* 1948*—Notification under S. 92 (1), Government of India Act—Sufficiency.*

An order of eviction under S. 4 of the Bihar House Rent Control Order, 1942, dated 6th September, 1946, cannot be executed by the Civil Court under S. 17 of the Bihar Buildings (Lease, Rent and Eviction) Control Act (III of 1947) as it has not been kept alive by Bihar Ordinance II of 1946, there having been no notification under S. 1 (2) of that Ordinance. A notification under S. 92 (1) of the Government of India Act (1935), dated 1st October, 1946, directing that the Bihar Act (III of 1947) shall apply to the area in which the house is situate, cannot have the effect of applying it to that area unless there was a notification under S. 1 (2) of that Ordinance. The power under S. 92 (1) is a very limited power; and an Act cannot be applied to an excluded area with retrospective effect. (1947) F.C.R. 11; A.I.R. 1949 F.C. 175, Ref. (*Ramaswami and Sarjoo Prasad, JJ.*) Manindra Nath Bhattacharjee *v.* Rampada Pal. 29 Pat. 647=A.I.R. 1950 Pat. 505.

———S. 17—*Jurisdiction—Eviction order—Execution—Proper Court—Munsif's Court—Munsif exercising small cause powers and Munsif exercising original jurisdiction—If same Court or different Courts.*

So far as the provisions of S. 17 of Bihar Act III of 1917 are concerned, there is no antithesis between a Munsif exercising the powers of a Small Cause Court and a Munsif exercising ordinary jurisdiction in suits of a civil nature not cognizable by a Small Cause Court. The Munsif exercising jurisdiction as a Small Cause Court under the Bengal, Assam and Agra Civil Courts Act (1887), and the Munsif exercising original civil jurisdiction are to be considered as different Courts only for the purposes of the Provincial Small Cause Courts Act and the C. P. Code, but for the purpose of S. 17 of Act III of 1947, he is one and the same Court. An execution petition presented to the Munsif under S. 17 of Act III of 1947 is therefore competent, when he has jurisdiction to entertain a "suit" for recovery of rent of the building in question, and he is the Court of the lower grade. (*Reuben and Das, JJ.*) Dasrathi Rai *v.* Kali Charan Ghose. 5 D.L.R. (Pat.) 239.

——**S. 17 and 25**—*Scope and Effect of—Bihar Rent Control Order, S. 4—Order of eviction for non-payment of rent—Execution by Civil Court—Permissibility.*

Under S. 4 of the Bihar House Rent Control Order, the Controller or Commissioner had no power to pass an order of eviction of a tenant on the ground of non-payment of rent. Such an order being illegal cannot continue in force by reason of Ss. 22 and 25 (2) of Act III of 1947; and it cannot therefore be executed under S. 17 of that Act. (*Sinha and Ramaswami, JJ.*) BRINDABAN BIHARI LAL *v.* BADRI PRASAD. 27 Pat. 925=4 D.L.R. (Pat.) 9=A.I.R. 1949 Pat. 335.

——**S. 18 (3)**—*Scope—Civil Court jurisdiction to question order of Controller.*

S. 18 of Bihar Act III of 1947 only excludes the jurisdiction of the civil Court to question the order of the Controller, provided the fact for which the order is made is not non-existent. It does not bar the civil Court's jurisdiction to examine into cases where the order is made in the absence of the facts on the establishment of which alone depends the jurisdiction of the Controller. The Court is not debarred from examining the proceedings of the Controller under the Act if the Controller has exercised a jurisdiction which he did not possess. 17 I.A. 40; 25 I.A. 151; 65 I.A. 301; 67 I.A. 222; 74 I.A. 103, ref.; 67 I.A. 197; 25 Pat. 7, rel. on. (*Manohar Lall and Mahabir Prasad, JJ.*) S. K. SHAW *v.* RAI BRIJ RAJ KRISHNA. 28 Pat. 390=4 D.L.R. (Pat.) 126=A.I.R. 1949 Pat. 474=30 P.L.T. 183.

——**S. 20**—*Applicability — Application for eviction for non-payment of rent—Order for eviction by controller—Date fixed for surrender of possession—Tenant not surrendering possession but appealing against order — Prosecution—Legality.*

There is a clear distinction between the provisions of sub-S. (3) and sub-Ss. (1) and (2) of S. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act. Sub-S. (3) refers to circumstances quite distinct from those mentioned in sub-Ss. (1) and (2). While an order passed by the Controller under S. 11 (3) authorises the fixing of a specific period within which the tenant should put the landlord in possession, S. 11 (2) does not specifically direct the Controller to fix any such period. When the landlord has asked for eviction under S. 11 (1) and (2), on the ground of non-payment of rent, it is not necessary for the Controller to fix in his order of eviction any definite period within which the tenant must put the landlord in possession. When the aggrieved party (the tenant) avails himself of the right of appeal given under S. 18, he is not bound to put the landlord in possession because he is questioning the order itself. The failure of the tenant in such a case to surrender possession to the landlord would not render him liable to prosecution under S. 20 of the Act, merely because the Controller has erroneously fixed a date in his order for delivery of possession to the landlord and the tenant has not so surrendered

possession within that date. When he has appealed and the appeal against the order is pending, it cannot be said that he has contravened the order for eviction, so as to render him liable to be prosecuted under S. 20 of the Act. (*Imam and Jamuar, JJ.*) HIRA LAL SAO *v.* RAMRAKHA SAO. 5 D.L.R. (Pat.) 31=4 A.I.Cr.D. 128=A.I.R. 1950 Pat. 204=51 Cr.L.J. 854.

BIHAR BUILDING (LEASE, RENT AND EVICTION) CONTROL ORDINANCE (II OF 1946)—Scope—If retrospective. *See* BIHAR HOUSE RENT CONTROL ORDER, (1942). 27 Pat. 1.

BIHAR (CHOTA NAGPUR AND SONTHAL PARGANAS DISTRICT VALIDATING) REGULATION (I OF 1941) AND (IV OF 1942)—*Scope—If* ultra vires.

Bihar Regulation I of 1941 and Regulation IV of 1942 are not *ultra vires* the Governor; under S. 92 (1) and (2) of the Government of India Act the Governor has full plenary powers to extend to a partially excluded area any Federal or Provincial Act to any extent, either prospectively or retrospectively. (*Spens, C.J., Muhammad Zafrullah Khan and Kania, JJ.*) KAMAKSHYA NARAIN SINGH *v.* COMMISSIONER OF INCOME-TAX, BIHAR. 26 Pat. 451=(1947) F.L.J. 99=(1947) I.T.R. 311=1947 M.W.N. 451=51 C.W.N. (F.R.) 27=A.I.R. 1947 F.C. 48=(1947) 2 M. L.J. 438 (F.C.).

——Scope—If *ultr avires*. *See* GOVERNMENT OF INDIA (1935), S. 92 (2). (1947) I.T.R. 302.

BIHAR (AND ORISSA) CO-OPERATIVE SOCIETIES ACT (VI OF 1935), Ss. 32 and 63—*Applicability and relative scope—Debts of a society and debts due to a society—Distinction—Limitation for proceeding against estate of deceased member.*

The words "debts of a registered society" in S. 32 of the Bihar and Orissa Co-operative Societies Act clearly mean the debts owed by the society and not the debts owed to the society; the section applies only to those cases where the society is a debtor and not to those where it is a creditor. The section refers clearly to cases of the type which are provided for by S. 54 of the Act, and it provides that in such cases the liability of the estate of a deceased member shall continue only for a period of two years from the date of his death. Where the liability is to be determined in connection with debts which a deceased member owes to a society, the case will be governed by S. 63 due to a society." In such a case the period of limitation is to be computed from the date on which is clearly applicable to the case of "debts Ray, J.) CHANDERSINGH *v.* KAMALPORE CO-OPERATIVE SOCIETY. 24 Pat. 681=225 I.C. 120=1946 Pat. (Rul.) 298=12 B.R. 553=A.I.R. 1946 Pat. 150.

——**S. 48 and Expl. (2)**—*Scope—Dispute—Jurisdiction of Registrar—Loan by karta of joint family—Award against other members also on the ground that they were benefited by loan—Jurisdiction—"Dispute".*

A decision that persons other than members or past members or their legal representatives or their sureties are liable for a loan incurred by a member, on the ground that such persons have been benefited by the loan incurred by the member concerned as karta of a joint family, is a decision on a question which is not within the jurisdiction of the Registrar of Co-operative Societies falling under S. 48 of Expl. 2 to S. 48 of the Bihar and Orissa Co-operative Societies Act. A question whether a person is or was a member of a society is of course a dispute which the Registrar has jurisdiction to decide under S. 48. Expl. 2 to that section is only to the effect that the Registrar can decide whether the membership of the person who joined in the application for registration of the society or was admitted to membership after registration is in accordance with the rules and bye-laws of the society. Any question as to the liability of some one other than the recorded member is foreign to Explanation 2 as also to anything as 'dispute' within the meaning of S. 48 of the Act. On a proper reference, the Registrar can no doubt decide whether or not the coparceners of a member were or are members of the society through the *karta* of the family whose name alone appears as a member. But in the absence of such a reference, an award holding the other coparceners liable for the debt incurred by the member on the ground that they were benefited by the loan incurred by the member as *karta* of the family is without jurisdiction and not binding on the other members of the family. It may be open to the society to sue in the ordinary civil Court for recovery of the debt from the members and his coparceners as well on the ground that in respect of the transaction the member acted for the benefit of the family as its manager. But such a ground of a liability can never be the subject of adjudication by the Registrar. 19 P.L.T. 328, dist. (*Ray, C.J. and Panigrahi, J.*) BHAGABAT CHARANJENA *v.* RAM NARAYAN MOHANTY. I.L.R. (1949) Cut. 505.

——**S. 57 (2) and (3)**—*Scope and effect of—S. 57 (3)—If controls S. 57 (2).*

Reading S. 57 (2) and (3) of the Bihar and Orissa Co-operative Societies Act together, it must be held that whatever may be the scope of the suit or legal proceeding that may be instituted against a liquidator as such, the leave of the Registrar would be necessary.

Sub-S. (3) does not control sub-S. (2). They deal with entirely different matters, one laying down the necessity for the leave of the Registrar in certain specified cases, the other declaring the single ground on which the final orders of the authorities created by the Act may be challenged.

A suit brought with the leave of the Registrar as contemplated in S. 57 (2) may fail if the ground of "want of jurisdiction" is not made out. But at the same time a suit in which that ground is made out will fail on the ground of maintainability, in the absence of the necessary leave of the Registrar. (*Sinha and Mukherji, JJ.*) REGISTAR, CO-OPERATIVE SOCIETIES *v.* RAGHUBIR RAM. 26 Pat. 582=A.I.R. 1948 Pat. 337=2 D.L.R. 257.

——**S. 63**—Applicability—Debts of society and debts due to society—Liability of estate of deceased member—Limitation for enforcement. *See* BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT, Ss. 32 AND 63. 24 Pat. 681.

BIHAR COTTON CLOTH CONTROL ORDER (1943), Cl. 13 (1) (e)—"In his possession or under his control"—Meaning of—Co-proprietors—Liability of one for act of another. [*See* Q.D. 1941-1945, Vol. I, Col. 410.] RAM NARAIN KEDIA *v.* EMPEROR. 224 I.C. 131=1946 Pat. (Rul.) 289=47 C.L.J. 568=27 P. L. T. 105=12 B.R. 485=A.I.R. 1946 Pat. 30.

BIHAR COTTON CLOTH AND YARN DEALERS (LICENSING AND CONTROL) ORDER (1944), Ss. 3 and 8—Prosecution under—Sanction—Necessity—Cotton Cloth and Yarn Control Order, 1943, Cl. 23—Scope. [*See* Q.D. 1941-1945, Vol. I, Col. 411.] MANOHAR LAL *v.* EMPEROR. 27 P.L.T. 46.

——**Cls. 3 and 9**—*Sanction of Provincial Government—Necessity for prosecution for contravention.*

No sanction of the Provincial Government is necessary for a prosecution for the contravention of Cl. 3 or Cl. 9 of the Bihar Cotton Cloth and Yarn Dealers (Licensing and Control) Order, 1944, and a conviction cannot be held to be bad for want of sanction of the Provincial Government for the prosecution. (*Das, J.*) GOGAN RAM *v.* EMPEROR. 226 I.C. 316=1946 Pat. (Rul.) 368=47 Cr.L.J. 892=12 B.R. 723=1946 P.W.N. 1=A.I.R. 1946 Pat. 285.

——**Cl. 8**—Scope and object—Prosecution for contravention—Sanction of Provincial Government—Necessity. [*See* Q.D. 1941-1945, Vol. I, Col. 411.] KAPILDEO PANDE *v.* EMPEROR. 12 B. R. 130=221 I.C. 426=47 Cr.L.J. 190.

BIHAR COTTON AND YARN DEALERS LICENSING AND CONTROL ORDER (1944), Cl. 8—Scope of—Offence—Sanction for prosecution—Necessity—Prosecution and conviction without sanction—Sustainability. *See* COTTON CLOTH AND YARN (CONTROL) ORDER (1943), Ss. 12 (1), (4) AND 23. (1947) P.W.N. 31.

BIHAR COTTON CLOTH AND YARN CONTROL ORDER (1945), Cl. 18 (2)—*Burden of proof—In excess of normal requirements—Possession of 76 yards marked in cloth and 35 pieces of sarees—Offence.*

It is true that in a criminal prosecution the burden of proof is on the prosecution; but it does not mean that in a trial on a charge of contravention of S. 18 (2) of the Bihar Cotton Cloth and Yarn Control Order, the prosecution must prove, that the quantity of cloth found in the possession of the accused was beyond his normal requirements. There is no definition in the act as to what would be the normal requirements of a person. But when a person is found in possession of a large quantity of cloth or yarn which cannot *prima facie* be regarded as his normal requirement, he has the burden on him of showing that the quantity found was his normal requirement. He has to lead evidence to show that that quantity was only needed for himself and for the members of his family. A person found with 76 yards marked in cloth and 35 pieces of sarees must be deemed to be in possession of cloth in excess of his normal requirements unless he can prove otherwise. (*Imam and Das, JJ.*) SHYAM LAL MARWARI *v.* THE KING. 49 Cr.L.J. 557=A.I.R. 1948 Pat. 355 =2 D.L.R. 807.

——**Cl. 18 (2)**—*Sentence—Mere fine—Sufficiency—Severe sentence—Necesity.*

Offences of contravention of the Bihar Cotton Cloth and Yarn Control Order are to be regarded as anti-social and have to be punished not merely with fine but with a substantial term of imprisonment. The Court must treat them with severity. (*Imam and Das, JJ.*) SHYAM LAL MARWARI *v.* THE KING. 49 Cr.L.J. 557=A.I.R. 1948 Pat. 355=2 D.L.R. 807.

BIHAR COURT OF WARDS ACT (IX OF 1879), S. 15—*"Any other person"—Manager appointed by Court of Wards.*

The manager appointed by the Court of Wards is "any other person" for the purposes of S. 15 of the Court of Wards Act. (*Agarwala, C.J. and Meredith, J.*) KAMAKSHYA NARAIN SINGH *v* HARKHU SINGH. 27 Pat. 1179=A.I.R. 1949 Pat. 265.

——**S. 18**—*Prudent management by Court—Presumption—Settlement of Zirat lands on cash rent on terms of fixity of tenure—Whether prudent.*

Under S. 18 of the Bihar Court of Wards Act, it is for the Court or whosoever acts in exercise of the powers delegated by the Court to exercise his individual judgment, if not discretion, in deciding whether the doing of a particular act is for the benefit of the property and the advantage of the ward. A considerable amount of latitude must be permitted to the authority concerned and the wisdom and sagacity of the said authority must be presumed.

In cases of a small area of Zirat lands and with good capacity for productivity, it may be an act of prudent management to preserve the lands by granting settlements on bhaoli rent by registered leases for terms of years. But where the area, is vast and productivity is low, it is *prima facie* wiser to settle on cash rent on terms of fixity of tenure than on bhaoli rent. (*Ray, J.*) KAMAKHYA NARAIN SINGH *v.* HARKHU SINGH. 4 D.L.R. (Pat.) 13=A.I.R. 1948 Pat. 438.

——**S. 18**—Scope — Non-compliance—Effect—Ward—If, bound by acts or omission of Court of Wards. [*See* Q.D. 1941-1945, Vol. I, Col. 205.] KAMAKSHYA NARAIN SINGH *v.* ARJUN. A.I.R. 1946 Pat. 143=227 I.C. 504=1947 Pat. (Rul.) 27=13 B.R. 81.

——**S. 39**—*Power of Manager—Creation of new holding in Zerat lands.*

A manager appointed by the Court of Wards has no power to create a new holding a Zerat lands without the sanction of the Court of Wards. (*Agarwala, C.J. and Meredith, J.*) KAMAKSHYA NARAIN SINGH *v.* HARKHU SINGH. 27 Pat. 1179=A.I.R. 1949 Pat. 265.

——**S. 65-A**—*Money due from property to Court of Wards—Property in hands of Receiver*

appointed by Court—Certificate—Leave of Court—Necessity.

Before attachment can issue against property in the hands of a Receiver appointed by the High Court, leave of that Court must be obtained. The manager of the Court of Wards cannot file a certificate against such Receiver for sums under S. 65-A of the Court of Wards Act without leave of the Court. (*Lee.*) RAMJI RAM *v.* COURT OF WARDS, PATNA. 12 B.R. 64.

——**S. 70**—*Rules defining powers delegated to Manager—Legal effect.*

The Rules defining the powers delegated to the Manager framed under S. 70 of the Bihar Court of Wards Act may not have the force of law so far as third persons are concerned, but they are binding on the Manager. (*Ray, J.*) KAMAKHYA NARAIN SINGH *v.* HARKHU SINGH. 4 D.L.R. (Pat.) 13=A.I.R. 1948 Pat. 438.

——**S. 70**—*Rules framed under R. 72—Power of Manager to sanction settlements—Limitations.*

The limitations on the power delegated to the Manager to sanction settlements have been provided for in R. 72 of the Rules framed under S. 70 of the Bihar Court of Wards Act. Besides them we cannot imply other limitations simply because such limitations will be more beneficial in the interests of the disqualified proprietor. (*Ray, J.*) KAMAKHYA NARAIN SINGH *v.* HARKHU SINGH. 4 D.L.R. (Pat.) 13=A.I.R. 1948 Pat. 438.

BIHAR COURT OF WARDS MANUAL (1941), R. 241—*Scope—Oral settlement of zirat lands by manager of Court of Wards—If* ultra vires.

A oral settlement of zirat lands of a ward of Court by the manager of the Court of Wards for a term exceeding one year, is in excess of the authority conferred upon the manager and is therefore *ultra vires* and illegal (*Sinha and Bennett, JJ.*) KAMAKHYA NARAIN SINGH *v.* KKEYAMIAN. 26 Pat. 143=A.I.R. 1948 Pat. 160.

BIHAR CRIMINAL LAW (INDUSTRIAL AREA) AMENDMENT ACT (1943), S. 5—*Applicability and scope.*

Cases which the Bihar Criminal Law (Industrial Area) Amendment Act, 1943, is intended to deal with are cases of theft in an industrial area of articles which are produced or manufactured in that area, or which are used for the purposes of any mine, factory or workshop situated in that area. (*Agarwala, A.C.J.*) AJIT RANKAN BHATTACHARYA *v.* THE KING. 49 Cr. L.J. 596=A.I.R. 1949 Pat. 40=2 D.L.R. 499.

BIHAR DISTRICT BOARD ELECTORAL RULES (1937), R. 3 (b)—*Applicability—"Has directly or indirectly any share or interest in any contract with or under the District or Local Board"—Meaning and effect of—Hindu joint family having leases of roadside lands from District Board—Member of—Eligibility for election to Board.*

(Per *Sarjoo Prasad, J., Das, J., dubitante*:) The word "contract", in R. 3 (*b*) of the Bihar

District Board Electoral Rules, is not confined to the class of contracts relating to construction of roads or the like. The language of the rule is wide enough to cover a case of contractual relationship arising out of leases as well or out of any other contract.

Where therefore a Hindu joint family has taken from the District Board leases of roads side lands and was holding the lands as lessees, a member of that joint family is a person "who has directly or indirectly any share or interest in any contract with or under the District Board", within the meaning of R. 3 (*b*) of the Electoral Rules, so as to render him ineligible for election. (*Das and Sarjoo Prasad, JJ.*) JAMUNA PRASAD *v* JOGENDRA PRASAD. 29 Pat. 581=5 D.L.R. (Pat.) 211.

———**R. 3 (b)**—Revision—Wrong interpretation of rule—If ground for—Election Commissioner—If Court. *See* C. P. CODE, **S. 115, 29 Pat. 581; 5 D.L.R. (Pat.) 211.**

———**Rr. 4 (2) and 30**—Scope—Name of voter and candidate included in two rolls in same district—Effect—If disqualifies him as voter or candidate—Decision of returning officer—Finality. [*See* Q.D. 1941-1945, Vol. I, Col. 411.] RAMCHANDRA *v.* JADUNANDAN. 27 P.L.T. 90.

———**R. 16 (1) (b)**—*Applicability and scope—Corrupt practice—Hiring of men to vote in place of dead voters and women to vote for absentee women voters—Effect of, on election.*

The hiring men to vote for dead voters at an election and the hiring of women to vote for absentee women voters, done with the knowledge of the successful candidate, must be held to be corrupt practices of a serious nature falling within R. 16 (1) (*b*) of the Bihar District Board Electoral Rules, and would render the election void, irrespective of whether the corrupt practices did or did not materially affect the result of the election. All that rule 16 (1) (*b*) requires is that the corrupt practices in question must be committed in the interest of the returned candidate, in which case his election must be held to be void. (*Das and Sarjoo Prasad, JJ.*) JAMUNA PRASAD *v.* JOGENDRA PRASAD. 29 Pat. 581=5 D.L.R. (Pat.) 211.

———**R. 16 (2)**—*Applicability—Conditions of —R. 16 (2) if exception to R. 16 (1)—Right to claim exception in favour of validity of election.*

The various clauses in R. 16 (2) of the Bihar District Board Electoral Rules have to be read conjunctively and all the conditions enumerated in those clauses must be found to exist before a returned candidate can take advantage of R. 16 (2), whereas under sub-R. (1) all the clauses are made disjunctive by the use of the word "or". Sub-R. (2) is thus obviously an exception to sub-R. (1), and this exception must be rigorously found before a returned candidate can take advantage of it. This exception can come into play only where the candidate himself is innocent but his agent is guilty or has knowledge of or connived at the practices in question. It can have no application at all where the returned candidate is himself found guilty of the corrupt practices of the variety referred to in Rr. 16 (1) (*b*) and 16 (2). (*Das and Sarjoo Prasad, JJ.*) JAMUNA PRASAD *v.* JOGENDRA PRASAD. **29 Pat. 581=5 D.L.R. (Pat.) 211.**

BIHAR ESSENTIAL ARTICLES CONTROL (TEMPORARY POWERS) ORDINANCE, 1946, S. 5—*Export of cattle to place outside province—Whether prohibited—Bihar Cattle, Fowl, Eggs, Sheep and Goats (Movement) Control Order,* 1943, *Cl.* (3).

The Bihar Cattle, Fowl, Eggs, Sheep and Goats (Movement) Control Order, 1943, expired on 30th September, 1946, the date on which the Defence of India Act, 1939, and the rules made thereunder expired, and the Bihar Essential Articles Control (Temporary Powers) Ordinance, 1946, cannot keep that control order alive in so far as it related to the export of cattle from Bihar to a place outside Bihar. S. 3 of the Control Order, 1943, by which the movement of cattle from Bihar to a place outside it was banned, is clearly a prohibition regarding the export of goods from the province to a place outside it. The Provincial Legislature could not pass such a law as its power to legislate in respect of Items 27 and 29 of the Provincial Legislative List is subject to the restriction contained in S. 297 of the Constitutions Act, and therefore the Provincial Governor could not do so by S. 5 of the Control Ordinance, 1946, made under S. 88 of the Government of India Act, (*Das, J.*) FESU SHEIKH *v.* EMPEROR. 49 Cr.L.J. 414=A.I.R. 1948 Pat. 297=29 P.L.T. 233.

BIHAR ESSENTIAL FOOD GRAINS (POSSESSION AND STORAGE) ORDER (1943), S. 3—Construction and Scope—Person found in possession of rice loaded in carts—Offence. [*See* Q.D. 1941-1945, Vol. I, Col. 412.] DINA NATH BANIA *v.* EMPEROR. 222 I.C. 359=12 B.R. 252=1946 Pat. (Rul.) 115=47 Cr.L.J. 436=A.I.R. 1946 Pat. 130.

———**Cls. 3 and 5**—Scope—Storing food grain in room not alleged or found to be occupied by person storing—Offence. [*See* Q.D. 1941-1945, Vol. I, Col. 412.] CHHOTAN *v.* EMPEROR. 224 I.C. 420=1946 Pat. (Rul.) 297=12 B.R. 546=47 Cr.L.J. 622=A.I.R. 1946 Pat. 20.

BIHAR EXCISE ACT, S. 47 (a)—*Sentence—One seer of ganja recovered from accused—Sentence of four months rigorous imprisonment—Propriety.*

A sentence of rigorous imprisonment for four months, in case of a conviction under S. 47 (*a*), Excise Act, when only one seer of ganja has been recovered, is too servere and should be reduced. A sentence of three weeks imprisonment (already undergone) and a fine of Rs. 50 would be sufficient to meet the ends of justice in such a case. (*S. K. Das and Narayan, JJ.*) RAJESWAR PRASAD SINGH *v.* PROVINCE OF BIHAR. 28 Pat. 53=4 D.L.R. (Pat.) 103=3 A.I.Cr.D. 280=A.I.R. 1949 Pat. 323=50 Cr.L.J. 676=30 P.L.T. 295.

BIHAR EXCISE MANUAL—*Measurement of liquor—Proper method.*

For an excise official to measure liquor by a bottle of 22 or 23 oz., by dipping out approximately 20 oz. each time is a proper or scientific method of measurement. (*Lee.*) RAMDHARI PRASAD *v.* EXCISE DEPARTMENT. 13 B.R. 520.

——**Vol. II, page 130**—*Rules—Breach of rule prescribing maximum limit of quantity saleable—Sale for being taken to a marriage party—Offence.*

A sale by a licensee of 420 oz. of liquor to a person in three instalments is a breach of the rule prescribing a limit of 80 oz. to each sale. Where, however, the liquor is sold for being taken to a wedding party waiting for drinks, the offence has to be regarded as a technical one, the motive not being liable to be criticised. (*Lee.*) RAMDHARI PRASAD *v.* EXCISE DEPARTMENT. 13 B. R. 520.

BIHAR (AND ORISSA) FOOD AND DRUGS ADULTERATION ACT (II OF 1919), S. 3 (1)—Exemption from liability—Right to claim—Absence of labels on unopened tins—Effect—S. 14. [*See* Q.D. 1941-1945, Vol. I, Col. 418.] RAMCHAND RAM *v.* GAYA MUNICIPALITY. 18 R.P. 165.

BIHAR FOOD GRAINS CONTROL ORDER (1942)—*Applicability to Chota Nagpur—Extension of Defence of India Act to excluded area—Effect of on rules or orders made under the Act.*

The Bihar Food Grains Control Order is applicable to Chota Nagpur, though no separate notification has been issued by the Provincial Government extending the order to that area. Once the Defence of India Act had been extended to Chota Nagpur and other Partially excluded areas in Bihar, it is unnecessary for the Provincial Government to issue separate notifications directing every rule or order made under that Act to be in operation in such areas. From the extension of the Defence of India Act to the area, it necessarily follows that any rule or order made in the exercise of powers conferred by the Act also comes into operation in such area. (*Shearer and Imam, JJ.*) MAHABIR *v.* EMPEROR. 25 Pat. 98=228 I.C. 360=13 B.R. 193=48 Cr.L.J. 207=1947 Pat. (Rul.) 131=A.I.R. 1947 Pat. 16.

BIHAR FOOD GRAINS CONTROL ORDER (1947), S. 3 (b)—*"Premises"—Country-boat, if premises.*

The word "premises" in S. 3 (*b*) of the Bihar Food Grains Control Order cannot be read as including a country-boat, especially when the boat is not used as a dwelling place or fixed to any land permanently. The enactment being a penal law, restricting as it does the ordinary rights of a citizen to possess food grains, must be construed strictly. There is nothing in the order which would justify giving to the word "premises" any special meaning other than the ordinary meaning given to it in the English language. (*Imam and Jamuar, JJ.*) PROVINCE OF BIHAR *v.* THAKKAN MANJHI. 28 Pat. 883=5 D.L.R. (Pat.) 11=A.I.R. 1950 Pat. 181=51 Cr.L.J. 681.

BIHAR & ORISSA GENERAL CLAUSES ACT (1917), S. 4 (7)—*Bihar and Orissa Act—Regulation made by Governor under S. 92, Government of India Act,* 1935.

Though the Government of India Act (1935) does not define a "Regulation," there can be no doubt that a Regulation duly passed by the Governor of Bihar acting under S. 92, is to have the force of and is to be regarded in every way as a Provincial Act except that it is enacted by the Governor acting in his discretion. It cannot be held that such a Regulation is something less than a "Bihar and Orissa Act" for purposes of the Bihar and Orissa General Clauses Act. (*Agarwala, C.J. and Ayyar, J.*) PESHAN SHAIKH *v.* EMPEROR. 2 D.L.R. 650=A.I.R. 1948 Pat. 234=49 Cr.L.J. 318.

BIHAR HINDU WOMEN'S RIGHTS TO PROPERTY (EXTENSION TO AGRICULTURAL LAND) ACT (VI OF 1942)—*Scope—Retrospective operation.*

Bihar Act VI of 1942, extending Hindu Women's Rights to Property Act of 1937 and its amendment by Act XI of 1938 to agricultural lands, is expressly stated to be retrospective, and when no transfer had been made by the holder before the Bihar Act was passed, the widow must be held entitled to her share in the property on the death of her husband, though he died before 1942. (*Manohar Lall and Das, JJ.*) DHANPAL *v.* MT. JANKIKUER. 25 Pat. 744=A.I.R. 1947 Pat. 410.

BIHAR HOUSE RENT CONTROL ORDER (1942)—*Scope—If retrospective—Bihar Buildings (Lease, Rent and Eviction) Control Ordinance II of* 1946—*Buildings (Lease, Rent and Eviction) Control Act (III of* 1947)—*Scope—If retrospective in effect.*

The Bihar House Rent Control Order, 1942, cannot be held to be retrospective in its operation. There is no provision in the control order that it will apply to pending proceedings, nor can the Court conclude from any of its provisions that it must infer a necessary retrospective intendment. So also neither the Bihar Ordinance II of 1946, nor the Buildings (Lease, Rent and Eviction) Control Act III of 1947, can be held to be retrospective in effect, 63 I.A. 47, dist.; 17 Pat. 460; 19 Pat. 752 (F.B.) ref. (*Manohar Lall and Imam, JJ.*) SHIVESWAR *v.* PARMESHWAR. 27 Pat. 1=A.I.R. 1949 Pat. 355.

——**Cl. 4**—*Scope—Jurisdiction of Rent Controller—**Application for eviction on ground of non-payment of rent and of landlord requiring house for own use—Compromise—Agreement by tenant to vacate within fixed period—Jurisdiction to order eviction.***

Where a landlord applies for eviction of the tenant under Cl. 4 of the Bihar House Rent Control Order, 1942, on the ground that the tenant had not paid rent and that he required the house for his own use, and the parties enter into a compromise providing for the tenant vacating the premises within a certain period, it is open to the Rent Controller to make an order of eviction on such compromise; the Rent Controller under Cl. 4 (1) has jurisdiction to evict the tenant if the landlord in good faith reasonably requires the house for his own occupation, though not for non-payment of rent. 27 Pat. 925, dist.;

9 All. 191 (P.C.); 11 Bom. 488, ref. (*Ramaswami and Sarjoo Prasad, JJ.*) MANINDRA NATH BHATTACHARJEE *v.* RAMPADA PAL. 29 Pat. 647=A.I.R. 1950 Pat. 505.

———**Cl. 12**—Applicability—"Tenant" — Person whose tenancy has been determined and against whom decree in ejectment had been passed before order came into operation—If "tenant." [*See* Q. D. 1941-1945, Vol. I, Col. 418.] GANESHADAS RAMGOPAL *v.* JAMUNA. 27 P.L.T. 55.

———**Cl. 13**—*Applicability—Conditions of—Whether applies to proceedings in Civil Court.*

Before Cl. 13 of the Bihar House Rent Control Order can be held to apply so as to protect a tenant from month to month from eviction, it must be established that either he had paid the rent or was ready and willing to pay the same.

Quaere: whether Cl. 13 applies to proceedings in a Civil Court? (*Monohar Lall and Imam, JJ.*) SHIVESHWAR *v.* PARMESHWAR. 27 Pat. 1=A.I.R. 1949 Pat. 355.

———**Cl. 13**—*Applicability—Conditions of—Willingness to pay rent—Sufficiency—Tenant, if bound to tender all arrears as condition precedent.*

The terms of Cl. 13 of the Bihar House Rent Control Order are very wide and protect the tenant from eviction so long as he is willing to pay rent. It is not the intention of the law that the tenant should make a useless offer of payment or send the amount to the landlord by money order which would without doubt be refused. The Courts will not require a party to make a formal tender where, from the facts stated in the bill or from the evidence, it appears that the tender would have been a mere form and that the party to whom it was made would have refused to accept the money. Where there is a finding that the tenant is willing to pay the rent, Cl. 13 will give the tenant protection from eviction. 49 C.W.N. 728, dist.; 50 I.A. 41; **14 M.I.A. 330, rel.; 29 P.L.T. 217, ref.** (*Manohar Lall, J.*) GAURISHANKAR AGARWALA *v.* GANGA PRASAD. 29 P.L.T. 245=A.I.R. 1949 Pat. 192.

———**Cl. 13**—*Construction—"Conditions of the tenancy"—Meaning of.*

The expression "conditions of the tenancy" in Cl. 13 of the Bihar House Rent Control Order must be construed as not including a condition to yield up the premises demised on the expiration of the term or on the service of a valid notice to quit. *Shearer and Bennett, JJ.*) DHARAMSHILA LALL *v.* BIBI AMNA. 26 Pat. 693=A.I.R. 1948 Pat. 269=29 P.L.T. 217=2 D.L.R. 945.

———**Cl. 13**—*Ejectment decree by Civil Court—Executing Court—Power to question.*

Where the conditions laid down by Cl. 13 of the Bihar House Rent Control Order have been complied with in that a decree for ejectment has been passed by a Civil Court after finding that the tenant had not paid the rent due from him, the decree cannot be attacked or challenged in the executing Court. (*Manohar Lall and Das, JJ.*) SURAJ NARAIN PRASAD *v.* JAMIL AHMAD. 25 Pat. 1=12 B.R. 506=224 I.C. 331=1946 Pat. (Rul.) 283=A.I.R. 1946 Pat. 385=27 P.L.T. 445.

———**Cls. 13 and 14**—*Scope—Jurisdiction of Civil Court—If taken away.*

There is nothing in Cls. 13 and 14 of the Bihar House Rent Control Order which takes away the jurisdiction of the Civil Court. The only restriction on the jurisdiction of the Civil Courts is that an order of the controller when made, shall be final and shall not be questioned in any Court. The Bihar House Rent Control Order does not create an independent or a new obligation; nor does it provide an exclusive Code for the determination of that obligation. It merely provides an alternative remedy which any party can avail himself of and if any party thus avails himself of that alternative remedy, then and then alone is the order of the controller final. It would, however, be subject to investigation by Civil Court as to whether the controller has complied with the Act or acted in conformity with the fundamental principles of judicial procedure. (*Manohar Lall and Das, JJ.*) SURAJ NARAIN PRASAD *v.* JAMIL AHMAD. 25 Pat. 1=12 B.R. 506=224 I.C. 331=1946 Pat. (Rul.) 283=A.I.R. 1946 Pat. 385=27 P.L.T. 445.

BIHAR KEROSENE OIL CONTROL ORDER (1948), S. 11—Scope—Contravention of Bihar Kerosene Oil Control Order on 25th April, 1948—Offence. *See* ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT, 1946, S. 7. 5 D.L.R. (Pat.) 13.

BIHAR AND ORISSA LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 141—*Scope—Breach of bye-law of District Board—Prosecution started by chairman of Local Board—Absence of evidence of authorisation by District or Local Board—Effect—Legality of conviction.*

A prosecution in respect of a breach of a bye-law of a District Board instituted by the Chairman of a Local Board, in the absence of evidence to show that the Chairman was authorised to institute the same either by the District Board or by the Local Board, is defective *ab initio* by reason of S. 141 of the Bihar and Orissa Local Self-Government Act, and a conviction had on such a prosecution is illegal and must be set aside. (*Agarwala, Ag. C.J. and Das, J.*) RAMAUTAR *v.* RAMBRICH. 26 Pat. 147=A.I.R. 1948 Pat. 255=49 Cr.L.J. 513.

BIHAR MAINTENANCE AND RESTORATION OF ORDER (INDEMNITY) ACT (III OF 1943), S. 4 (b)—*Construction and scope—Question of previous sanction—When to be referred to Government—Court if bound to refer as soon as plea is raised—Act if* ultra vires.

S. 4 (*b*) of Bihar Act (III of 1943), assuming the Act to be *intra vires*, does not indicate the stage at which the Court has to refer for decision the question whether the previous sanction of the Provincial Government is necessary or not. The Court has jurisdiction to decide whether in a particular case, on the materials then before it, the question has arisen. When it decides that it has arisen and refers it to

Government, what the Provincial Government has to decide is not that the question has or has not arisen, but that, after the question has been referred to it whether in the paricular case, the previous sanction of the Government was or was not necessary. The Court may decide that on the materials then placed before it, the question has not yet arisen and therefore decide to proceed with the suit, and then later on refer the question when it does arise. It is correct to hold that as soon as the defendant informs the Court that no previous sanction to the suit has been obtained, the Court loses jurisdicion to proceed with the suit and is bound to refer the question to the Government.

Quaere:—Whether Bihar Act III of 1943 is *ultra vires*.

Das, J.:—The foundation of the protection given in S. 4 (*a*) of the Act is the purpose for which the act which is the subject of the suit is ordered or done. It is for the Court, under S. 4 (*b*), to decide if any question as to previous sanction arises or not. The Court may well say that there at least must be some *prima facie* evidence as to the purpose for which the acts complained of were done, before it can hold that a question as to the previous sanction of the Provincial Government has arisen. (*Manohar Lal, Ag. C.J., Sinha and Das, JJ.*) R. NICHOLES LINES *v.* ALL INDIA SPINNERS ASSOCIATION. (1946) P.W.N. 321=A.I.R. 1947 Pat. 185=13 B.R. 382=230 I.C. 88=1947 Pat. (Rul.) 274 (S.B.).

BIHAR MAINTENANCE OF PUBLIC ORDER ACT (V OF 1947)—*Whether* ultra *vires—Government of India Act,* (1935), *Sch. VII, List II, Item* 1.

The true nature and character of the Bihar Maintenance of Public Order Act brings it within Item 1 of the Provincial Legislative List which relates to "public order," and the use of the expression "public safety" in the preamble and in S. 2 (1) of the Act, does not make the Act *ultra vires* the Provincial Legislature. The expression "public order" in Item 1 of the Provincial Legislative List must, in its context, be taken in a comprehensive sense so as to include public safety in its relation to the maintenance of public order. In the context in which the expression "public safety" occurs in the preamble and in S. 2 (1) of the Act, it is either synonymous with public order or is comprehended by the more general term "public order" and the use of the word "and" is not disjunctive. There is no encroachment on Item 1 of the Federal Legislative List which deals with, *inter alia,* preventive detention in British India for reasons of state connected with defence, external affairs, etc. That item may also have an aspect of public safety, but of a different character altogether, being connected with defence, external affairs, or the discharge of the functions of the Crown in its relation to the Indian States. (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773=A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

———S. 1 (3)—*Duration of Act for one year —Act extended to Chota Nagpur by Governor's notification, dated 16th March,* 1947—*Duration of Act extended by Provincial Government for another year till 15th March,* 1949—*No fresh notification by Governor extending the extended Act to Chota Nagpur till 6th March,* 1949—*Detention of petitioners in Chota Nagpur in February,* 1949—*Legality—Government of India Act* (1935), *S.* 92 (1).

The Bihar Maintenance of Public Order Act, 1947, came into force on 16th March, 1947, for a period of one year. On the same day, the Governor by a Notification under S. 92 (1) of the Government of India Act brought the Act into operation in the partially excluded area of Chota Nagpur. By a Notification, dated 11th March, 1948, the Provincial Government in exercise of the powers conferred by the proviso to S. 1 (3) of the Bihar Maintenance of Public Order Act, extended its operation for a further period of one year, (*i.e.*,) from 16th March, 1948 to 15th March, 1949. Upto 6th March, 1949, no fresh notification was issued by the Governor extending the extension of the Act to Chota Nagpur. On 7th March, 1949, however, the Governor issued a notification directing that the Act should apply and should always be deemed to have applied to Chota Nagpur with effect from 16th March, 1948. The petitioners were detained under the Act in Chota Nagpur in February, 1949.

Held (Per Full Bench) that the detention of the petitioners was legal, that a fresh notification by the Governor under S. 92 (1) of the Government of India Act extending the extended Act to Chota Nagpur was not necessary and that the Notification of 7th March, 1949, was entirely unnecessary and that nothing contained in it could render the detention of the petitioners, which was oherwise legal, illegal.

Per *Meredith, J.*—When the Governor by his notification of 16th March, 1947 applied the Act to the area, he applied it for whatever its duration might eventually be. There was no question of any fresh legislation extending the Act, the operation of which would be barred under S. 92 (i), Government of India Act, and which needed fresh application by the Governor. The whole legislation was in fact contained in the original Act (V of 1947), though in regard to the first proviso to S. 1, it was conditional legislation. It was not quite accurate to speak of extension of the Act to Chota Nagpur. It was originally an Act for the whole province including Chota Nagpur. S. 1 (2) of the Act said "it extends to the whole of the Province of Bihar". The effect of S. 92 (1) was merely to impose a bar to its operation in Chota Nagpur, and the Governor's Notification did not extend the Act to that area, but merely removed the bar to its operation. Once the bar was removed, it would operate for its entire duration.

Per *Shearer, J.*—In the enacting the proviso to S. 1 (3) of the Bihar Maintenance of Public Order Act, the Legislature delegated to the executive a power to amend the Act, the only restriction on the exercise of the power being that the Provincial Government was not to continue the Act in operation for more than a specified period. It is immaterial that the Provincial Government made no other modifications in the Act. When it continued the Act in operation for another year it amended the Act. This was no doubt an exercise of delegated legislative power, but the power so exercised was not a power conferred by the Constitution Act but a power conferred by the Bihar Legislature itself. It is true that when an Act which has been applied to Chota Nagpur is amended by a subsequent Act, that subsequent Act must also be applied to Chota Nagpur, otherwise the unamended Act continues in operation there. But there is nothing in the language used in S. 92 (1), Government of India Act, to suggest that, when an Act which has already been applied to Chota Nagpur is amended otherwise than by an Amending Act, the Act as amended will not apply to Chota Nagpur forthwith and that the issue of a notification, expressly declaring that it shall, is necessary.

Per *Imam, J.*—There is nothing in the terms of S. 92 (1), Constitution Act which required the Governor of the Province to issue a fresh notification thereunder directing that the Act shall remain in force for a further period of one year in Chota Nagpur. There was no new Act of the Provincial Legislature which required the Governor to proceed under S. 92 (1), Constitution Act. The Act had never ceased to be an Act of the Provincial Legislature. At no time was there a period in which its continuity had been broken. It had already been applied to Chota Nagpur under S. 92 (1), Constitution Act. While the Act remained in force it was the law of the province of Bihar including Chota Nagpur. Accordingly the detention of the petitioners by virtue of its provisions was not illegal. The Notification, dated 7th March, 1949, issued by the Governor under S. 92 (1), Constitution Act did not make the detentions illegal. If anything, the intention of the Governor in issuing the said Notification was to declare that such detentions were legal. (*Meredith, Shearer and Imam, JJ.*) KANAI LAL PAUL *v.* PROVINCE OF BIHAR. A.I.R. 1949 Pat. 369=50 Cr.L.J. 730=30 P.L.T. 257 (F.B.).

——**S. 1 (3), Proviso**—*Delegation of power to extend duration of the Act—If* ultra vires *the powers of the Bihar Legislature—Government of India Act* (1935), *S. 92 (1)—Power of the* ***Governor to extend Act with an*** **ultra vires** *provision.*

The Bihar Maintenance of Public Order Act of 1947 came into force on 16th March, 1947 and by sub-S. (3) of S. 1, its operation was limited to one year from the date of its commencement. There was, however, a proviso to the effect "that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification". On the 11th March, 1948, after a reasolution of both Houses the Provincial Government issued a notification extending the life of the Act for one year from 16th March, 1948 to 15th March, 1949. By the Bihar Act V of 1949 which came into force on the '15th March, 1949, in subsection (3) of S. 1 of the Act, 1947, for the words "for a period of one year from the date of its commencement" the words and figure "till the 31st March, 1950" were substituted. As the Bihar Act of 1947 could not of its own force operate in the Chota Nagpur Division which had been declared to be a "partially excluded area" under S. 91 of the Government of India Act, the Governor of Bihar issued a notification on the 16th March, 1947, directing that the Bihar Act of 1947 should apply to the Chota Nagpur Division. But when the life of the Act of 1947 was extended in 1948, it was not followed by fresh notification under S. 92 (1) of the Government of India Act though subsequently the Bihar Act V of 1949 was extended to that area by a notification. The appellants who were arrested in that area in January and February of 1949 under the Bihar Act as extended, applied under S. 491, Criminal Procedure Code, for their release on the ground that their arrest and detention were unauthorised and illegal inasmuch as the proviso to S. 1 (3) of the Act was *ultra vires* the powers of the Bihar Legislature and as such there was no Act in existence after the expiry of the period of one year fixed under the Act and even otherwise the Bihar Act with its extended duration was not effectually brought into operation in that area.

Held (*Kania, C.J., Mehrchand Mahajan and Mukherjea, JJ.*):—The proviso to sub-S. (3) of S. 1 of the Bihar Maintenance of Public Order Act of 1947 was *ultra vires* in that it amounted to a delegation of legislative power. That Act which was a temporary Act came to an end when the one year expired and had not been validly reenacted when the appellants were arrested and the Governor had no power to adopt it to Chota Nagpur as there was nothing to adopt. When the Bihar Amending Act V of 1949 was passed there was no Bihar Maintenance of Public Order Act, 1947, in operation in the Province which could be amended.

Patanjali Sastri, J.—The application of the first proviso to S. 1, sub-S. (3) of the Bihar Maintenance of Public Order Act to Chota Nagpur by the Notification of 16th March, 1947, was unconstitutional and, assuming without deciding, that the enactment of the Proviso by the Provincial Legislature was *ultra vires* and the notification issued by the Provincial Government on the 11th March, 1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chota Nagpur and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal.

Fazl Ali, J.—The proviso to sub-S. (3) to S. 1 of the Bihar Act of 1947 is only a piece of conditional legislation and it cannot be impugned so far as it confers upon the Provincial Government the power to extend the Act for a further period of one year. The mere fact that this power is coupled verbally with the power to modify the Act will not make the entire proviso void. If the provision as to modification is not valid, it can be ignored and the proviso can be read as if that provision was not there. The notification of the 11th March, 1948, is valid.

Per *Kania, C.J.*—The power contained in the impugned proviso to extend the Act for a period of one year, with modifications, if any, is one power and not two severable powers and is legislative power. Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is as conditional legislation by the Provincial Government. Applying the principles laid down by the Privy Council in the *Queen* v. *Burah* and *Russel* v. *Queen,* I do not think the extension of the Act beyond the first year by the Notifications could escape being classed as delegated legislation.

Per Mehrchand Mahajan, J.—The proviso which has been assailed in this case, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void. The power given in the proviso to re-enact the Act for another year is legislative power and does not amount to conditional legislation.

Per *Mukherjea, J.*—The proviso to S. 1 (3) of the Bihar Maintenance of Public Order Act must be held to be *ultra vires* the powers of the Bihar Provincial Legislature and *a fortiori* it would be *ultra vires* the legislative authority with which the Governor is invested under S. 92 (1) of the Government of India Act. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) JATINDRA NATH GUPTA *v.* PROVINCE OF BIHAR. 28 Pat. 703=1949 F.C.R. 595=30 P.L.T. 453=1949 F.L.J. 225=53 C.W.N. (F.R.) 91=A.I.R. 1949 F.C. 175=3 A.I.Cr.D. 566=4 D.L.R. (F.C.) 158=50 Cr.L.J. 897=(1949) 2 M.L.J. 356 (F.C.).

——**S. 1 (3), Proviso**—*Notification continuing Act issued in Governor's name—Validity.*

The expression "Provincial Government" in S. 1 (3), proviso of the Bihar Maintenance of Public Order Act means nothing more or less than the Governor of Bihar, by virtue of S. 4-A read with Ss. 3 (27-a) and 3 (43-a) of the General Clauses Act. If, therefore, the notification continuing the Act is issued in the name of the Governor, there is no illegality about it. (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773=A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

——**S. 1 (3), Proviso**—Scope—Extension of Act under—Notification under S. 92 (1), Government of India Act, applying Original Act to excluded area—Fresh notification—Necessity when Act is extended under S. 1 (3). *See* GOVERNMENT OF INDIA ACT, S. 92 (1). 4 D.L.R. (Pat.) 158 (F.B.).

——**S. 1 (3), Proviso**—*Whether valid.*

When the Governor-General gave his assent to the Bihar Maintenance of Public Order Act, he gave his assent to the proviso to S. 1 (3) of the Act; in other words, the Governor-General assented to that provision which says that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that the Act shall remain in force for a further period of one year. It cannot be contended that by assenting to the proviso the Governor-General has really delegated his power, to assent in favour of the Provincial Government and such delegation being illegal the proviso has no legal validity. On the contrary, the Governor-General has exercised his power of assent and the utmost that can be said is that the assent is a conditional assent, the condition being that the Provincial Government can act only on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council. Conditional assent of this kind is not unknown to legislative practice. [1945 P.C. 48, appl.] (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773=A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

——**Ss. 2 and 4**—*Ground for detention—Validity—Mere statement that detenu was responsible for strikes in collieries or that he attempted to participate in simultaneous strikes—Sufficiency.*

A mere statement that a detenu was responsible for strikes in collieries, or that he attempted to participate in simultaneous strikes in several collieries is not a ground of such precision or adequacy as would justify an order of detention under S. 2 of Bihar Act (V of 1947) or be a sufficient compliance with the mandatory provisions of S. 4, when there is no allegation that the strikes mentioned are illegal strikes. (*Das and Narayan, JJ.*) ARUN KUMAR SINHA *v.* PROVINCE OF BIHAR. 4 D.L.R. (Pat.) 38=3 A.I.Cr.D. 133=A.I.R. 1949 Pat. 236=50 Cr.L.J. 497.

——**S. 2**—*Grounds for order under—If to have reference solely to Province of Bihar—Ground referring to consequences or repercussions of prejudicial act outside province as well as within—If makes order* ultra vires.

The consequences of an act constituting "a prejudicial act" within the meaning of the Bihar Maintenance of Public Order Act (1947), need not necessarily be confined to the Province of Bihar, and the fact it may have repercussions or consequences outside the Province does not necessarily oust the jurisdiction of the Provincial Government to pass an order of detention under S. 2 of the Act, provided that the ground based on the prejudicial act has connection with or reference to the public safety and maintenance of public order in the Province of Bihar. A particular ground for detention of a person may, therefore, have reference to or connection with public safety and maintenance of public order in the Province, and may, at the same time, have reference to consequences or repercussions outside that Province. It would then be quite within the powers of the Provincial Government to make an order of detention under the Act on such a ground though an order on grounds which have only reference to or connection with the defence of India or the external affairs of India, and which have no connection with the public safety and maintenance of order in Bihar, would be in excess of the powers of the Provincial Government, because then the Act would encroach on the Federal Legislative list, *viz.*, Item I, List I, of Sch. VII to the Government of India Act (1935). A ground of detention which has reference to the public safety and maintenance of order in the Province of Bihar does not lose its force and validity under the Act merely because it may a have a wider aspect or consequences not necessarily confined to that Province and it cannot be contended that the order of detention is *ultra vires* in that the Act has been given an extra-territorial application, when it can have no such application in law. 29 P.L.T. 207, ref. (*Das and Narayan, JJ.*) SIDDIQUE ALI *v.* PROVINCE OF BIHAR. 28 Pat. 23=4 D.L.R. (Pat.) 28=3 A.I.Cr.D. 125 =A.I.R. 1949 Pat. 241=50 Cr.L.J. 510.

———S. 2—*Grounds for order—Past act of detenu—Sufficiency—Inference from past act—If justified.*

S. 2 of Bihar Act V of 1947 is meant for preventive detention and an inference from past acts of the detenu as to his acting in a manner prejudicial to safety, etc., is not shut out by the provisions of the Act. Hence an act done by the detenu in the past may be made a ground for his detention under the Act. [1949) Pat. 1 (F.B.) ref.] (*Das and Narayan, JJ.*) SIDDIQUE ALI *v.* PROVINCE OF BIHAR. 28 Pat. 23=4 D.L.R. (Pat.) 28=3 A.I.Cr.D. 125=A.I.R. 1949 Pat. 241=50 Cr.L.J. 510.

———S. 2—Mala fides *of detaining authority—Burden of proof.*

The recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by the Court as establishing the necessary condition for passing an order of detention. The onus of showing bad faith rests heavily on the detenu who imputes *mala fides* to the detaining authority. (*Das and Narayan, JJ.*) SIDDIQUE ALI *v.* PROVINCE OF BIHAR. 28 Pat. 23=4 D.L.R. (Pat.) 28=3 A.I.Cr.D. 125=A.I.R. 1949 Pat. 241=50 Cr.L.J. 510.

———S. 2—*Scope and operation of—Detention of habitual criminals—If legal or justified—Act, if* ultra vires *on that account.*

Shearer, J.—The Bihar Maintenance of Public Order Act is not an act for the preventive detention of habitual criminals. *Prima faice,* the persons aimed at are persons engaged in activities likely to lead to public disorder or domestic violence. "Public safety" as used in the Act includes safety of the property as well as the lives and liberties of His Majesty's subjects. But the expression cannot mean only the safety of the goods of individual members of the public. The correct meaning of the expression is the safety of the community, as a community, which may be threatened either from without by enemy action or from within by internal disorder or domestic violence. If the Act be regarded as authorising the detention of habitual criminals, then the Act would be *ultra vires* the Provincial Legislature and void.

Reuben, J.: Quaere: Whether an act for the detention without trial of a habitual criminal as such would be *ultra vires*. (*Shearer and Reuben, JJ.*) LALU *v.* KING. 4 D.L.R. (Pat.) 48=3 A.I.Cr.D. 171=A.I.R. 1949 Pat. 299=50 Cr.L.J. 575.

———S. 2 (1)—*Order of detention passed by Minister but expressed in Governor's name—Validity—Government of India Act,* (1935) *S.* 57.

An order of detention under S. 2 (1) of the Bihar Maintenance of Public Order Act expressed in the name of the Governor is valid, although under the new rules of executive business the order was passed by the Minister concerned and not by the Governor. Under S. 59 of the Government of India Act, executive action of the Government of a Province has to be expressed in the name of the Governor. [72 I.A. 241, rel.] (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773 =A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

———S. 2 (1)—*Order of detention—Satisfaction of Governor—Enquiry into—Power of Court.*

If an order of detention under S. 2 (1) of the Bihar Maintenance of Public Order Act states that the Governor was satisfied that it was necessary to make that order the Court must accept the position that he was so satisfied, unless there are grounds for holding that he was not acting in good faith, or that the order was a sham order or in excess of the powers given to him under the Act. [23 Pat. 252 and 72 I.A. 241, rel.] (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773=A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

———S. 4—*Construction—"As soon as may be"—Meaning of.*

The phrase "as soon as may be" in S. 4 of the Bihar Maintenance of Public Safety Order, means as early as is reasonable in the circumstances of the particular case.

Where the order under S. 2 (1) (*a*) was issued on 16th April, 1947, the arrest was made on 9th May, 1947, and the grounds of detention were communicated on 24th July, 1947:

Held, that the provisions of S. 4 had not been complied with and that the grounds were not communicated "as soon as may be." (*Agarwala, Ag. C.J., Reuben and Bennett, JJ.*) MURAT PATWA *v.* PROVINCE OF BIHAR. 26 Pat. 628=2 D.L.R. 654=A.I.R. 1948 Pat. 135=49 Cr.L.J. 132=29 P.L.T. 295 (F.B.).

———S. 4—*Grounds for detention—Communication to detenu—Time limit.*

No specific period can be laid down within which the grounds for detention have to be communicated to a detenu under S. 4 of the Bihar Maintenance of Public Order Act. The phrase "as soon as may be" as used in the section means as early as is reasonable in the circumstances of the particular case. (*Imam and Narayan, JJ.*) BADRI PRASAD *v.* KING. 49 Cr.L.J. 683=A.I.R. 1948 Pat. 401.

——**S. 4**—*Order of detention—Need to disclose grounds and particulars.*

Under S. 4 of the Bihar Maintenance of Public Order Act, the authority passing the order of detention should communicate the grounds, but it need not disclose facts which it considers it would be against the public interest to disclose. Under the section the facts may be so intertwined with the grounds that the Provincial Government may be in a position to say that the grounds cannot be disclosed without disclosing the facts.

It is clear from the section that a distinction is made between "grounds" and "particulars", in spite of the use of the word "other" before "particulars". The authority making the order is given a discretion to give such particulars as are in the opinion of the authority sufficient to enable the detenu to make a representation against the order of detention. The discretion, however, is not to be exercised capriciously, and if no particulars are given or particulars are given in such a way as to make it impossible for the detenu to make a representation against the order, then there is a failure to comply with the mandatory provisions of the section and the detenu is deprived of, to use the words of the section, "the earliest practical opportunity" of making a representation. A statement in the grounds that the detenu is a member of an organization or association which has been recently declared unlawful, without any reference to the nature of the activity in which he is or was engaged and without any particulars of that activity, is not a sufficient compliance with the mandatory provisions of S. 4 of the Act. [50 Bom.L.R. 175, 50 Bom.L.R. 183 and 1949 All. 37, ref.] (*Meredith, Sinha and Das, JJ.*) NEK MAHOMED *v.* PROVINCE OF BIHAR. 27 Pat. 773=A.I.R. 1949 Pat. 1=50 Cr.L.J. 44=4 D.L.R. (Pat.) 67=3 A.I.Cr.D. 227 (F.B.).

——**S. 4**—*Scope—Compliance—Vague and general assertions as to person being trusted lieutenant of Communist leader or of being link between Communists.*

A mere statement that a person is a trusted lieutenant of a Communist leader or that he is the link between certain Communist groups or that, his activities were suspicious, is clearly vague, and is not a ground with such particulars as would enable the person detained on such grounds to make an effective representation against the order of detention passed against him. Mere vague or general assertions without any particulars whatsoever cannot amount to sufficient compliance with the mandatory provisions of S. 4 of Bihar Act V of 1947. (*Das and Narayan, JJ.*) ARUN KUMAR SINGHA *v.* PROVINCE OF BIHAR. 4 D.L.R. (Pat.) 38=3 A.I.Cr.D. 133 =A.I.R. 1949 Pat. 236=50 Cr.L.J. 497.

——**S. 4**—*Scope—Non-compliance—Effect on detention—Order under S. 2 (1) (a)—If void.*

The provisions of S. 4 of the Bihar Maintenance of Public Safety Act are mandatory. The mere fact that one of the formalities attendant upon the exercise of a statutory power is directed to be carried out after the exercise of such power has already commenced does not of itself preclude an intention on the part of the Legislature that non-compliance with the formalities shall have an invalidating effect on the thing done or on the continued doing of the thing. The Act is not primarily concerned with orders but with the preventive detention of persons whose detention is, in the opinion of the Provincial Government, necessary with a view to prevent them from acting in a manner prejudicial to the public safety and maintenance of public order. A detention becomes illegal if the grounds for such detention are not communicated to the detenu within a reasonable time.

Quaere: Whether the order under S. 2 (1) (*a*) is void *ab initio* on this ground? (*Agarwala, Ag. C.J., Reuben and Bennett, JJ.*) MURAT PATWA *v.* PROVINCE OF BIHAR. 26 Pat. 628=29 P.L.T. 295=2 D.L.R. 654=A.I.R. 1948 Pat. 135=49 Cr.L.J. 132 (F.B.).

——**S. 19**—*Scope and effect—Notification under S. 6 (1) of Ordinance of 1946, void and* ultra vires—*If kept in force.*

A Notification issued under S. 6 (1) of the Bihar Maintenance of Public Order Ordinance, 1946, which is kept in force by S. 19 of the Bihar Maintenance of Public Order Act, 1947, should be a notification validly issued. But a notification which is *ultra vires* and beyond the scope of the powers conferred by S. 6 (1) of the Ordinance of 1946 cannot be kept in force, or validated by S. 19 of the Act of 1947. (*Manohar Lall and Ramaswami, JJ.*) RAMKHELAWAN PODDAR *v.* THE KING. 28 Pat. 854=4 D.L.R. (Pat.) 235.

——**(III of 1950)**—*Scope—Effect of Constitution Act—Bad parts if severable from other parts—Act void as a whole.*

Bihar Act III of 1950 has to be taken as a whole. The provisions in it for detention cannot be separated from the safeguards, and the safeguards are inextricably mixed up with the provisions for duration. The Court cannot tear an Act to pieces, take away the bad pieces, and then build a different structure by putting together the pieces that remain. That would amount to legislation on lines which can never be approved. Hence severance is not possible and hence the Act as a whole must be held to be void by reason of the Constitution having come into force at midnight of 26th January, 1950. (*Meredith, C.J. and Sarjoo Prasad, J.*) BRAHMESHWAR PRASAD *v.* STATE OF BIHAR. 29 Pat. 335=5 D.L.R. (Pat.) 221=4 A.I.Cr.D. 557=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

——*Scope—If retrospective.*

Bihar Act III of 1950 is not retrospective in operation. (*S. K. Das and Sarjoo Prasad, JJ.*) SUNIRMAL DUTTA *v.* PROVINCE OF BIHAR. 29 Pat. 293=4 A.I.Cr.D. 265=A.I.R. 1950 Pat. 259=5 D.L.R. (Pat.) 103=51 Cr.L.J. 1025.

——**Ss. 2, 4 and 5**—*Scope—If* ultra vires—*Constitution of India, Arts.* 13, 21 *and* 22 (4)—*Preventive Detention (Extension) Order,* 1950.

The detention provisions of Bihar Act III of 1950 are completely inconsistent with the fundamental rights prescribed in Art. 22 (4) of the Constitution of India; and as a consequence, directly the Constitution came into force at midnight of 25th January, 1950, these provisions became void under Art. 13 (1) of the Constitution. With the detention provisions the power to detain also lapsed on 26th January, 1950, and the detention cannot therefore legally continue even for one moment after the lapse of the law, in view of Art. 21 of the Constitution. The Act is not validated by the Preventive Detention (Extension) Order, 1950, because the Act having become void directly after midnight of 25th January, 1950, the subsequent order of the President made after 10-45 A.M. on 26th January, 1950, could not restore the Act which had already become void and ceased to exist. (*Meredith, C.J. and Sarioo Prasad, J.*) BRAHMESHWAR PRASAD *v.* STATE OF BIHAR. 29 Pat. 335=5 D.L.R. (Pat.) 221=4 A.I.Cr.D. 557=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

———S. 2 (1) (b)—*Scope—If void under Arts. 13 (1) and 19 of the Constitution of India—Act imposing restrictions—Validity—Onus of proof—Power of Court.*

Meredith, C.J. and Das J., Shearer, J., diss.:—S. 2 (1) (*b*) of the Bihar Maintenance of Public Order Act, 1949, became void under Art. 13 (1) of the Constitution of India, in so far as it operates to restrict the freedom of movement of a citizen and it is not served by Art. 19 (5) of the Constitution. A law to satisfy the criterion imposed by Art. 19 (5) must be so framed as to leave it open to the Courts to apply the objective test of reasonableness to its operation. Bihar Act III of 1949, not having been so framed is not saved by Art. 19 (5).

The burden is on the government to establish that the provision in the Act is valid, that is to say that the restrictions imposed are reasonable. No law can infringe the fundamental right of freedom of movement under Art. 13, and when by the law enacted there has been a *prima facie* infringement of that right, the onus is necessarily on the State Government to bring the law within the exception contained in Art. 19 (5) which alone can save it.

The test of reasonableness is not what is actually done under the law, but what the law enables to be done. There can be no presumption that an executive official will always act reasonably, though he may be presumed to act *bona fide*, which is a different thing.

The Courts do not apply any subjective test, but apply the objective test.

Shearer, J.: While it is for the judiciary to decide whether the Legislature has exceeded the limits of its legislative jurisdiction, it is not open to the judiciary to pronounce on the reasonableness or otherwise of anything which has been done by the Legislature within limits. 73 I.A. 144, rel. (*Meredith, C.J., Shearer and Das, JJ.*) BRAJNANDAN SHARMA *v.* STATE OF BIHAR. 29 Pat. 461=5 D.L.R. (Pat.) 166=A.I.R. 1950 Pat. 322 (F.B.).

———S. 5—*Grounds—Communication—Source of information—If to be disclosed.*

In communicating the grounds for detention to the person detained, it is not obligatory on the Provincial Government to disclose the source of their information. When the grounds stated are

definite and specific, the provisions of S. 3 are fully complied with. (*S. K. Das and Sarjoo Prasad, JJ.*) SUNIRMAL DUTTA *v.* PROVINCE OF BIHAR. 29 Pat. 293=A.I.R. 1950 Pat. 259=4 A.I.Cr.D. 265=5 D.L.R. (Pat.) 103=51 Cr.L.J. 1025.

———S. 5 (1)—*Scope—Grounds of detention clear and definite—Detenu making detailed representation on basis thereof—Detention, if bad for vagueness or indefiniteness.*

When the grounds furnished to the detenu under S. 5 of the Bihar Act III of 1950, are clear and definite and sufficient to enable a representation to be made (and indeed the detenu has made a detailed representation), it cannot be held that they are vague and indefinite and hence renders the detention illegal. A.I.R. 1949 Pat. 1 (F.B.), Foll. (*Meredith, C.J. and Sarjoo Prasad, J.*) BRAHMESHWAR PRASAD *v.* STATE OF BIHAR. 29 Pat. 335=5 D.L.R. (Pat.) 221=4 A.I.Cr.D. 557=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

———S. 5 (1)—*Scope—If void as inconsistent with Art. 22 (4), Constitution—If renders rest of the Act void as a whole.*

The provisions of S. 5 (6) of Bihar Act III of 1950 are inconsistent with Art. 22 (4) of the Constitution, designed as they are to prevent the Court from ascertaining if detention beyond three months is in accordance with the report of the Advisory Council. As such it appears to be calculated to evade the safeguard laid down in the Constitution on a fundamental right, and is hence rendered void for inconsistency. It is however severable and the rest of the Act can stand unaltered after its excision. It would not make the detention illegal if found to be in accordance with that report, which the Court can call for despite S. 5 (6). (*Meredith, C.J. and Sarjoo Prasad, J.*) BRAHMESHWAR PRASAD *v.* STATE OF BIHAR. 29 Pat. 335=5 D.L.R. (Pat.) 221=4 A.I.Cr.D. 567=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

———S. 5 (1), Proviso—*Scope—If void as inconsistent with Art. 22 (5), Constitution of India.*

Proviso to S. 5 (1), Bihar Act III of 1950, is inconsistent with Art. 22 (5) of the Constitution, which is mandatory and hence, the proviso, whatever may have been the case before 26th January, 1950, became void after 26th January, 1950. But the provisions are clearly severable, and can be removed, it being no integral part of the Act. (*Meredith, C.J. and Sarjoo Prasad, J.*) BRAHMESHWAR PRASAD *v.* STATE OF BIHAR. 29 Pat. 335=5 D.L.R. (Pat.) 221=4 A.I.Cr.D. 557=51 Cr.L.J. 1081=A.I.R. 1950 Pat. 265.

———S. 5 (3)—[S. 4 (4) *and* (5) *of Ordinance of* 1949]—*Non-compliance—Effect—Legality of detention.*

Where the representation of the detenu had been sent to the Advisory Council but there has been no report submitted, nor had the Provincial Government called for any report or take any other action in respect of the detenu, it must be held that there has been a failure to comply with the mandatory provisions of S. 4 (4) and (5) of the Bihar Maintenance of Public Order Ordinance of 1949, and the detention must therefore be held to be illegal. (*S. K. Das and Sarjoo Prasad, JJ.*) SUNIRMAL DUTTA *v.* PROVINCE OF BIHAR. 29 Pat. 293=4 A.I.Cr.D. 265=A.I.R. 1950 Pat. 259=5 D.L.R. (Pat.) 103=51 Cr.L.J. 1025.

——S. 9—*If* ultra vires—*Government of India Act,* 1935, *Schedule VII, List II, Item* 1—*"Public Order"—If synonymous with public safety.*

Neither S. 6 of the Bihar Maintenance of Public Order (No. 2) Ordinance, 1949, nor S. 9 of the Bihar Act III of 1950, is *ultra vires* the Provincial Legislature on the ground that the Provincial Legislature under the Government of India Act, 1935, Seventh Schedule, List II, Item 1, had authority only to make a law with regard to public order, but not with regard to public safety. The terms "public safety" and "public order" are interchangeable terms in the context in which they are used in the relevant sections. (*Das and Sinha, JJ.*) INDERDEO SINGH *v.* STATE. 5 D.L.R. (Pat.) 252=4 A.I.Cr.D. 686.

——S. 9—Scope—If void under Art. 13 (1) of the Constitution as infringing Art. 19 (1). *See* CONSTITUTION OF INDIA, ARTS. 13 (1) AND 19 (3). 5 D.L.R. (Pat.) 252.

——S. 26—*Scope and effect of—Detention under Ordinance—If deemed one under Act, as from 4th January,* 1950.

S. 26 of Bihar Act III of 1950, is both a repealing as well as a saving section in respect of the previous legislation, namely the Ordinance of 1949. The repealing and the saving provisions of the section have to be read in such a manner as not to create any incompatibility, and to give effect to the intentions of the Act and not so as to defeat its purpose.

It cannot be held that the effect of S. 26 is that an order of detention passed under the Ordinance of 1949 would be deemed to have been passed under the Act of 1950 as from the date on which the Act came into force, namely, 4th January, 1950. The true effect is that if a final order within the meaning of S. 4 (5) of the Ordinance has been already passed, that order will take effect as provided in S. 3 of the Ordinance, 1949. But if no such final orders have been passed, but only proceedings have been commenced or acts done, and in so far as they have been properly done under the Ordinance, they shall be continued or deemed to have been done under the Act.

S. 26 does not revive anything not in force or existing at the time when the repeal takes effect. (*S. K. Das and Sarjoo Prasad, JJ.*) SUNIRMAL DATTA *v.* PROVINCE OF BIHAR. 29 Pat. 293=5 D.L.R. (Pat.) 103=A.I.R. 1950 Pat. 259=4 A.I.Cr.D. 265=51 Cr.L.J. 1025.

BIHAR MAINTENANCE OF PUBLIC ORDER ORDINANCE (II OF 1949)—*Scope—If* ultra vires—***Ordinance promulgated when Provincial Legislatures were in session***—*Government of India Act, S.* 88.

Bihar Maintenance of Public Order Ordinance, 1949, is *ultra vires* and invalid, as the Governor of Bihar acted beyond the authority conferred upon him by S. 88, Government of India Act, in promulgating that Ordinance on 3rd June, 1949, when the Provincial Legislatures were in session. (*Ramaswami and Narayan, JJ.*) BIDYA CHAUDHARY *v.* PROVINCE OF BIHAR. A.I.R. 1950 Pat. 19=51 Cr.L.J. 256.

——Scope—If void or *ultra vires* for want of sanction of Governor-General or being repugnant to Cr. P. Code. *See* GOVERNMENT OF INDIA ACT (1935), S. 107. 4 D.L.R. (Pat.) 201.

——**Ss. 2, 4, Proviso (new) 23 and 24**—Scope—If *ultra vires. See* INTERPRETATION OF STATUTES. 4 D.L.R. (Pat.) 201.

BIHAR MAINTENANCE OF PUBLIC ORDER ORDINANCE (IV OF 1949)—Scope—If beyond Governor's powers under **S. 88,** Government of India Act invalid. *See* GOVERNMENT OF INDIA ACT (1935), S. 88. 4 D.L.R. (Pat.) 201.

——*Scope—If* ultra vires.

Bihar Ordinance IV of 1949, deals in "pith and substance" with an item in the Provincial List *viz.*, Item 1 of List II of Sch. VII to the Government of India Act, 1935, (public order and preventive detention for purposes connected with the maintenance of public order) and hence *intra vires* the Provincial Legislature. (*Ramaswami and Narayan, JJ.*) BHUTNATH GHOSH *v.* PROVINCE OF BIHAR. 28 Pat. 782=4 D.L.R. (Pat.) 201=3 A.I.Cr.D. 634.

——*Scope—If* ultra vires.

Bihar Ordinance IV of 1949, is not invalid or *ultra vires.* The Governor, in promulgating the same did not act beyond his legislative competency. [4 D.L.R. (Pat.) 201, foll.] (*Ramaswamy and Narayan, JJ.*) LAL BAHADUR SINGH *v.* PROVINCE OF BIHAR. 28 Pat. 806=4 D.L.R. (Pat.) 213=3 A.I.Cr.D. 647.

——Validity of. *See* GOVERNMENT OF INDIA ACT (1935), SS. 88 AND 107 AND SCH. VII, LISTS II AND III AND BIHAR MAINTENANCE OF PUBLIC ORDER ORDINANCE (IV OF 1949). 1950 S.C.J. 32.

——**Ss. 2, 4, 23 and 24**—*If* ultra vires—*Government of India Act, S.* 107 *and Sch. VII, List II, Items* 1 *and* 2.

The Bihar Maintenance of Public Order Ordinance (IV of 1949) deals in "pith and substance" with Item 1 of the Provincial List, namely, public order and preventive detention for reasons connected with maintenance of public order. The rule is well established that, if a Provincial Act deals in pith and substance with a subject in the Provincial List, it would be valid, though it incidentally trenches on matters reserved for the Federal Legislature.

As the subject-matter of the Ordinance falls clearly within Items 1 and 2 of the Provincial Legislative List, there was no necessity for the Governor to invoke any powers from the concurrent Legislature List. It follows that the Ordinance cannot be held to be *ultra vires* for absence of instructions from the Governor-General.

Even if Ss. 23 and 24 and the new proviso to S. 4 are invalid, they are separable from the rest of the Ordinance which would still retain its original character, and S. 2 of the Ordinance would be *intra vires* and valid. (*Ramaswami and Narayan, JJ.*) BHUTNATH GHOSH *v.* PROVINCE

OF BIHAR. A.I.R. 1950 Pat. 35=51 Cr.L.J. 300.

———**S. 2 (1)**—*Order of detention—Adequacy of grounds—Power of Court to examine.*

The Court is not entitled to apply any objective standard and examine the adequacy of the grounds on which the Provincial Government have ordered detention under S. 2 (1) of the Bihar Maintenance of Public Order Ordinance (IV of 1949). (*Ramaswami and Narayan, JJ.*) JAGDISH PRASAD PAL *v.* PROVINCE OF BIHAR. 28 Pat. 800=51 Cr. L.J. 327=A.I.R. 1950 Pat. 41.

———**Ss. 4 (1), (3) and (4)**—*Scope—Mandatory nature—Non-compliance with S. 4 (1)—Effect on detention—Power of High Court to scrutinise validity of order.*

S. 4 (1) of the Bihar Maintenance of Public Order Ordinance (IV of 1949) is mandatory and absolute, and a failure to comply with the mandatory provisions of S. 4 (1) would make the detention of a person illegal, improper and invalid.

The mere fact that Cls. 3 and 4 of S. 4, provide for an advisory Council to review the orders of detention would not preclude the High Court, in an application under S. 491, Cr. P. Code, from scrutinising the validity of the order of detention or excuse the Government from strict compliance with the mandatory provisions of S. 4 (1). [2 D.L.R. (Pat.) 654 (F.B.); 4 D.L.R. (Pat.) 67 (F.B.), appl.] (*Rameswamy and Narayan, JJ.*) LAL BAHADUR SINGH *v.* PROVINCE OF BIHAR. 28 Pat. 806=4 D.L.R. (Pat.) 213=3 A.I.Cr.D. 647.

———**S. 4 (1), Proviso**—*Scope—Validity.*

The proviso to S. 4 (1) of the Bihar Maintenance of Public Order Ordinance, 1949, is valid and not *ultra vires*. 5 D.L.R. (F.C.) 17; 5 D.L.R. (Pat.) 66, ref. (*S. K. Das and Sarjoo Prasad, JJ.*) SUNIRMAL DUTTA *v.* PROVINCE OF BIHAR. 29 Pat. 293=4 A.I.Cr.D. 265=A.I.R. 1950 Pat. 259=5 D.L.R. (Pat.) 103=51 Cr.L.J. 1025.

———**S. 6**—*"Holding" a procession—Meaning of—Taking out procession—Offence.*

S. 6 of the Bihar Maintenance of Public Order (No. 2) Ordinance of 1949, makes a distinction between holding a procession and taking part in a procession, but not between holding a procession and *taking out* a procession. Taking out a procession may mean the same thing as holding a procession. Holding a procession imports some idea of leading, arranging, convoking, etc. Where certain persons arrange and lead the procession, it must be held that they come within the mischief of S. 6. (*Das and Sinha, JJ.*) INDERDEO SINGH *v.* STATE. 5 D.L.R. (Pat.) 252=4 A.I.Cr.D. 686.

———**S. 6**—Scope—If *ultra vires* the Provincial Legislature—"Public Order"—If different from public safety. *See* BIHAR MAINTENANCE OF PUBLIC ORDER ACT (III OF 1950), S. 9. 5 D.L.R. (Pat.) 252.

———**S. 6 (2)**—*Scope—"Public" procession—Test—Burden of proof—Inference from facts proved.*

S. 6 (2) of the Bihar Maintenance of Public Order (No. 2) Ordinance, 1949, enlarges rather restricts the ordinary concept of a public procession. Where it is found that the procession was going along the public road, and that there were sight-seers on both sides of the public road, the test is not whether the sight-seers actually joined the procession, but whether it was open to the members of the public or a class of the public to join in the procession. When there is no evidence that the procession, while it was proceeding along a public thoroughfare, had imposed any restriction on the joining of any outsider or any sympathiser in the procession, the only reasonable inference is that the procession was a public procession within the meaning of S. 6 (2). The question is not really one of onus of proof, but of a reasonable inference to be drawn from the facts proved or established in the case. A.I.R. 1943 Bom. 177, ref. (*Das and Sinha, JJ.*) INDERDEO SINGH *v.* STATE. 5 D.L.R. (Pat.) 252=4 A.I.Cr.D. 686.

———**S. 24**—*Scope—Orders and sentences under Maintenance of Public Order Act (1947) as amended in 1948 and 1949—If saved.*

S. 24 of the Bihar Maintenance of Public Order Ordinance (IV of 1949) refers only to orders made or sentences passed under the provisions of Ordinance II of 1949. It does not save orders made or sentences passed under the Bihar Maintenance of Public Order Act of 1947 or the Amending Acts XXIX of 1948 and V of 1949. (*Manohar Lall and Ramaswami, JJ.*) RAMKHELAWAN PODDAR *v.* THE KING. 28 Pat. 854=4 D.L.R. (Pat.) 235.

BIHAR MONEY-LENDERS ACT (III OF 1938)—Pronote. [*See* Q.D. 1941-1945, Vol. I, Col. 420.] NARSING PRASAD SINGH *v.* RAM CHARITAR SINGH. 27 P.L.T. 18.

———**S. 8, Proviso 2**—*Construction and scope—Payments made exceeding interest at bond rate—If can be adjusted in reduction of principal of loan.*

The second proviso to S. 8, Bihar Money-lenders' Act, is neither exhaustive nor so wide in terms as to cover all cases of payment. Where there is a payment covering the entire amount of the interest due at the bond rate and also towards the principal the excess payment will certainly go towards reduction of the principal. The proviso cannot be interpreted as meaning that even if the amount paid is so high as to cover not only the interest payable on the date of the payment at the bond rate, but also a portion of the principal, it would not go to reduce the principal. 22 P.L.T. 293, explained. 23 P.L.T. 618, ref. (*Reuben and Narayan, JJ.*) RAMSAROOP MAHTO *v.* MATHURA PRASAD SINGH. 4 D.L.R. (Pat.) 237.

———**Ss. 13 and 14**—Applicability—Execution in Bihar of decree passed by Calcutta High Court—Rules applicable. *See* C. P. CODE, Ss. 40 AND 42. 26 Pat. 307.

———**(1939) (as applied to Chota Nagpur), S. 4**—*Applicability—Bar to suit—Conditions of—"Loan"—Absence of fresh advance after Act, but only arrangement to pay balance due by instalments with default clause—Effect of.*

S. 4 of the Bihar Money-Lenders Act, as extended to Chota Nagpur does not operate as a bar, when there has been no advance either actual or notional, by the creditor to the debtor after the Act came into force in the particular area in question. Each case has to be considered on its own merits, before it can be said whether S. 4 will apply or not. When there is nothing in the document to suggest any fresh advance either actual or notional, and the transaction is not expressed as a notional repayment and the substitution of a fresh liability upon a fresh advance out of which the original liability was to be regarded as discharged, the bar of S. 4 will not apply. When the bond merely recites that out of the loan advanced upon prior hand-notes, a certain amount remains due and outstanding after accounting, and the debtor being unable to pay the creditor had agreed to payment in instalments and the debtor therefore promises to pay by certain instalments within a certain period of time, and that in default of payment of any instalment, the whole amount would become payable at once, there is no fresh advance, and the transaction cannot be regarded as a "loan" to which the Act applies. [25 Pat. 90, ref.] (*Agarwala, C.J. and Meredith, J.*) ATTU HUSSAIN *v.* JAI NARAIN. 27 Pat. 1187=4 D.L.R. (Pat.) 35 =A.I.R. 1949 Pat. 307=29 P.L.T. 460.

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII OF 1939), S. 4—*Applicability—Bond of 1938 in renewal of hand notes of 1935 without any fresh advance—Suit on basis of—If barred under S. 4—"Loan".*

S. 4 of the Bihar Money-Lenders Act was intended to apply only to loans contemplated by the first part of the definition in S. 2 (*f*) of the Act; it has no application to a transaction executed in respect of a past liability incurred before the Act, when there is no fresh advance at the time of the later transaction in respect of the past liability, there being no actual advance after the Act came into force. S. 4 speaks of a "loan advanced."

When there is nothing in the document evidencing the transaction of renewal to suggest any fresh advance, either actual or notional, on the basis of which the old liability is to be regarded as discharged and a fresh liability. is substituted, S. 4 does not apply so as to bar a suit to recover such a loan. 25 Pat. 90, foll. (*Agarwala, C. J. and Meredith, J.*) A. HUSSAIN *v.* J. N. AGARWALA. 27 Pat. 1187=29 P.L.T. 460=A. I.R. 1949 Pat. 307=4 D.L.R. (Pat.) 35.

———**S. 4**—*Applicability—Casual money-lender.*

The provisions of the Bihar Money-Lenders Act as to registration cannot apply to casual money-lending. The definition of the term Money-lender in the Act, though wide, has to be read with Ss. 4 and 5, and can apply only to professional money-lenders or those who carry on business as money-lenders. A person who is a zamindar or ijaradar and who has only advanced one single loan, cannot be regarded as a "money-lender" under the Act. [1945 Pat. 108, dist., 25 Pat. 90, foll. 1942 Pat. 884, rel.] (*Manohar Lall and Mukherji JJ.*) BHUTNATH *v.* NILKANTHA. 27 Pat. 77=A.I.R. 1949 Pat. 400.

———**S. 4**—*Applicability—If confined to loan advanced after Act.*

S. 4 of the Money-Lenders Act of 1939 can only apply to loans advanced after the commencement of the Act. (*Meredith and Ray, JJ.*) MT. SURAJ BANSI *v.* MT. LARHO. 25 Pat. 90=227 I.C. 253=13 B.R. 29=27 P.L.T. 178=1946 P. W.N. 124=A.I.R. 1946 Pat. 310.

———**S. 4**—*Applicability—"Loan"—Money due under handnote executed by customer to merchant for money due for goods purchased—If "loan".*

S. 4 of the Bihar Money-Lenders Act of 1939 (as also S. 5 of the Act of 1938), was never intended to apply to cases of isolated or intermittent instances of lending. The section was intended to apply only to those persons who are money-lenders by profession or desire to do the business of money-lending. A casual money-lending transaction entered into under unforesseen circumstances, *e.g.*, a handnote taken by a merchant from his customer for money due in respect of goods supplied is not a transaction of "loan" within the meaning of S. 4. (*Meredith and Ray, JJ.*) MT. SURAJ BANSI *v.* MT. LARHO. 25 Pat. 90= 227 I.C. 253=13 B.R. 29=27 P.L.T. 178=1946 P.W.N. 124=A.I.R. 1946 Pat. 310.

———**S. 7**—"Amount of loan mentioned in or evidenced by such document"—Meaning. [*See* Q.D. 1941-1945, Vol. I, Col. 424.] DEONANDAN PRASAD *v.* RAM PRASAD. 1946 Pat. (Rul.) 28=12 B.R. 120=221 I.C. 336 (F.B.).

———**S. 7**—*Applicability—Suit by debtor for redemption of mortgage.*

S. 7 of the Bihar Money-Lenders Act does not apply to a suit by a debtor; it only applies to a suit brought by a money-lender. A suit brought by a debtor-mortgagor for redemption of a mortgage is not a suit to which S. 7 can be applied. (*Das, J.*) THAKAN SAHU *v.* RAMPARTAP MAHTO. A.I.R. 1950 Pat. 201.

———**S. 7**—*Applicability—Suit for redemption of mortgage by purchaser of equity of redemption in execution sale, against money-lenders.*

To invoke the application of S. 7 of the Bihar Money-Lenders Act, the suit must have been brought by a money-lender. A suit for redemption of a mortgage brought by the purchaser of the equity of redemption in an execution sale, the money-lenders being the defendants in the suit, is not governed by S. 7. (1940) 3 F.L.J. 1, dist.; 22 Pat. 148, rel. (*Reuben and Jamuar, JJ.*) GAJADHAR MARWARI *v.* BAIDYANATH MANDAL. 29 Pat. 545=A.I.R. 1950 Pat. 379.

———**S. 7**—*Applicability—Transaction of loan prior to Act.*

S. 7 of the Money-Lenders Act has no application when the loan in question was advanced long before the commencement of the Act. (*Reuben and Jamuar, JJ.*) GAJADHAR MARWARI *v.* BAIDYANATH MANDAL. 29 Pat. 545=A.I.R. 1950 Pat. 379.

———**Ss. 7 and 8**—*Previous unsecured loans consolidated in mortgage—Previous interest, if may be treated as interest on secured loan.*

Where a mortgage bond itself represents the consoldiation of a number of previous loans all of which were unsecured, the Court in estimating the interest is not bound to treat the previous interests which ran while the loans were unsecured as if they were secured. (*Lord Simonds.*) Amar Nath Ghosh *v.* Sukhraj Rai. 26 Pat. 555=52 C.W.N. 105=A.I.R. 1947 P.C. 213=1948 O.W.N. 48=1948 A.L.W. 45=2 D.L.R. 193. (P.C.).

———S. 7—Scope—Mandatory nature of. [*See* Q.D. 1941-1945, Vol. I, Col. 427.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———**Ss. 7 and 8**—Scope—If override Ss. 32 and 77, Negotiable Instruments Act—Rights of holders in due course—If affected. [*See* Q.D. 1941-1945, Vol. I, Col. 428.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———S. 8—*Applicability—Conditions—Discretion of Court.*

S. 8 of the Bihar Money-Lenders Act is discretionary. To justify the application of the section there must be in the opinion of the Court, something in the particular transaction, beyond the fact that the interest charged is more than 9 per cent. simple in the case of a secured loan or 12 per cent. simple in the case of an unsecured loan.

Where it appeared that every three years an accounting was made between the parties and interest at 12 per cent. was added to the amount found due and fresh hundis were executed for the total, but that there was nothing unconscionable in the terms of the loan, nor any evidence of the charging of excessive interest, or of unfairness or harshness or unreasonableness on the part of the creditor, the Court would refuse to apply S. 8, though the interest was in excess of 12 per cent. simple or was compound interest. (*Meredith and Ray, JJ.*) Mehdi Razvi *v.* Panna Lall. 25 Pat. 671=A.I.R. 1947 Pat. 336=27 Pat.L.T. 408.

———S. 8—Applicability—"Loan"—Procedure. [*See* Q.D. 1941-1945, Vol. I, Col. 428.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———S. 8—*Nature of the provisions of—Interference by the Federal Court with the exercise of discretion by the High Court.*

S. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act is not mandatory but discretionary and the Federal Court would not interfere with the exercise of discretion by the High Court under S. 8 unless it appeared that the High Court did not apply its mind at all to the question before it or acted capriciously or in disregard of some legal principle or was influenced by some extraneous considerations wrong in law. [(1940) F.C.R. 61, foll.] (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) Girwar Prasad Narain Singh *v.* Ganeshlal Saraogi. (1949) F.C.R. 23=1949 F.L.J. 87=53 C.W.N. (F.R.) 8=A.I.R. 1949 F.C. 57=4 D.L.R. (F.C.). 47=30 P.L.T. 6=(1949) 1 M.L.J. 565 (F.C.).

———S. 8—Permissive not mandatory—Discretion and duty of Court. [See Q.D. 1941-1945, Vol. I, Col. 428.] Deonandan Prasad *v.* Ram

Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———S. 8—*Reopening of transaction—Rate of interest—Discretion of Court.*

A Court reopening a transaction under S. 8 of the Bihar Money-lenders (Regulation of Transactions) Act, may in its discretion impose any rate of interest which it thinks fit, subject only to this, that it is not to be less than 9 per cent. in the case of a secured loan or 12 per cent. in the case of an unsecured loan. (*Lord Simonds.*) Amar Nath Ghosh *v.* Sukhraj Rai. 26 Pat. 555=52 C.W.N. 105=A.I.R. 1947 P.C. 213=1948 O.W.N. 48=1948 A.L.W. 45=2 D.L.R. 193.

———**S. 8, Second Proviso**—*Construction and scope—Payments made exceeding interest at bond rate—If can be adjusted in reduction of principal of loan.*

The second proviso to S. 8, Bihar Money Lenders Act, is neither exhaustive nor so wide in terms as to cover all cases of payment. Where there is a payment covering the entire amount of the interest due at the bond rate and also towards the principal the excess payment will certainly go towards reduction of the principal. The proviso cannot be interpreted as meaning that even if the amount paid is so high as to cover not only the interest payable on the date of the payment at the bond rate, but also a portion of the principal, it would not go to reduce the principal. 22 P.L.T. 293, explained. 23 P.L.T. 618, ref. (*Reuben and Narayan, JJ.*) Ramsaroop Mahto *v.* Mathura Prasad Singh. 28 Pat. 874=4 D.L.R. (Pat.) 237.

———S. 11—Applicability—Decree in suit on promissory note—Instalments—Power of Court to allow. [*See* Q.D. 1941-1945, Vol. I, Col. 430.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———S. 11—*Construction—"Amount of decree"—Costs decreed—Instalments as to Jurisdiction to grant.*

Under S. 11 of the Bihar Money-Lenders Act, 1939, the jurisdiction of the Court to grant instalments is confined to that amount of the decree which is in respect of the loan referred to in the section, that is to say the principal and interest strictly and not the costs. An order for instalments will not therefore govern the amount of costs decreed. (*Ray, J.*) Hazar Singh *v.* Bethal Kahar. 29 P.L.T. 169=A.I.R. 1949 Pat. 116.

———S. 13—Applicability—Decree in suit on promissory note—Execution—Valuation of property—Power of Court to fix. [*See* Q.D. 1941-1945, Vol. I, Col. 429.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336=1946 Pat. (Rul.) 28 (F.B.).

———**Ss. 13 and 14, First Proviso**—*Scope and effect of—Option of decree-holder to specify property to be sold—Duty of Court.*

The first proviso to S. 14 of the Bihar Money-Lenders Act must be read subject to the first paragraph of S. 14, which clearly says that only so much of the property shall be sold as will be sufficient to satisfy the decree. The proviso means that the decree-holder may specify any portion of the property provided it is sufficient to satisfy the decree. It does not mean that the decree-holder may specify any portion which will not be sufficient to satisfy the decree. Under Ss. 13 and 14, the Court, after estimating the value of the properties, ought to direct the sale of such properties as would be sufficient to satisfy the decree. (*Chatterji and Pande, JJ.*) Manbhata Jha v. Muni Lal. 226 I.C. 122=1946 Pat. (Rul.) 335=12 B.R. 685=(1945) P.W.N. 514=A.I.R. 1946 Pat. 199.

——S. 13—Second appeal—Order as to valuation—If subject to second appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 433.] Deonandan Prasad *v.* Ram Prasad. 12 B.R. 120=221 I.C. 336 =1946 Pat. (Rul.) 28 (F.B.).

——S. 13—*Valuation made under—Whether final—Revaluation of properties—Power of Court.*

There is nothing in the C. P. Code or in the Bihar Money-Lenders Act precluding the Court from making a revaluation of the properties whose valuation has once been determined by the Court under S. 13 of the Bihar Money-Lenders Act, if proper and sufficient reasons are established for doing so. An order of the High Court in the valuation proceedings at the appellate stage is not final in the sense that in no circumstances can the Court make a fresh valuation of the properties. Where after the order of the High Court the value of the properties has been materially affected by legislation and other events like fluvial action of the river, and an application for a fresh valuation is made to the lower Court, that Court must go into the question of valuation over again on such fresh materials as may be forth-coming. If it refuses to do, it clearly refuses to exercise a jurisdiction vested in it by law, and the High Court will interfere in its revisional jurisdiction. (*Sinha and Mukharji, JJ.*) Rajendra Narain Bhanj Deo *v.* Janak Kishori Devi. 26 Pat. 541=A.I.R. 1948 Pat. 358.

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922), S. 24—*Power of chairman—Institution of prosecution for encroachment without sanction of Commissioners—Legality—S. 375—Scope.*

The Chairman of a Municipality has, under S. 24 of the Bihar and Orissa Municipal Act, power to institute a prosecution with an order or consent of the Commissioners, though S. 375 of the Act ordinarily bars a prosecution except with the consent or order of the Commissioners. (*Agarwala, J.*) Gopal Lal Tatak *v.* Commissioners of Gaya Municipality. 230 I.C. 320=48 Cr.L.J. 609.

——S. 82 (1) (a)—*Applicability—Joint Hindu family owning joint property yielding income—Individual members—Liability to tax—Members having separate earnings—Liability of.*

A joint Hindu Mitakshara family is not a person; it is one entity, and when the entire income of the family proceeds from joint property and there are no separate earrning of the individual members of the family, the individual members cannot be assessed to tax under S. 82 (1) (*a*) of the Bihar and Orissa Municipal Act, which is a personal tax. The words of the section are, however, broad enough to permit assessment to tax of members of a joint family having separate earnings. (*Fazl Ali, C.J. and Ray, J.*) Sunder *v.* Commissioners, Sasaram Municipality. 24 Pat. 678=12 B.R. 545=224 I.C. 417 =1946 Pat. (Rul.) 291=A.I.R. 1946 Pat. 153.

——S. 107 (f)—*Applicability and scope—Holding neither diminished nor destroyed and valuation remaining same as before.*

S. 107 (*f*) of the Bihar and Orissa Municipal Act deals with the reduction of the valuation of a particular holding and it applies only when the holding has been wholly or partly demolished or destroyed, or the value thereof has diminished for some reason or other. It does not apply where the value of the holding remains the same and the holding is neither diminished nor destroyed. (*Fazl Ali, C.J. and Ray, J.*) Commissioners, Arrah Municipality *v.* Jatendra. 24 Pat. 668=A.I.R. 1946 Pat. 167=227 I.C. 638 =1947 Pat. (Rul.) 55=13 B.R. 111.

——S. 119—*Scope—Jurisdiction of Civil Court to question validity of assessment—Objections and appeal filed under S. 116—If bar to suit in Civil Court.*

The jurisdiction of a Municipality to re-value and re-assess any holding on the ground of an increase in the value by reason of additions or alterations must necessarily depend on the correctness of the finding whether there have been any addition or alteration. While the extent of the additions and alterations cannot be questioned in the Civil Court, the finding as to whether there has been any addition or alteration can be reviewed by the Civil Court.

The mere fact that the plaintiff availed himself of the remedy provided under S. 116 of the Bihar & Orissa Municipal Act, and filed an objection and also an appeal to the Assessment Committee would not preclude the Civil Court from going into the validity of the assessment, on the ground of waiver on the part of the plaintiff, in a case where the assessment is ultra vires [35 Cal. 859; 23 Pat. 862, rel.; 16 Pat. 662; 1942 Pat. 81, ref.] (*Manohar Lall and Mahabir Prasad, JJ.*) Ram Chor Prasad *v.* Bakshi Ram. 4 D.L.R. (Pat.) 110.

——S. 119—*Scope—Suit challenging assessment.*

Where the whole assessment is *ultra vires*, the assessee can always bring a suit for a declaration that the assessment is not binding upon him. S. 119 of the Bihar and Orissa Municipal Act does not bar such a suit. (*Fazl Ali, C.J. and Ray, J.*) **Commissioners, Arrah Municipality *v.*** Jatendra. 24 Pat. 668=A.I.R. 1946 Pat. 167 =227 I.C. 638=1947 Pat. (Rul.) 55=13 B.R. 111.

——Ss. 228, 229 and 230—*Applicability—Notice requiring owner to face well with cement, surround it with platform with a drain and coping—Failure to comply—Offence—Conviction* ***under S. 230—Legality.***

When no notice has been served upon an owner of property under S. 230 of the Bihar and Orissa Municipal Act, calling upon him to close or fill up a well, there can be no conviction in respect of his failure to comply with the notice in so far as it was a notice under S. 229 of the Act. A notice calling upon the owner to face the well with cement to a depth of 25 feet, surrounded it by a pacca platform with a drain to lead off the water, and with a coping three feet high is not a notice to repair it under S. 228. (*Agarwala, J.*) JANAK SAHU *v.* RANCHI MUNICIPALITY. (1946) P.W.N. 282=A.I.R. 1947 Pat. 167=48 Cr.L.J. 836.

———**S. 228 and 229**—*Relative scope and distinction.*

Although at first sight Ss. 228 and 229 of the Bihar and Orissa Municipal Act appear to overlap, there is a distinction between the conditions they are intended to deal with. (*Agarwala, J.*) JANAK SAHU *v.* RANCHI MUNICIPALITY. (1946) P.W. N. 282=A.I.R. 1947 Pat. 167=48 Cr.L.J. 836.

———**S. 375**—*Applicability and scope—Prosecution for making privy without permission—Limitation—Offence, if continuing one.*

The making of a privy without the permission of the Municipality is an offence which is complete as soon as it is made. It is not a continuing offence. Where there is no finding that it was made within six months before the launching of the prosecution, there can be no conviction in view of S. 375 of the Bihar and Orissa Municipal Act, under which a prosecution has to be launched within six months of the offence. (*Sinha, J.*) RAJKUMAR RAM *v.* CHAIRMAN, SASARAM MUNICIPALITY. A.I.R. 1950 Pat. 510.

———**S. 375**—Scope—Bar—If removed by S. 24—Prosecution instituted by Chairman without sanction of Commissioners—Validity. *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 24. 230 I.C. 320.

———**S. 375**—*Starting point of limitation—Encroachment on public lane—Continuing offence.*

Under S. 375, Bihar and Orissa Municipal Act, if the offence is a continuous one, the period of 6 months has to be computed from the date on which the commission or the existence of the offence is brought to the notice of the Chairman. An encroachment on a public road or lane is a continuing offence so long as the right of the municipality has not been extinguished by adverse possession. (*Agarwala, J.*) GOPAL LAL TATAK *v.* COMMISSIONERS OF GAYA MUNICIPALITY. 230 I.C. 320=48 Cr.L.J. 609.

———**S. 377**—*Suit for declaration that certain assessment is* ultra vires—*If barred—"Act"—Meaning of.*

A suit for a declaration that a certain assessment by a municipality is illegal and *ultra vires* and for a permanent injunction restraining the municipality from realising the tax, is not barred by S. 377, Bihar and Orissa Municipal Act. The word "act" used in the section refers to tortious acts and not to any act arising out of a contractual or quasi-contractual basis. 2 C.W.N. 689 and 22 B. 637, rel. on. (*Imam and Ramaswami, JJ.*) COMMISSIONER OF BUXAR MUNICIPALITY *v.* BHAGWAN DAS. A.I.R. 1950 Pat. 8=4 D.L.R. (Pat.) 97.

BIHAR (AND ORISSA) NATURAL CALAMITIES ACT (I OF 1934), S. 8—Scope and effect of—If annuls prior mortgage—Certificate sale of property to recover loan advanced under Act—What passes. [*See* Q.D. 1941-1945, Vol. I, Col. 442.] SHEIKH RAHMAT ALI *v.* ABDUL KABIR. 220 I.C. 332=1946 Pat. (Rul.) 2=1944 P.W.N. 531=11 B.R. 499.

BIHAR PAPER DEALERS LICENSING ORDER, 1945—If in force in 1947—Breach of order committed in 1947—Offence—Conviction—Legality. *See* ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT, S. 17 (2). 26 Pat. 688.

BIHAR PREVENTION OF FOOD ADULTERATION ACT (V OF 1948), Ss. 3 (b) and 16 (2)—*Analyst of private Technological Institute—If public analyst or chemical examiner—Report of Analyst—Admissibility.*

The analyst of a private Technological Institute (*e.g., Harcourt Butler Technological Institute*), is not a public analyst within the meaning of S. 3 (*b*) of the Bihar Prevention of Food Adulteration Act; nor is he a chemical examiner within the meaning of that clause. The report of such an analyst is not therefore admissible in evidence under S. 16 (2). (*Das, J.*) DEVABRATA GANGULI *v.* STATE OF BIHAR. 5 D.L.R. (Pat.) 125=4 A.I.Cr.D. 332=A.I.R. 1950 Pat. 301=51 Cr.L.J. 1136.

———**S. 8 (1), Proviso**—*Applicability—Mustard oil.*

S. 8 of Bihar Act V of 1948, refers to articles of food in general and has no application to mustard oil which is specifically dealt with by S. 9 (2) of that Act. Hence the proviso to S. 8 (1) of the Act does not also apply to such a case. (*Das, J.*) DEVABRATA GANGULI *v.* STATE OF BIHAR. 5 D.L.R. (Pat.) 125=4 A.I. Cr.D. 332=A.I.R. 1950 Pat. 301=51 Cr.L.J. 1136.

———**S. 9 (2)**—*Scope—Manager of mill—If within the terms—Liability of manager of mill.*

S. 9 (2) of the Bihar Prevention of Food Adulteration Act is expressed in very wide terms and is wide enough to include the manager of a mill; and a manager also can be made liable under the section. (*Das, J.*) DEVABRATA GANGULI *v.* STATE OF BIHAR. 5 D.L.R. (Pat.) 125=4 A.I. Cr.D. 332=A.I.R. 1950 Pat. 301=51 Cr.L.J. 1136.

———**S. 27**—Sentence—First offence—Fine—Imprisonment in default—Nature of—Penal Code, S. 67. *See* PENAL CODE, S. 67. 5 D.L.R. (Pat.) 125.

BIHAR PREVENTIVE DETENTION ORDINANCE (II OF 1950)—Scope—If inconsistent with Art. 19 of the Constitution of India and therefore void. *See* CONSTITUTION OF INDIA, ART. 19. A.I.R. 1950 Pat. 332.

———*Scope—If validly framed, as being in accordance with only Art. 22 (4) of the Constitution and not with President's order modifying same.*

Meredith, C.J. and Sarjoo Prasad, J.—Ordinance II is rightly framed in accordance with

Art. 22 (4) of the Constitution of India; it cannot be said that the Ordinance, as it is not framed in accordance with Art. 22 (4) as modified by the President's Preventive Detention (Extension of Duration) Order, 1950, is on that ground void. (*Sinha, J., on difference of opinion between Meredith, C.J. and Sarjoo Prasad, J.*) Ratan Roy *v.* State of Bihar. 29 Pat. 410=51 Cr.L.J. 1251=A.I.R. 1950 Pat. 332.

——Scope—If void as repugnant to Art. 254, Constitution of India. *See* Constitution of **India, Art. 254. 25 Pat. 410=A.I.R. 1950 Pat. 332.**

——*Scope—Validity—Preamble—If not in compliance with Art.* 213 (1) *of Constitution of India.*

Art. 213 (1) of the Constitution of India does not require that the Ordinance to be validly promulgated by the Governor has to state in so many words that the Governor was satisfied as to a certain state of affairs. The preamble to the Bihar Preventive Detention Ordinance (II of 1950), read as a whole, clearly shows, that the Governor was satisfied of the existence of circumstances necessitating immediate action and of the necessity for provision for preventive detention, leading up to the making of the Ordinance in exercise of the powers conferred by cl. (1) of Art. 213. The Ordinance cannot therefore be held to be void on the ground that the preamble thereto is defective in that it does not comply with the terms of Art. 213 (1), in so far as it does not state that, in the Governor's opinion, the circumstances require the ordinance to be promulgated in the particular terms in which it has actually been made. (*Sinha, J., on difference* ***between Meredith, C.J., and Sarjoo Prasad, J.,*** *and agreeing with Sarjoo Prasad, J., and diss. from Meredith, C.J.*) Ratan Roy *v.* State of **Bihar. 29 Pat. 410=51 Cr.L.J. 1251=A.I.R. 1950 Pat. 332.**

BIHAR PRIVATE FORESTS ACT (III OF 1946), S. 21 (2)—*Publication of order in prescribed manner—If imperative—Order issued before framing of Rules prescribing manner of* ***publication—If effective.***

Sub-S. (2) of S. 21 of the Bihar Forests Act makes it imperative that the order contemplated in sub-S. (1) of that section shall be published in the prescribed manner. It will not do to publish it in any other manner than the one prescribed by the Rules. So long as the Rules prescribing the manner of publication are not framed, an order under S. 21 (1), even if issued, cannot be published and made effective. If, therefore, the order is not republished in the manner prescribed by the Rules after they come to be framed, a contravention of the order is not an offence. [1946 Pat. 122, Dist.; 24 P. 29, Ref.] (*Sinha and Mahabir Prasad, JJ.*) Sitaram Jagatramka *v.* King. 27 Pat. 761=A.I.R. 1949 Pat. 129=50 Cr.L.J. 287=30 P.L.T. 14.

BIHAR PRIVATE IRRIGATION WORKS ACT (V OF 1922), S. 4—*Jurisdiction to inquire into existence of liability to repair irrigation system.*

There is nothing in the Private Irrigation Works Act which provides that only tenants of the

landlord can apply for repairs to be done by the landlord. When an application is made in the matter of the liability to repair the irrigation system by any party the Court has jurisdiction to decide the question and can inquire into the existence of the liability to repair and maintain the system. (*Swanzy.*) Sayeedakhatoona *v.* Deolal Singh. 11 B.R. 497.

——**S. 32**—*Village Channel—Construction of—Permissibility when other owners' rights are affected prejudicially.*

Where it is found that the construction of a Village Channel would interfere with the water rights of other owners in that village, the order for deposit of costs under S. 32 of the Bihar Private Irrigation Works Act, is not justified and will be set aside. Such a construction cannot be permitted, if it would deprive other lands of the advantage of the benefit of rain water. (*Swanzy.*) Sheolakhan Singh *v.* Ramlakhan Singh. 12 B.R. 76.

BIHAR (AND ORISSA) PUBLIC DEMANDS RECOVERY ACT (IV OF 1914)—*Certificate sale for partition costs—Certificate issued against dead person—Nullity—Proper procedure.*

Where in respect of a certificate sale for partition costs under the Bihar and Orissa Public Demands Recovery Act, the certificate had been issued against a man, who had died long before the certificate was signed, the sale must be held to be void. Mere insertion of the names of the heirs of the deceased will not be sufficient. The proper procedure will be to strike out the void certificate and issue a fresh properly prepared certificate, when the proceedings are void *ab initio*, and when it is evident that the whole business was carried out without the knowledge either of the petitioner or the Court of Wards (who had taken charge of the estate) it is unnecessary to remand the case. (*Lee.*) Mehditunnissa Begum *v.* Shyam Pyari Kuer. 12 B.R. 618.

——*Sale—Setting aside—Grounds—Property sold for inadequate price to professional bidder—Inference of fraud.*

Where at a certificate sale the property put up for sale is sold for a grossly inadequate price and is purchased by a professional bidder, he being the sole bidder, it must be inferred that the sale was fraudulent and the sale must be set aside. (*Lee*). Mahomed Shah Jahan *v.* Khodaijatul Kubra Bibi. 12 B.R. 4.

——**S. 7**—*Notice under—Absence of certificate of certificate-officer certifying correctness of amount of demand—Effect on sale.*

S. 7 of the Bihar and Orissa Public Demands Recovery Act requires that a copy of the certificate should be served upon the certificate debtor, besides a notice in the prescribed form. Where the notice is not accompanied by a certificate of the cetificate-officer certifying the correctness of the demand as required in the prescribed form it must be held that the service of notice is defective for want of the copy of the certificate. Since it is a non-compliance with an imperative provision, that vitiates the sale and the sale therefore must be set aside. (*Ray, J.*) LACHMIKANT DEO *v.* RAMESHWAR CHAUDHURY. (1947) P.W.N. 37=A.I.R. 1948 Pat. 104=2 D.L.R. 72.

——**S. 7**—*Scope—Non-compliance—Effect on sale—Jurisdiction of Civil Court—Ss. 29, 31 and 45.*

The provisions of Ss. 29, 31 and 45 of the B. and O. Public Demands Recovery Act clearly show that the Legislature did not intend that the Civil Courts should interfere with the proceedings of the certificate officer on the ground of irregularities. By Ss. 29 and 31, it has kept such matters for the consideration of the Certificate Officer himself; and even where the notice under S. 7 of the Act is alleged not to have been served, it has refused relief to the certificate debtor under S. 45, if he appears in the certificate proceedings. 23 I.A. 45; 44 C.W.N. 1097; 26 Pat. 66; 29 P.L.T. 9, dist. ((*Reuben and Narayan, JJ.*) ASGHUR ALI *v.* JASODA KUER. 5 D.L.R. (Pat.) 52.

——**S. 7 and Sch. II, Rr. 2 and 3**—*Service of notice—Service on agent—Sufficiency—Proof—Onus.*

The onus is always on the certificate creditor or the auction-purchaser seeking to uphold the validity of the sale that service of notice has been effected in accordance with the manner prescribed by law on the certificate debtor or his agent duly authorised to receive the notice. The initial onus is no doubt on the debtor to deny the receipt of the notice. When that has been done, and an allegation is made that notice has been served on his agent, it is for the certificate holder and purchaser to prove that the agent on whom notice has been served was duly empowered to receive it. (*Ray, J.*) LACHMIKANT DEO *v.* RAMESHWAR CHAUDHURY. (1947) P.W.N. 37=A.I.R. 1948 Pat. 104=2 D.L.R. 72.

——**Ss. 26 and 52**—*Scope—Doctrine of representation—Applicability—Sale without entire body of recorded tenants on record—Holding—If passes—Right of purchaser.*

The doctrine of representation obtaining in the case of proceedings of rent suits and execution of rent decrees does apply to certificate proceedings under the Public Demands Recovery Act also. In order to hold that one person represents another, it is necessary to establish some relationship between them which will create a right to represent and a right to be represented. This may happen in the case of a joint family owning a tenancy when the manager of the family is on the record; it may also happen if several tenants, having common ownership and possession allow themselves to be represented before the landlord in respect of their joint holding by only some of them. But when neither of those conditions is present, the principle of representation cannot have application. Where the entire body of the recorded tenants are not represented in the Certificate proceedings culminating in the sale, the tenancy or holding cannot pass; the purchaser at such sale obtains only the right, title and interest of the certificate debtors at the time of sale and nothing more. A.I.R. 1940 Pat. 692, ref. (*Ray, C. J. and Jagannadhadas, J.*) DEBENDRANATH MITTRA *v.* GOWRISANKAR. 5 D.L.R. (Cut.) 79=A.I.R. 1950 Orissa 198.

——**S. 26 (3)**—*Applicability and scope—If complementary to S. 212, Orissa Tenancy Act—*Khasmahal *homestead tenancy.*

The language of S. 26 (3), Bihar and Orissa Public Demands Recovery Act, makes it plain that the section will operate in cases of tenancies to which S. 212 of the Orissa Tenancy Act would apply. S. 26 (3) refers to the area in which Ch. XVI of the Tenancy Act is in force as its coverage. S. 26 (3) of the Public Demands Recovery Act and S. 212, Tenancy Act, are not mutually exclusive but on the other hand complementary. The Provisions of the Tenancy Act do not apply to a *khasmahal* homestead tenancy. The rent reserved of such a tenancy has nowhere been declared to be a first charge. The legislature in providing that S. 26 (3) of the Public Demands Recovery Act would apply in areas where S. 212, Tenancy Act is in force, can be held to have intended only that the incident of the concerned tenancies shall be the same or similar, one such incident being the rent payable is a first charge. S. 212 deals with the scope of sales in execution of certificates issued for recovery of rents on the requisition of a landlord other than the Government under Ch. XV of the Tenancy Act, while S. 26 (3) deals with certificates issued for recovery of rents of holdings and tenures which are public demand as defined in S. 3 (6) and enumerated in Sch. I of the Public Demands Recovery Act, items 7 and 8. S. 26 (3) does not aim at either supplementing or adding to the substantive law governing the incidents of *khasmahal* tenancies and the respective rights and liabilities of the *khasmahal* (landlord) and his tenants. (*Ray, C.J. and Jagannadhadas, J.*) DEBENDRANATH MITTRA *v.* GOWRISANKAR. 5 D.L.R. (Cut.) 79=A.I.R. 1950 Orissa 198.

——**S. 29**—*Frivolous application to set aside sale—Maintainability—Question of* locus standi *of applicant—Relevancy.*

When an application to set aside a certificate sale is bound to be quite frivolous, it has to be dismissed without any further consideration. The question whether the applicant has any *locus standi* to apply does not arise and need not be considered. (*Godbole.*) MANI DEVI *v.* TASHBIR AHMAD. 12 B.R. 776.

——**S. 29**—*Material irregularity—Notice not properly signed by officer authorised—If ground for setting aside sale.*

Where the notice under S. 7 of the Bihar and Orissa Public Demands Recovery Act was neither signed by the certificate officer nor by any ministerial officer authorised by him, but only bore a rubber stamp impression affixed by some unknown person, there is no proper service of notice and the sale is liable to be set aside. (*Lee.*) BIGU SINGH *v.* FUDAN SINGH. 12 B.R. 393.

——**S. 29**—*Material irregularity—Notice under S. 7 not signed by certificate officer but affixed with rubber stamp facsimile of officer's signature—Effect on sales—Sale, if to stand in respect of non-objecting debtor.*

B. & O. PUB. DEM. REC. ACT (1914), S. 29.

Where the notice under S. 7 of the Public Demands Recovery Act is not signed by the Certificate Officer or any ministerial officer authorised by him, but is only impressed with the rubber stamp facsimile of his signature, it amounts to a material irregularity, which renders the sale liable to be set aside if substantial injury has resulted therefrom. The fact that one of several certificate debtors has not objected to the irregulariy does not justify the sale being allowed to stand in respect of his interest, or share in the property sold, where such interest or share is not separable from the rest and where the entire property was put up for sale in one lot and a lump sum was offered as the price at the bid. (*Godbole.*) Mahomed Salim v. Bibi Sabra. 13 B. R. 13.

——**Ss. 29, 31 and 45**—Scope and effect of—Jurisdiction of Civil Court—Sale—Irregularities—Refusal of relief by certificate officer—Civil Court's powers of interference. *See* B. & O. Public Demands Recovery Act, S. 7. 5 D.L.R. **(Pat.) 52.**

——**S. 37**—*"Certificate"—Single sale in respect of dues of two certificates—Debtor same in both—Legality of sale—If liable to be set aside by Civil Court.*

There is nothing inherently irregular or objectionable in holding of one sale of one property for the satisfaction of the dues of two certificates, when the certificate debtor is identical or same in both. The use of the singular "certificate" in S. 37 and other sections of the Public Demands Recovery Act is obviously intended to include the plural as well. It is also a legal principle of interpretation that words in the singular shall include the plural. Hence the fact that a single sale was held in respect of the dues of two certificates in respect of different *jamas,* is not illegal or without jurisdiction, so as to render it liable to be set aside by the Civil Court, when it is found that the certificate debtors were the same. (*Sharpe, J.*) Mafzalar Rahaman v. Karimannessa. I.L.R. (1947) 1 Cal. 137=227 I.C. 228=1946 Cal. (Rul.) 438=51 C.W.N. 934 =A.I.R. 1947 Cal. 241=83 C.L.J. 20.

——**S. 37**—*Jurisdiction of Civil Court to set aside sale—Certificate duly filed—Irregularities not affecting merits—Effect of.*

The Civil Court cannot interfere with a certificate sale unless the sale was without jurisdiction, in view of S. 37, Public Demands Recovery Act which specifically includes questions relating to execution, discharge or satisfaction of a certificate duly filed under the Act. Once it is not disputed that the certificate in question was "duly filed" under the Act, mere irregularities, not affecting the merits, will not confer any authority upon the Civil Courts to set aside a certificate sale. (*Sharpe, J.*) Mafzalar Rahaman v. Karimannessa. I.L.R. (1947) 1 Cal. 137=227 I.C. 228=1946 Cal. (Rul.) 438=51 C.W.N. 934=A.I.R. 1947 Cal. 241=83 C.L.J. 20.

——**S. 45**—*Parties—Suit for possession by debtor on ground of invalidity of sale—Province of Bihar—If necessary party.*

BIHAR RENT CONT. ETC. ACT (1947).

In a suit by a certificate debtor to recover possession of the property sold from the purchaser at the sale on the ground that the sale was void *ab initio,* the Province of Bihar is not a necessary party; and a suit without joining the Province of Bihar cannot be held to be defective in frame. (*Ray, J.*) Lachmikant Deo v. Rameshwar Chaudhury. (1947) P.W.N. 37=A.I.R. 1948 Pat. 104=2 D.L.R. 72.

——**S. 52**—*Applicability—Death of certificate debtor after service of notice under S. 7—Substitution of heirs—Necessity.*

S. 52, Bihar and Orissa Public Demands Recovery Act, applies even when a certificate debtor dies after service of notice under S. 7 of the Act. Even if he had died after the notice under S. 7, it is necessary that his legal representatives should be substituted, as required by S. 52. (*Ray, C.J. and Jagannadhadas, J.*) Debendranath Mittra v. Gowrisankar. 5 D.L.R. (Cut.) 79=A.I.R. 1950 Orissa 198.

——**S. 62**—*Interference by Board—Prnciples.*

Where in a certificate sale case it is apparent that the Commissioner had taken considerable pains over the case and written an order which thoroughly goes into the whole facts and if, after doing this, the Commissioner thought that the ends of justice would be better served by remanding the case, there is no reason why the Board should interfere. (*Godbole.*) Brij Kishore Mandal v. Jagadambi Prasad Mandal. 12 B.R. 624.

——**S. 62**—*Revision against order under—Reluctance to interfere in.*

The provisions of the Public Demands Recovery Act should not be trifled with. It provides a summary procedure for realisation of "public demands" and the whole object of the Act is frustrated if too much latitude is allowed to parties and the proceedings allowed to drag on interminably or in a dilatory fashion like a civil suit. When the requirements of law had been complied with and when no good grounds such as those indicated in S. 29 (1) and (2) of the Act exist a sale under the Act cannot be set aside. (*Godbole.*) Raghunath Prasad v. Kashi Rai. 12 B.R. 606.

BIHAR REGULATION (III OF 1872), S. 27—*Applicability—Person not in possession as transferee—Eviction of—*Ultra vires.

The jurisdiction to evict a person in possession from a holding under S. 27, Bihar Regulation (III of 1872), cannot be exercised unless there is a valid transfer of the right of a raiyat in his holding and the person in possession comes on the land as a transferee. A person who is not in possession of the holding as a transferee is not within the mischief of the section and is not liable to eviction whether he has been in possession for 12 years or not. An order of eviction of such a person in *ultra vires.* (*Manohar Lall and Mahabir Prasad, JJ.*) Kishan Barai v. Huro Pandey. 28 Pat. 319=4 D.L.R. (Pat.) 120=A.I.R. 1949 Pat. 408.

BIHAR RENT CONTROL AND EVICTION ACT (III OF 1947). *See* Bihar Buildings Lease Rent and Eviction) Control Act (III of 1947).

BIHAR RESTORATION OF BAKASHT LAND AND REDUCTION OF ARREARS OF RENT ACT (IX OF 1938)—*Order restoring possession to tenant by collector—Finality—Interference in revision.*

The order of the collector restoring possession of lands to the tenants under Bihar Act (IX of 1938) passed after hearing the objections of the landlord and the third party with whom the landlord had settled the lands in question, is final under the law. It will not be interfered with in revision by the Commissioner or by the Board of Revenue, at the instance of the third party on an application made by them after the period for appeal has expired.. (*Lee.*) AKSHAY LAL MISHRA *v.* DURGA OJHAIN. 12 B.R. 642.

———**S. 3**—*Application for restoration filed by tenant after sale and before landlord obtained possession—Maintainability.*

A tenant whose holding was sold in execution of a decree for rent but was not reduced to possession by the landlord by obtaining delivery of possession from Court, is not entitled to make an application for restoration of that holding under S. 3, Bakasht Restoration Act, and an order restoring the holding to him is *ultra vires* and without jurisdiction, although during the pendency of the application the landlord has obtained delivery of possession It is clear from the wording of the section that no application under it can be made unless the holding is in possession or control of the landlord. Mere sale of the holding does not put the holding either in possession or under control of the landlord. The material date on which the holding has to be in possession or under control of the landlord is the date on which the application is made and not the date on which the order restoring the holding is to be passed. (*Manohar Lal and Mahabir Prasad, JJ.*) NANHA KUER *v.* KHUBSURAT KUER. 28 Pat. 379=A.I.R. 1949 Pat. 462.

———**S. 3**—*Application for restoration—Maintainability—Holding purchased at execution sale only by some of co-sharer landlords.*

The Revenue Court has jurisdiction to entertain an application for restoration under S. 3 of the Act, although the holding was not purchased at the execution sale by the entire body of co-sharer landlords, but only by some of them. The definition of landlord as given in S. 3 (4) of the Tenancy Act which, by virtue of S. 2 of the Restoration of Bakasht Act, applies also to the expression as used in the latter Act, applies to each individual of a number of co-sharer proprietors or tenure-holders immediately under whom as a body the tenant held. [1948 Pat. 38, foll.] (***Agarwala, C.J. and Meredith, J.***) **BANKEY BEHAPI SINGH *v.* RAMSARAN GOPE. 27 Pat. 1192=A.I.R. 1949 Pat. 302.**

———**S. 4**—*Jurisdiction—Defective application—Defect remedied—Order by Collector—If void—Interference by Civil Court.*

The Collector, acting as Rent Reduction Officer under the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act has jurisdiction under S. 4 of the Act, to entertain a defective application under S. 3, defective in the sense of not complying with the requirements of

S. 3 (2) and to allow the defect to be remedied. Where the Collector entertains a defective application and the defect is remedied within the time fixed by the Collector, it cannot be said that the Collector acts without jurisdiction and his order on the application cannot be questioned by the Civil Court, as being *ultra vires,* or interfered with on that ground. (***Manohar Lall and Meredith, JJ.***) SHEOBADAN *v.* BIHARI. 26 Pat. 40=A.I.R. 1948 Pat. 86.

———**S. 10 (b)**—*"Landlord"—Meaning of—Rent to whom payable—Auction-purchaser co-sharer landlord or whole body of landlords.*

The definition of "landlord" in S. 3 (4) of the Bihar Tenancy Act applies to that expression as used in the Bihar Act (IX of 1938) by virtue of S. 2 of the latter Act, and this definition will clearly apply to each individual of a number of co-sharer proprietors or tenure-holders immediately under whom as a body the tenant holds. Therefore the expression "landlord" in S. 10 (*b*) of the latter Act means not the whole body of landlords of the original holding but the co-sharer landlord who purchased the original holding and subsequently held it under S. 22 (2) of the Bihar Tenancy Act until the proceedings were taken under Bihar Act (IX of 1938). Accordingly when a raiyat is restored to possession of a holding under the provisions of Bihar Act (IX of 1938) from which holding he had been previously dispossessed by an auction-purchaser co-sharer landlord in execution of his decree for rent, the raiyat upon such restoration becomes the tenant of the auction-purchaser co-sharer landlord only and the latter alone is entitled to realise the entire rent of the holding from the raiyat. (*Bennett and Beevor, JJ.*) SURYAMOHAN THAKUR *v.* ARJUN RAI. 1948 P.W.N. 22=A.I.R. 1948 Pat. 38.

———**Ss. 11 and 10 (b)**—*Restoration of possession of portion of holding—Determination of rent payable by raiyat.*

When a person dispossessed by delivery of possession under S. 8 (2) is restored to possession under S. 11 of Bihar Act IX of 1938, the effect is that only a part of the holding or portion sold is to be restored to the raiyat according to the directions of the Collector and thus, in such circumstances, S. 10 (*b*) relating to the determination of rent payable by the raiyat for the portion of the holding will come into operation. (*Bennett and Beevor, JJ.*) SURYAMOHAN THAKUR *v.* ARJUN RAI. 1948 P.W.N. 22=A.I.R. 1948 Pat. 38.

———**S. 12**—*Scope—Settlement of land purchased by landlord in sale for arrears of rent on another who had already purchased the holding from the raiyat—Restoration to original raiyat—Effect—If rights under prior alienation by raiyat wiped out.*

A landlord purchased in a sale for arrears of rent the raiyat's holding and settled a portion of it on X who had previously purchased same from the raiyat, and the original raiyat then succeeded in obtaining an order for restoration of his holding under Act (IX of 1938). X then filed a suit for a declaration of his rights and confirmation or in the alternative recovery of possession.

Held, S. 12 of the Restoration Act says that the restoration to the raiyat has the effect only that any simple mortgage or charge created by the landlord in respect of such land or any portion thereof shall not be binding on the raiyat and that all such rights as the raiyat had and the incidents thereof before its sale shall revive. The settlement on *X* is not a mortgage or charge and the raiyat cannot avoid his own sale to *X* who had obtained a valid title by paying *salami*. *X* is entitled to succeed. (*Manohar Lal and Imam, JJ.*) RAM **KIRIT SINGH *v.* RAMA SINGH. 25 Pat. 464**= 12 B.R. 585=A.I.R. 1947 Pat. 141=225 I.C. 250.

——Ss. 15 and 16—Applicability—Occupancy holding with cash rent. [*See* Q.D. 1941-1945, Vol. I, Col. 459.] RAMESHWAR SINGH BAHADUR *v.* ARJUN MISSIR. 221 I.C. 568=1946 Pat. (Rul.) 41.

——S. 22—*Finality of decision of Revenue Courts—Power of Civil Courts to reopen.*

The determination of the questions as to whether certain landlords were "petty landlords" within the meaning of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act and whether they were in direct cultivating possession of the holding in question, have been left entirely to the Revenue Courts and whether right or wrong has been made final by the provisions of S. 22 of the Act. Even if the decision is wrong, it is not open to the Civil Court to re-open that decision. (*Sinha and Mukharji, JJ.*) HARBANS PANDEY *v.* SOBHAN SINGH. A. I.R. 1948 Pat. **176**.

——Ss. 22, 3 and 4—*Jurisdiction of Civil Court—Application under S.* 3 ex facie *on behalf of all dispossessed tenants, signed only by one—Landlord not contesting application on that ground—If can question Revenue Court's Jurisdiction on that ground in Civil Court.*

Every order passed by the Collector under the Bakasht Restoration Act is declared by S. 22 to be final, and a Civil Court is prohibited from entertaining any suit or application to vary or set aside any decision or order given or passed under the Act. The scheme of the Act is to provide a complete Code for dealing with applications for restoration of bakasht lands. The finality of an order made on an application under the Act cannot therefore, be questioned in a Civil Court except on the narrow ground that the officer who made it had no jurisdiction to do so. Where an application for restoration under S. 3 of the Act *ex facie* purported to be on behalf of all the dispossessed tenants, the fact that only one signed it, is certainly a defect which the Revenue Officer should require to be remedied under S. 4. This formal defect, however, cannot be regarded as sufficient to oust the jurisdiction of the Revenue Court in a matter which it had jurisdiction to entertain and decide. If the landlord does not contest the application on the ground of this defect in the Revenue Court, he cannot dispute the Revenue Court's jurisdiction in the Civil Court upon the ground that there was an irregularity in the initial procedure which, if objected to at the time, would have led to the dismissal of the application. 9 A. 191 (P.C.), 17 C. 580 and 26 P. 748, rel. on. (*Agarwala, C.J. and Meredith, J.*) BANKEY BEHARI SINGH *v.* RAMSARAN GOPE. 27 Pat. 1192=A.I.R. 1949 Pat. 302.

BIHAR SALES TAX ACT (VI OF 1944)—

Costs—Board of Revenue—Power to award costs—Inherent powers.

There is nothing in the Bihar Sales Tax Act authorising any of the Sales Tax authorities to award costs. The Board of Revenue, even if it be assumed to be a Court, is only a statutory Court of limited jurisdiction having only the powers conferred by the relevant statute or statutes, and it has no inherent jurisdiction. The award of costs by the Board and officers subordinate to it in Sales Tax cases is not lawful but illegal. The only provision as to costs in the Act, namely, S. 21 (6) only applies to the High Court. (*Agarwala, C. J. and Meredith, J.*) PROVINCE OF BIHAR *v.* JOKHI RAM RAM PRASAD. 27 Pat. 1171.

——S. 2 (c)—*"Dealer"—Proprietor of estate possessing extensive lands in which agricultural products are grown—Sale of surplus produce after meeting requirements—Liability to assessment of tax.*

A proprietor of an estate owning extensive *zirat* lands on which are grown grains such as paddy, khesari, wheat, grain and sugarcane, who, after meeting the personal requirements of himself, his family, and his large staff, sells a portion of the excess produce which is not required to be stored for consumption and who has set up no place of business, the produce being sold in each village after harvesting or after they are brought to the granaries, is not a dealer as defined in S. 2 (*c*) of the Bihar Sales Tax Act and is not liable to assessment of sales tax under the **Act. (1938) I.T.R. 502; (1939) I.T.R. 48 (P.C.); (1948) I.T.R. (Supp.) 87 (P.C.), rel.** on. (*Manohar Lall and Mahabir Prasad, JJ.*) RAJA VISHESHWAR *v.* PROVINCE OF BIHAR. 27 Pat. 820.

——S. 6—*Scope—"Betels"—If "vegetables"—Exemption from tax—Notification No. 7567-F, dated 8—7—1944, Finance Department, Government of Bihar.*

Betel-leaves called *pan* are taxable articles within the meaning of S. 6 of the Bihar Sales Tax Act; they are not green "vegetables" exempted from taxation under notification No. 7567-F, dated 8—7—1944, issued by the Government of Bihar in the Finance Department.

"Vegetables" in the notification means plants cultivated for food. Betel is not a food and is eaten not for its food value, but at the highest as an aid to digestion. As a digestive agent it may be a medicinal preparation, but the notification does not exempt medicinal preparations. (*Manohar Lall and Meredith, JJ.*) KOKIL *v.* PROVINCE OF BIHAR. 28 Pat. 148.

——Ss. 9 and 10—*Finance Department Notification No.* ***7567-F, dated 8th July, 1944—"Green vegetables"***—*Betel leaves—If exempt from tax.*

"Green vegetables" referred to in Bihar Government Finance Department Notification No.

7567-F, dated 8th July, 1944, do not include betel leaves. In framing the notification, the aim was to exclude from taxation the normal items of human diet. It was not the intention of Government to exempt betel leaves from taxation under the Bihar Sales Tax Act. (*Lee.*) KOKIL RAM *v.* PROVINCE OF BIHAR. 13 B.R. 327.

———Ss. 18 (d) and 20 (3)—*Applicability and scope—Question as to taxability of betel leaves—**Jurisdiction of Commissioner and of Board to** revise orders.*

Where the question is whether certain articles, such as betel leaves, are taxable, the case does not fall under S. 18 (*d*) of the Bihar Sales Tax Act. But under S. 20 (3) of the Act, the Commissioner may review any order passed by the Sales Tax Officer. The Board also can revise any order passed by the Commissioner under S. 20 (3). (*Lee.*) KOKIL RAM *v.* PROVINCE OF BIHAR. 13 B.R. 327.

———S. 20 (1)—*Limitation—Delay in filing appeal—Excuse of—Grounds.*

Though an appeal under the Bihar Sales Tax Act has to be filed within 60 days of the date of the order of amendment, since assessment orders are usually passed behind the back of the assessees concerned it is desirable that the assessee should have the opportunty of finding out whether orders have been passed and to what effect. In a case where the delay is not much and there is evidence to show that the assessee was ill at the critical or relevant time, there would be good grounds for excusing the delay in filing the appeal beyond the period prescribed under S. 20 (1). (*Godbole.*) RAMBHAGAT SAO JANKI SAO *v.* PROVINCE OF BIHAR. 12 B.R. 563.

———**S. 24 (4)**—*Discretion—Revision—Dismissal by Commissioner without hearing petitioner—Legality—Nature of revisional jurisdiction.*

The Commissioner may legally dismiss an application for revision under S. 24 (4) of the Bihar Sales Tax Act without giving the applicant a reasonable opportunity of being heard in support of his application. The revisional jurisdiction both of the Commissioner and of the Board of Revenue is entirely discretionary, and no body has any vested right to be heard before an order refusing to exercise the revisional jurisdiction is made or passed. (*Agarwala, C.J. and Meredith, J.*) BHAGWAN DAS *v.* PROVINCE OF BIHAR. 28 Pat. 823=5 D.L.R. (Pat.) 49.

———S. 25 (6)—*Scope—If exhaustive of the power to award costs.*

In a proceeding under S. 25 (6) of the Bihar Sales Tax Act, there is no power to award costs apart from the power vested in the High Court under S. 25 (6) of the Act. (*Agarwala, C.J. and Meredith, J.*) BHAGWAN DAS *v.* PROVINCE OF BIHAR. 28 Pat. 823=5 D.L.R. (Pat.) 49.

BIHAR SALES TAX RULES (1944), R. 36—*Scope—If ultra vires.*

R. 36 of the Rules framed under the Bihar Sales Tax Act is not *ultra vires.* (*Godbole.*) BRIJRAJ LAL *v.* PROVINCE OF BIHAR. 12 B.R. 561.

———R. 36—*Validity.*

The enactment of R. 36 under S. 26 of the Bihar Sales Tax Act was essential for carrying out the purposes of the Act and the rule is therefore legal and proper. The prescription in S. 26 (2) of specific matters with regard to which rules may be made is without prejudice to the generality of the power given by sub-S. (1) to make rules for the carrying out the purposes of the Act. (*Lee.*) BUJHAWAN SAH RAMNATH *v.* PROVINCE OF BIHAR. 12 B.R. 613.

———R. 36—*Validity and scope—Notice of assessment—Need for giving date of assessment.*

R. 36 framed under S. 26 of Bihar Sales Tax Act is not *ultra vires.* That rule prescribes what record the dealer has to maintain and to produce as evidence to support a certain claim. It does not preclude the production of other evidence to prove the claim. But the assessing officer may not accept such evidence as satisfactory. It is even open to the assessing officer to make an assessment without any evidence or even without any return but simply in the exercise of his best judgment. But the assessing officer will be better advised in considering such evidence as is produced. The notice of assessment must give the date of assessment. (*Godbole.*) RAM PRATAP KAMALIA FATWA *v.* PROVINCE OF BIHAR. 12 B.R. 601.

———R. 36 (1)—*Cash or credit memo volumes with serially numbered leaves containing entries about sales of both tax-free and taxable goods—Admissibility in evidence.*

Cash or credit memo. volumes containing serially numbered leaves some of which contain entries about sale of taxable goods while others contain entries about tax-free goods may be admitted as evidence complying with the terms of R. 36 (1) of the Rules under the Bihar Sales Tax Act. Under the Act, even where no evidence is called for or return filed, the assessing authority can make an assessment without the evidence or to the best of his judgment. Simply because an assessee fails to produce the prescribed cash or credit memo. in time or has produced memoranda which do not strictly comply with the terms of R. 36 (1), the authority is not justified in treating the whole gross turnover as taxable without exercising his judgment. The exercise of judgment can only mean a consideration of the nature of the assessee's business, any other reliable evidence that he may produce and such other factors as unfamiliarity with the provisions of a new Act, the novelty of the requirement of the issue of separate memoranda for tax-free and taxable goods though sold to the same customer and paid for at the same time or by the same cheque on the customer's banker. (*Godbole.*) SARJOO LAL RAMCHANDRA LAL. *v.* PROVINCE OF BIHAR. 13 B.R. 10.

———R. 36 (1)—*Petty dealers selling controlled goods in small lots—Non-issue of cash-memo.—Gross turnover—If to be taken as turnover for taxable turnover.*

In the case of a petty dealer selling controlled goods in small lots, who is honestly led to believe, by orders of the Price Control Department, that he need not issue a cash memo. for a petty sale, the sales tax department would not be justified in taking the gross turnover to be the taxable turnover, merely because the dealer did not issue any cash memo. (*Godbole.*) RAMASHIS CHOWDHURY *v.* PROVINCE OF BIHAR. 13 B.R. 19.

———**R. 36 (1)**—*Scope—If mandatory.*

The provisions of R. 36 (1) of the Bihar Sales Tax Rules are clearly mandatory, the word used being "shall". (*Agarwala, C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* JOKHI RAM RAM PRASAD. 27 Pat. 1171.

———**R. 36 (1)**—*Scope—If* ultra vires *as inconsistent with Ss.* 6 *and* 10.

R. 36 (1) of the Bihar Sales Tax Rules, 1944, framed under S. 26 of the Bihar Sales Tax Act, is not *ultra vires* on the ground of its being inconsistent with Ss. 6 and 10 of the Act. It does not make non-taxable goods taxable. It is a mere rule of evidence specifying the nature of the evidence which is required under S. 10 (2) in support of a plea that any portion of the gross turnover represents sales of non-taxable goods. Breach of the rule will make the dealer liable to any penalty prescribed under S. 26 (3), but it will not and cannot make non-taxable goods taxable; nor does it attempt to do so. There is nothing inconsistent between R. 36 (1) and the provisions of Ss. 6 and 10 of the Act. (*Agarwala, C.J. and Meredith, J.*) PROVINCE OF BIHAR *v.* JOKHI RAM RAM PRASAD. 27 Pat. 1171.

BIHAR SURCHARGE ON COURT-FEES ACT (XXV OF 1948)—*Scope—If retrospective.*

The Bihar Act (XXV of 1948) which imposed 6 annas surcharge on Court-fees has no retrospective effect, and cannot affect suits instituted before it came into operation. 51 Cal. 216, rel. on. (*Ramaswami and Sarjoo Prasad, JJ.*) BASUKI PRASAD SINGH *v.* SATYA KINKAR SAHANA. A.I.R. 1950 Pat. 470.

BIHAR TENANCY ACT (VIII OF 1885)—*Record of rights—Interpretation—Village notes—Value.*

Village notes may not be record of rights by themselves, but they are authoritative records prepared by public servants in discharge of public duties and certainly can be used for the purpose of interpretation of entries in the record of rights. (*Ray, J.*) DARSAN DAS *v.* LAKSHMAN PRASAD. A.I.R. 1948 Pat. 190.

———*Rent—Joint landlords—Agreement by some to reduce their share of rent—If binding on their transferee.*

An agreement by some of the joint landlords to receive rent for their share at a reduced jama, is not a covenant running with the land. It is purely a personal contract which does not bind a transferee of their interest. A tenure carrying two rentals for ever is inconceivable in law. 15 W.R. 21, 17 C. 695 and 25 C. 917, referred to. (*Reuben and Narayan, JJ.*) TARAK NATH DUFFY *v.* RAGHUNANDAN PANDEY. A.I.R. 1950 Pat. 22.

———**(as amended in 1934), S. 1 (3)**—*Construction—"Notification"—If means notification excluding area.*

The notification referred to in S. 1 (3) of the Bihar Tenancy Act, as amended in 1934, is a notification specifically excluding a particular municipal area, and in the absence of a notification excluding the particular area the Bihar Tenancy Act will apply to all municipal areas. [50 I.A. 778, appr., 3 P.L.R. 621, dist., 1942 Pat. 325 not foll.] (*Agarwala, C. J. and Meredith, J.*) SHRIKISHUN *v.* HARIHAR. 27 Pat. 194=A.I.R. 1949 Pat. 444.

———**Ss. 3 (9) and 22 (2)**—*"Holding"—Land while held by co-sharer landlord under S. 22 (2).*

The co-sharer landlord holding land under S. 22 (2) of the Bihar Tenancy Act is not a raiyat and therefore, the land while held by him is not a holding. (*Bennett and Beevor, JJ.*) SURYAMOHAN THAKUR *v.* ARJUN RAI. 1948 P.W.N. 22=A.I.R. 1948 Pat. 38.

———**Ss. 4 and 5**—*Scope—Settlement by raiyat for building purpose—Sub-lessee—If under-raiyat governed by Act.*

Where the original lease is governed by the Tenancy Act, so must a sub-lease be governed by that Act and not by the Transfer of Property Act, irrespective of the purpose thereof. There is nothing in the Act to show that an under-raiyat must be a person holding for agricultural purposes. Every one holding under a raiyat (as defined by the Act), for whatever purpose, will be an under-raiyat and so governed by the Tenancy Act, and the application of the Act is not excluded by the fact that the sub-lease to the under-raiyat was granted for building purposes. [8 C.W.N. 454; 15 C.L.J. 672; 22 P.L.T. 821, rel. on.] (*Agarwala, C.J. and Meredith, J.*) SHRIKISHUN *v.* HARAHAR. 27 Pat. 194=A.I.R. 1949 Pat. 444.

———**Ss. 5 and 26-A**—*Under-raiyat—Right to transfer interest—Custom.*

The Bihar Tenancy Act does not give an under-raiyat the right to transfer his interest, even if he has an occupancy status. To justify the transfer a custom of transferability must be established. [22 P.L.T. 749. appr.] (*Agarwala, C.J. and Meredith, J.*) SHRIKISHUN *v.* HARIHAR. 27 Pat. 194=A.I.R. 1949 Pat. 444.

———**S. 13**—Purchaser of share of tenure—Notice not given to landlord—Purchaser not impleaded in rent suit—Decree, if affects his interest. [*See* Q.D. 1941-1945, Vol. I, Col. 465.] CHANDRA SEKHAR MISSIR *v.* JAGARNATH SINGH. 26 P.L.T. 302.

———**(as amended in 1907), S. 22 (2)**—*Applicability—Purchase of holding by co-sharer landlord in execution of rent decree against recorded tenant—Subsequent sub-lease of part to third person—Liability of latter to pay rent to their co-sharers—Liability of purchasing co-sharer to other co-proprietors:*

S. 22 (2) of the Bihar Tenancy Act applies only if the purchasing co-sharer or co-proprietor sublets the entire land purchased by him to a third person who will then be deemed to be a raiyat in respect of it. There is no warrant for holding that the purchasing proprietor can split the holding into fractions and by separate sub-leases create smaller holdings.

Where a co-sharer landlord purchases the holding in execution of a decree for rent against the original recorded tenant, and subsequently settles a part of the area purchased by him with a third person, keeping the remaining area in his own possession, such purchasing co-sharer renders himself liable to pay compensation to the other co-sharers to the extent of their share in respect of the area purchased by him. The third person with whom a portion of the area purchased is settled is not liable to pay rent to the other co-sharers. (*Manohar Lal and Ramaswami, JJ.*) JADUPRAVA MITRA *v.* RAI BATOBEHARI. 26 Pat. 659=A.I.R. 1948 Pat. 202=3 D.L.R. (Pat.) 65=29 P.L.T. 383.

———**(as amended in 1907), S. 22 (2)**—*Construction and object of—"Shall be deemed to be a tenure-holder or a raiyat"—Meaning of.*

The phrase "shall be deemed to be a tenure-holder or a raiyat," cannot be construed as "shall be deemed to be a tenure-holder or a raiyat, etc. *vis-a-vis* the purchasing co-proprietor but not *vis-a-vis* the remaining co-proprietors." The object of the legislature in enacting S. 22 (2) was to prevent the accrual of occupancy right in land in possession of proprietor or co-proprietors. It was obviously intended that the purchasing co-sharer should not himself acquire an occupancy right or by subletting bar the acquisition of raiyati rights by sub-lessees. (*Manohar Lall and Ramaswami, JJ.*) JADUPRAVA MITRA *v.* RAI BATOBEHARI. 26 Pat. 659=A.I.R. 1948 Pat. 202=3 D.L.R. (Pat.) 65=29 P.L.T. 383.

———**S. 22 (2)**—*Scope and effect of—Co-sharer acquiring occupancy right and sub-letting same to third person—Suit for rent by other co-sharers—Sub-lessee—If necessary party—Liability of transferee co-sharer.*

S. 22 (2) of the Bihar Tenancy Act enacts that when an occupancy right in land is transferred to a person jointly interested in the land as proprietor, he is entitled to hold the land subject to the payment to his co-proprietors of their share of the rent which may be from time to time payable to them. The fact that he sublets the land to someone else cannot deprive his co-sharers of their right to realise from him that share of the rent. The sub-lessee may be a proper, but not a necessary party to a suit by the co-sharers against the transferee-co-sharer. *Vis-a-vis* himsl and his co-sharers, his liability to pay the shares of rent to his co-sharers remains unaffected by the subletting. (*Imam and Das, JJ.*) RAJA SURAJPAL *v.* RAMGATI. 26 Pat. 353=A.I.R. 1948 Pat. 239.

———**S. 22 (2)**—*Scope and effect of—Co-sharer landlord purchasing holding and parting with possession—Liability for rent—Transferee, if raiyat.*

A co-sharer lanlord who purchases an occupancy holding is not a raiyat; he acquires a peculiar status and his only right is to retain possession of the land on payment of the share of rent which was payable for the land to his co-sharer landlords. He cannot sever the two interests and sell his right to hold the land apart from his interest as a co-sharer landlord of the holding. The two interests are soldered together and cannot be severed. A sale by him will not operate to transfer any occupancy right and the person let in will not be a raiyat under the other co-sharer landlords. The co-sharer landlord who is out of possession cannot be held liable for rent to the other landlords of the holding. [52 I.A. 145; 171 I.C. 306, ref.] (*Manohar Lall and Mukharji, JJ.*) LALNARAIN *v.* S. M. ANZAR. 27 Pat. 81=A.I.R. 1949 Pat. 367.

———**(as amended in 1907), S. 22 (2)**—*Scope and effect of—Co-sharer landlord purchasing occupancy holding—Right of to retain same at partition between co-sharers.*

Per *Meredith and Narayan, JJ., Agarwala, C.J.,* diss.:—The provisions of S. 22 (2) of the Bihar Tenancy Act, as amended in 1907, entitle a co-sharer landlord who has purchased a transferable occupancy holding between the years 1907 and 1923, to retain it in his possession as his purchased land on a partition taking place between him and his co-sharers. 5 Pat. 281; 2 P.L.T. 163; 3 P.L.T. 22, approv.; (1864) W.R. (Act X Rul.) 82; 10 W.R. 15; 11 W.R. 485; 7 Cal. 414; 24 Cal. 143; 25 Cal. 324; 32 Cal. 386; 51 Cal. 631; 54 Cal. 586; 26 C.W.N. 585; 14 Pat. 672; 16 Pat. 500; 19 Pat. 893; 22 Pat. 382; 23 Pat. 291; 26 Pat. 659; 4 P.L.J. 540; 3 P.L.T. 13; 7 P.L.T. 87; 7 P.L.T. 170; 8 P.L.T. 69; 14 P.L.T. 57; 18 P.L.T. 173; A.I.R. 1939 Pat. 522; A.I.R. 1948 Pat. 38, cons. and discussed. 4 M.I.A. 179; 17 I.A. 110; 48 I.A. 49; 10 P.L.T. 204; 44 I.C. 922; 88 I.C. 495; ref. (*Agarwala, C.J., Meredith and Narayan, JJ.*) **U. P. N. SAHI *v.* DULHIN I. KUER. 27 Pat. 610**=A.I.R. 1950 (Pat.) 115.

———**S. 22 (2)**—*Scope—Occupancy raiyat—Purchase by co-sharer proprietor of right, title and interest—Partition—Land treated as* bakasht *and allotted to different co-sharer—Subsequent purchaser of rights—Right to possession—Bengal Estates Partition Act, S.* 189.

R. who had purchased a *khata* in a holding was holding possession of the same under S. 22 (2), Bihar Tenancy Act. His interests were sold and purchased by *K.* who was one of the co-sharers of the proprietary interest in the estate, in 1921. At a subsequent partition of the estate under the Bengal Estates Partition Act, the *khata* was treated by the *batwara* authorities as *bakasht* of the proprietary body and allotted to the *takhta* of the defendants who were also proprietors, *K.* having got his *takhta* in another village. Delivery of possession in pursuance of the *batwara* was effected in 1929 and *K.* was *never in* possession after the collectorate partition. Plaintiff, claiming to be a purchaser of the lands from *K.* in April, 1939, brought a suit for declaration of his right to *K's* interest as an occupancy raiyat and for possession.

Held, (1) that the plaintiff who had merely purchased the right, title and interest of *K.*, was not entitled to possession; (2) that the land having been treated as *bakasht* and allotted to the defendants in the *batwara* proceedings to which *K.* was a party, the allotment could not be interfered with in view of S. 189 of the Bengal Estates Partition Act. (*Manohar Lal and Sinha, JJ.*) MANGRI *v.* THAKUR PRASAD. 224 I.C. 92=1946 P.W.N. 132=12 B.R. 486=1946 Pat. (Rul.) 259.

——**S. 22 (2)**—*Scope and effect of—Trusts Act, S. 90—Applicability.*

S. 22 (2) of the Bihar Tenancy Act does not confer upon the purchasing co-owner any right which he is entitled to maintain as against another co-sharer in whose *takhter* and land or occupancy holding or part thereof is allotted upon partition. When some co-owners, representing all the persons interested in the property, gain an advantage, they must hold that advantage for the benefit of all the persons interested in the property both under S. 22 (2) of Bihar Tenancy Act and under S. 90, Trusts Act. (*Shearer and Bennett, JJ.*) KAMESHWAR SINGH *v.* JHALAK SINGH. 3 D.L.R. (Pat.) 42=A.I.R. 1949 Pat. 16=29 Pat.L.T. 323.

——**S. 23-A, Proviso (a) and (b)**—*Land in respect of which rent is paid in cash as well as half the produce of the trees or their value in cash—Right of landlord to share in flowers, fruits, etc.—If abrogated by legislature.*

Where in respect of a land the tenant has been paying not only the cash rent but also half the produce of the trees or the price thereof the case is not governed by S. 23-A (*a*) and the proviso. The proviso by its very terms only applies to the case goverened by S. 23-A (*a*) and is by way of an exception to the tenants general rights in trees defined in sub-S. (*a*) (*ii*). The land is governed by sub-S. (*b*) of S. 23-A and the landlord will be entitled to his share in the flowers, fruits and other products of all trees or bamboos growing on such land whether planted before or after the commencement of the Bihar Tenancy (Amendment) Act, 1934. (*Ray, J.*) RAGHO SINHA *v.* DASRATH KANJI. 225 I.C. 562=1946 P.W.N. 258=A.I.R. 1947 Pat. 119=12 B.R. 625.

——**S. 23-A, Proviso**—*Specific entry in record of rights—Value—Presumption.*

A specific entry in the record of rights may owe its origin to a contract as between the parties, particularly where the record is against the local custom. Every specific entry in the record of rights has a presumptive value. The word "specific" is used as an epithet to the word "entry". (*Ray, J.*) DARSAN DAS *v.* LAKSHMAN PRASAD. A.I.R. 1948 Pat. 190.

——**S. 26-A—(as amended in 1938)**—Applicability—Homestead land—S. 182—Object and scope of. [*See* Q.D. 1941-1945, Vol. I, Col. 467.] MAHADEOASHRAM PRASAD SAHI *v.* PARIKHA CHAUDHRI. 230 I.C. 304=1947 Pat. (Rul.) 316=13 B.R. 437.

——**(as amended in 1938), S. 26-A**—*Applicability and scope—Rent decree—Execution sale—Purchase by landlord—Mortgagee of part of holding not impleaded in suit—Right—Landlord if bound to annul encumbrance—Failure to annul—Effect—S. 167.*

S. 26-A of the Bihar Tenancy Act, as amended in 1938, which came into force on 10—11—1938, has changed the substantive law as regards occupancy holdings with the result that it is no longer open to the landlord to contend that such holding are non-transferable, in the absence of proof of custom to the contrary, as was the case before the new section came into force. As such

though a mortgagee of the whole or a part of an occupancy holding may not claim a right to be impleaded in suit by the landlord for rent, the landlord, in the event of his purchasing the holding at a sale in execution of the rent decree, held after 10—11—1938, cannot ignore the mortgage, but must take notice of such an encumbrance, and exercise his option of annulling the same in accordance with S. 167 of the Act. The auction-purchaser after the coming into force of S. 26-A, whether he be the landlord or a stranger, must take notice of the provisions of S. 167 and unless the encumbrance is annulled in accordance with that section, it is binding on the landlord as much as on any other purchaser at an execution sale. 20 P.L.T. 469, declared no longer good law. 1 P.L.T. 108; 1 P.L.J. 161; 3 P.L.T. 362; 8 P.L.T. 464; 68 C.L.J. 209, cons.; 4 P.L.J. 362; 9 P.L.T. 241; 10 P.L.T. 129, ref. (*Sinha and Ramaswami, JJ.*) LALDHARI KUER *v.* UMASANKER PRASAD. 27 Pat. 865=29 P.L.T. 408=A.I.R. 1949 Pat. 500.

——**Ss. 26-A and 182**—*Scope and Effect—Homestead—Transfer by raiyat—Validity—Burden of proof—Evidence Act, S.* 101.

S. 26-A, Bihar Tenancy Act, does not expressly or impliedly confer on an occupancy raiyat a right to transfer without the consent of his landlord his homestead held by him otherwise than as part and parcel of his occupancy holding. This section must be read along with S. 182 of the Act and an endeavour must be made so to construe the section taken together as to avoid any ambiguity or inconsistency. The only way of doing this is to assume that a homestead is not by itself an occupancy holding within the meaning of that expression as it occurs in S. 26-A. When therefore a homestead is transferred by a raiyat, and the landlord seeks to evict the transferee, the onus under S. 101 of the Evidence Act is on the transferee to prove the existence of a local custom or usage which confers on the raiyat an unrestricted right of transfer. If the defendant in such a suit succeeds in proving the existence of such a local custom or usage, the suit is bound to be dismissed. If, however, he does not succeed, the suit is bound to be decreed. [24 Pat. 366, comm. 2 C.W.N. 122. ref.] (*Agarwala, C.J., Meredith and Shearer, JJ.*) HARI NARAIN SINGH *v.* BABUI MOHARI. 28 Pat. 463=A.I.R. 1949 Pat. 413 (F.B.).

——**(as amended in 1938), S. 26-A**—*Scope and effect of—Old S. 26 (c)—Distinction—Transfer of occupancy—Mode of.*

There is no distinction between the terms of S. 26 (*c*), Bihar Tenancy Act, as it stood before it was amended and those of S. 26-A, which replaced S. 26 (*c*) by the amendment in 1938. The effect of both is the same, namely, that whenever it is intended to transfer an occupancy holding, it must be done by a registered document; and in order that title may pass or be effected by transfer, the provisions of S. 26-A, must be strictly followed. (*Manohar Lall and Mahabir Prasad, JJ.*) BAJRANGI GOPE *v.* RUPNARAIN MAHTON. 28 Pat. 351=4 D.L.R. (Pat.) 178=A.I.R. 1949 Pat. 464.

———S. 26-A—*Transfer of holding by tenant after rent decree—Transferee depositing landlord's fee in favour of landlord recorded in Register D and not real landlord—Transferee not impleaded in execution proceedings—If bound by sale.*

The landlord to be named in the notice for transmission of the fee deposited under the provisions of the Bihar Tenancy Act is the landlord recorded in Register D and not the real landlord who has omitted to get his name registered in Register D. A transferee of a holding depositing the landlord's fee in favour of the landlord recorded in Register D must be deemed to have been recognised as a transferee of his holding. If he is not impleaded in the proceedings in execution of a rent decree passed against the original tenant before the transfer, he is not bound by the execution sale. At the time of the sale the judgment-debtor having already transferred his interest in the holding has no subsisting interest which can be sold, and the transferee is, therefore. entitled to recover possession of the holding from the auction-purchaser. (*Manohar Lall and Mahabir Prasad, JJ.*) Sidheswari Singh *v.* Rajbaran Singh. 28 Pat. 384=A.I.R. 1949 Pat. 484.

———(as amended in 1935), S. 26-N—*Scope and effect—Non-transferable holding purchased by sale deeds between 1913 and 1921—Execution sale in 1936 for decree for rent in 1936—Purchasers not impleaded as parties—Effect—Interest of purchasers not impleaded—If affected.*

Plaintiffs were purchasers of a non-transferable holding by virtue of sale deeds between the years 1913 and 1921. from the family of the original tenants. In execution of a decree obtained by the landlord against the original tenants for rent, the holding was sold in execution on 5th June, 1936, but the plaintiffs were not represented in the execution proceedings.

Held, that by reason of the amended S. 26-N of the Bihar Tenancy Act, which came into force on 10th June, 1935, the plaintiffs had become raiyats of the disputed lands, as the landlord must be deemed to have recognised the transfer in their favour, and that the execution proceedings taken out against the original tenant after the coming into force of S. 26-N had not the effect of passing the holding itself, but could only affect the right, title and interest of the persons impleaded as parties and did not affect the interest of the plaintiffs purchasers who were not impleaded but who had became raiyats. 22 Pat. 370 (F.B.); A.I.R. 1938 Pat. 591, dist.; 41 I.A. 91; 59 Cal. 1202 (S.B.); 23 C.W.N. 654, rel. on. (*Sinha and Ramaswami, JJ.*) Damodar *v.* Mahangu. 27 Pat. 856.

———(as amended in 1937), Ss. 29 and 112-A (1) (a)—"Enhancement"—Rent increased by compromise in suit—Effect—Cancellation as enhancement under S. 112-A (1) (*a*)—Jurisdiction of Rent Reduction Officer. [*See* Q.D. 1941-1945, Vol. I, Col. 469.] Prabhu *v.* Doma. 224 I.C. 424=12 B.R. 549=1946 Pat. (Rul.) 292=A.I.R. 1946 Pat. 138.

———S. 40—*Amalgamation of holdings—Proof—Single rent receipt in respect of more than one holding—If conclusive evidence of amalgamation.*

A tenant alleging that there has been an amalgamation of two holdings has the burden on him to prove it. The fact that a single rent receipt is given to the tenant in respect of more than one holding is not conclusive evidence to show that there has been amalgamation; a single receipt is often given to a tenant for more than one holding and no agreement on the part of the landlord to amalgamate the holding can be inferred from that circumstances. (*Lee.*) Baijnath Singh *v.* Bahuria Attarbas Kuer. 12 B.R. 567.

———S. 40—*Burden of proof—Commutation proceedings—Landlords alleging that third party is an occupancy raiyat—Onus.*

Where in commutation proceedings the landlord alleges that a third party is one of the occupancy raiyat in the holding, but the tenants deny it, the onus is on the former to prove affirmatively that such third party has an interest in the holding. If the landlords fail to discharge this onus it has to be assumed that the third party is not an occupancy raiyat interested in the holding in question. (*Lee.*) Baijnath Singh *v.* Bahuria Attarbas Kuer. 12 B.R. 567.

———S. 40—*Commutation of bhaoli rent of holding held by under-raiyat—If* ultra vires—*Subsequent suit by landlord—Maintainability.*

The commutation officer has no jurisdiction to commute the bhaoli rent of a holding held by an under-raiyat. An under-raiyat remains an under-raiyat whether he has acquired a right of occupancy or not. As the commutation proceeding is *ultra vires*, the decision in such proceeding is no bar to a subsequent suit by the landlord who was a party to the commutation proceeding. The absence of an objection by the landlord did not confer any jurisdiction on the commutation officer. (*Manohar Lall and Mahabir Prasad, JJ.*) Gajar Ahir *v.* Jita Pandey. 28 Pat. 376=A.I.R. 1949 Pat. 461.

———S. 40 (b) (ii)—*Collector's decision on appeal in commutation case—Interference by Commissioner.*

The decision of a Collector in appeal in a commutation case under S. 40 of the Bihar Tenancy Act is final in view of S. 40 (*b*) (*ii*); and his decision cannot therefore be interfered with by the Commissioner or by the Board of Revenue on the ground that the Collector had made a mistake when there is no question of jurisdiction involved. (*Lee.*) Elokeshi Devi *v.* Deoki Singh. 12 B.R. 559.

———S. 40—*Appeal in case under S. 40—Order of Collector—Interference by Commissioner—Jurisdiction.*

An order passed by the Collector in appeal in a case under S. 40 of the Bihar Tenancy Act is final under S. 40 (6) of the Act. It is not therefore open to the Commissioner to interfere with the Collector's order unless it can be shown that the Collector has acted without jurisdiction. (*Lee.*) Harbans Singh *v.* Dwarka Das. 12 B.R. 391.

——S. 40 (6) (a)—*Collector's decision on appeal under S. 40 (5)—Interference by Commissioner or Board of Revenue—Jurisdiction.*

The Legislature having declared in S. 40 (6) (*a*) of the Bihar Tenancy Act that the decision of the Collector passed on appeal from an order under S. 40 (5), shall be final, neither the Commissioner nor the Board of Revenue has jurisdiction to interfere with that decision, or to modify or reverse that decision. Any such reversal or modification would be *ultra vires* and cannot be validated by consent or waiver of the parties. 60 Cal. 618; 24 Pat. 234; 25 Pat. 84, ref. (*Sinha and Narayan, JJ.*) RAGHURAJ PRASAD SINGH *v.* BASUDEO SINGH. 29 Pat. 38=A.I.R. 1950 Pat. 318.

——S. 40 (6)—*Revision—Order by Collector on appeal—Finality—Interference by Commissioner and by Board of Revenue.*

In a case under S. 40 of the Bihar Tenancy Act, the order of the Collector passed on appeal is final under S. 40 (6), and cannot be interfered with by the Commissioner or by the Board of Revenue, except where the Collector has acted without jurisdiction or failed to exercise a jurisdiction vested in him. (*Lee.*) ANNA PURNA DEVI *v.* JUNAB KHAN. 12 B.R. 646.

——S. 40 (6)—*Revision—Collector's order on appeal in commutation case—Finality—Interference—Want of jurisdiction in Collector—Absence of some landlords—Effect.*

The decision of the Collector on appeal in a commutation case in final under S. 40 (6) of the Bihar Tenancy Act, though this finality is sometimes subject to the Collector having jurisdiction. There is, however, no such restriction about jurisdiction in the case of an appeal governed by O. 41, R. 4, C.P. Code and it cannot be said that the Collector had no jurisdiction because the whole body of landlords were not represented before him, especially when no objection as to non-joinder was taken before the Collector. (*Lee.*) SUNDAR KRISHNA SARKAR *v.* MANMOHAN SARKAR. 12 B.R. 675.

——S. 40 (6)—*Scope and effect of—Collector's order in appeal—Finality—Setting aside in revision—Grounds—Plea of jurisdiction—When to be raised.*

An order passed by a Collector on appeal under S. 40 of the Bihar Tenancy Act is final under cl. (6) of that section; and it can be set aside only on the ground of want of jurisdiction. It cannot be attacked or set aside on the ground that it is erroneous in law or proceeds on a wrong view of the facts. The question of jurisdiction cannot be raised for the first time in an application for review against the final order of the Collector, when it was never mentioned in the first Court or in appeal, especially when the facts giving rise to the question of jurisdiction are disputed. (*Lee.*) PRADIP NARAIN SINGH *v.* DALU SINGH. 12 B.R. 552.

——S. 40-A—Scope—If overrides S. 112. *See* BIHAR TENANCY ACT, S. 112. 12 B.R. 692.

——(as amended in 1938), S. 48-A—*Applicability—Under-raiyat surrendering holding and giving up possession to landlord before coming into force of Act—Subsequent settlement to same tenant for fresh period after landlord's possession for over one year—Raiyat—If protected.*

S. 48-A, Bihar Tenancy Act (as amended in 1938), operates retrospectively only on titles otherwise incomplete which are either in existence accompanied with possession or which are under challenge being *sub-judice,* whether accompanied or not with possession where both title and possession of an under-raiyat have lawfully come to an end, and no under-proprietary right is in existence either actually or even notionally at the date the section came into force, there is no subject on which the section would operate and which may be deemed to have been acquired within the purview of the section.

Where it is found the under-raiyat had surrendered and given up possession of his holding to the landlord before the Amending Act came into force, and he was let into possession under a new arrangement between him and the landlord about one year after he gave up possession of the land (the area of which he was put in possession being also a different area from that of the original holding), he is not protected by the retrospective operation of S. 48-A. 17 Pat. 333; 22 Pat. 411 (F. B.); 17 P. L. T. 25 (P.C.); 18 P.L.T. 345; 22 P.L.T. 356; 22 P.L.T. 505; (1939) P.W.N. 661; (1940) P.W.N. 272; (1943) P.W.N. 75, discussed and reviewed. (*Manohar Lall and Ray, JJ.*) RAMNATH *v.* JAMUNA. 27 Pat. 588.

——S. 60—*Object and scope—Suit for rent by registered proprietor parting with rights—Maintainability—Right of tenant to plead that registered owner has parted with interest—Vendee not registered as owner in Register D—Effect.*

It is well settled that a person who is a registered proprietor is entitled to recover rent even if he has conveyed his title to a third person. There is nothing to prevent a person who has taken a conveyance of a proprietary interest in an estate and who, for some reason or other, has not taken steps to have his name entered in Register D, from coming to an arrangement with his vendor, under which the latter will sue the tenants for arrears of rent due by them and will pay over to him the sums which he may recover. The object of the legislature in enacting S. 78 of the Bengal Land Registration Act was to coerce owners of estates into registering themselves as owners and the object of the legislature in enacting S. 60, Bihar Tenancy Act, was to afford protection to tenants who pay rent to persons so registered though they may have ceased to be the true owners. It could not have been intended that tenants should find in these provisions a loophole enabling them to escape all liability for rent. (*Shearer and Reuben, JJ.*) MT. SAFIA *v.* YUSUF MD. MUZAFAR. 26 Pat. 269=A.I.R. 1948 Pat. 328.

——S. 60—*Scope—Mortgagee registered as in possession—Suit by for rent—Plea of payment to mortgagor — Proprietor — Sustainability—Bengal Land Registration Act, S. 44.*

Where a mortgagee is registered as being in possession under S. 44 of the Bengal Land Registration Act, as long as that entry stands, the mortgagor-proprietor is not entitled to realize the rent. Nor is the tenant entitled to plead payment of rent to the mortgagor by way of defence to a suit by the mortgagee. S. 60 of the Bihar Tenancy Act will not protect the tenant, though he has paid the rent to the mortgagor and obtained a receipt from him. 3 Pat. L.W. 245, foll.; 23 Pat. 858, not foll. (*Agarwala, C.J. and Meredith, J.*) KAMLA *v.* BHIKHAN. 27 Pat. 521.

———**S. 65**—*Scope—Purchase of tenure by landlord in execution of money decree in suit for rent—Rent due from date of suit to date of sale—Liability for.*

A landlord who purchases a tenure in execution of a money decree obtained by him in a suit for recovery of arrears of rent of the tenure takes the property subject to the liability for the rent accruing from the date of the suit to the date of the sale, though such liability is not notified in the sale proclamation. The landlord having placed himself in the position of the tenant by purchasing his right, title and interest, cannot claim to recover the arrears from the person whose right, title and interest he has purchased. He does not, moreover, require any notice that arrears of rent are due. (*Meredith and Sinha, JJ.*) LAKSHMINARAYAN LAL *v.* BHUPENDRA PRASAD SHUKUL. 1947 P.W.N. 33=A.I.R. 1948 Pat. 143.

———**S. 69**—*Duty of sub-divisional officer—Necessity for prompt relief and completing proceedings.*

Where in proceedings under S. 69, Bihar Tenancy Act, substantial justice has been done, the Board will not interfere on the ground of mere irregularity in procedure. But when the landlord is given to oppressive ways, it is the duty of the sub-divisional officer to give prompt relief to the raiyat who ask for it and to watch the proceedings. When there is any apprehension of a breach of the peace, the sub-divisional officer should act strictly according to law and put the proceedings through to their proper conclusion. (*Godbole.*) MEGHAM MAHTO *v.* MAHANT RAMDHAN PURI. 13 B.R. 26.

———**S. 70 (4)**—*Scope of inquiry—Powers of inquiring officer—Final order dismissing application for division—Competency.*

The enquiry under S. 70 (4) of the Bihar Tenancy Act is clearly summary and the enquiring officer has wide discretion in making it. He has jurisdiction to pass a final order rejecting the application for division of crops, even after a division has been effected by an amin deputed for the purpose. (*Swanzy.*) JAGDEO SINGH *v.* MANBAHAL SINGH. 12 B.R. 51.

———**S. 70 (5) (a)**—*Revision—Order for compensation—Mistake of law—If ground for revision.*

A mistake of law is no ground for revision by the Board of Revenue of an order for compensation under S. 70 (5) (*a*) of the Bihar Tenancy Act in a case under S. 69 of the Act. (*Swanzy.*) JAGU GOPE *v.* THAKUR PRASAD SAH 12 B.R. 266.

———**S. 70 (5) (a)**—*Revision—Question of fact—Whether amin was to blame or not in respect of loss of crops by theft—Amount of compensation.*

Whether the amin was to blame or not for the loss of crops by theft in respect of which compensation has been ordered under S. 70 (5) (*a*) of the Bihar Tenancy Act is a question of fact which will not justify interference in revision with an order for compensation. The question whether the compensation awarded is equitable or inequitable is also one of fact. (*Swanzy.*) JAGU GOPE *v.* THAKUR PRASAD SAH. 12 B.R. 266.

———**S. 71**—*Applicability—Case under S. 69—Loss of crops by theft and waste—Compensation including value of crops lost—Order under S. 70 (5) allowing compensation—If appraisement of crops.*

An order under S. 70 (5) (*a*) of the Bihar Tenancy Act awarding compensation including the value of crops lost by theft and waste in a case under S. 69 of the Act does not amount to an appraisement of the crops under S. 71. (*Sawazy.*) JAGU GOPE *v.* THAKUR PRASAD SAH. 12 B.R. 266.

———**S. 103-B**—*Khas mahal—Entries in papers prepared by—Presumption of correctness.*

Entries in papers prepared by the *khas mahal* cannot be used as presumptive evidence under S. 103-B, Bihar Tenancy Act. Though they may be treated as evidence, it cannot be presumed that they are correct. (*Fazl Ali, C.J. and Reuben, J.*) JAINAK SINGH *v.* ADYA SINGH. 13 B.R. 95=227 I.C. 575=1947 Pat. (Rul.) 39=A.I.R. 1947 Pat. 261.

———**S. 103-B**—*Scope—Entry in record of rights—Presumption of correctness—Effect—Land recorded as* belagan *or rent-free—Landlord showing land as lying in zamindari—Right to claim rent or assessment of rent.*

In a suit for assessment of rent on homestead land held by the defendant under the plaintiff otherwise than as part of an agricultural holding, where the land is entered in the record of rights as *belagan*, it must be held that the landlord is not entitled to claim such assessment since the presumption of correctness attaching to the entry of land as *belagan*, which means rent-free, under S. 103-B of the Bihar Tenancy Act, holds good unless the landlord adduces evidence in rebuttal thereof.

The statutory presumption attaching to the entry in the record of rights is not and cannot be rebutted by another presumption under the general law based on the circumstance that the land in respect of which rent is claimed or assessment of rent is claimed lies in the plaintiff's zamindari. The landlord by merely showing that the land is within his zamindari cannot be held to have rebutted the presumption of correctness of the entry in the record of right and thus claim a right to have the lands assessed to rent. 2 Pat. 38, expl.; 11 P.L.T. 444; 11 P.L.T. 468, foll.; 17 P.L.T. 819, not foll.; 16 Pat. 105, rel.

(*Agarwala, J.*) Ramnath Singh *v.* Dawas Singh. A.I.R. 1950 Pat. 487.

——**Ss. 103-B (3) and 107**—*Presumption of correctness—Note in remarks column of Record of Rights about civil and dismissal—Effect of—Finding of fact based on presumption of correctness of such entry—Finality—Error of record.*

A note in the remarks column in a record-of-rights with regard to a plot of land, to the effect that a suit was brought in respect of it on the strength of a *kebala* and that it was dismissed (without mention of the name of the plaintiff in that suit or the date of the kebala on which the suit was based) is not an entry which carries with it the presumption of correctness under S. 103-B (3), Bihar Tenancy Act, since an entry in a record-of-rights about a suit in a civil Court is not one the particulars required to be entered under S. 102 of the Act. The entry not being an authorized entry, cannot carry with it the statutory presumption of correctness under S. 103-B. Nor is such an entry, one made under S. 107 (2) of the Act. A finding based on the basis of the presumption of correctness of such an entry, is one vitiated by an error of record, and hence cannot be binding in second appeal. (*Das, J.*) Mohan Jha *v.* Shivadayal Prasad. A.I.R. 1950 Pat. 293.

——**S. 104-E, Proviso**—*Scope—Omission to hear parties—If fatal.*

The proviso to S. 104-E of the Bihar Tenancy Act provides for notice to parties and for an opportunity being given to be heard before revision of an entry in settlement rent. But the failure to give an opportunity to the parties to appear and be heard before revising the rent settled would not amount to a case of absence of jurisdiction. At least it would be a case of exercising jurisdiction illegally. Such revision cannot be declared to be void by the Civil Court as being without jurisdiction. (*Fazl Ali, C.J. and Imam, J.*) Mahomed Yasin *v.* Tara Mahton. 24 Pat. 597=1946 P.W.N. 31=226 I.C. 144=12 B.R. 692=1946 Pat. (Rul.) 349 =A.I.R. 1946 Pat. 15.

——**S. 112**—*Jurisdiction—Reduction of rent—Absence of notice to landlord—Effect.*

An order by a Revenue Officer for reduction of rent passed without giving notice to the landlord is without jurisdiction. (*Beevor, J.*) Mahomed Yunus *v.* Bishunath Singh. 1945 P.W. 393=A.I.R. 1946 Pat. 102=227 I.C. 615=13 B.R. 102=1947 Pat. (Rul.) 47.

——**S. 112**—*Scope—Jurisdiction to reduce rent commuted under S. 40—S. 40-A—If overrides S. 112.*

S. 112 of the Bihar Tenancy Act is quite independent of S. 40-A; and S. 40-A cannot be read as overriding the provisions of S. 112. The power vested in a Revenue Officer to reduce rents under S. 112, is a power to reduce "all rents" without exception, and the term will include even rents which have been commuted under S. 40. S. 40-A is only intended to prohibit further reduction of rent within 15 years at the instance of the tenant just as much as it is intended to prohibit enhancement of the rent within 15 years at the instance of the landlord when rent had been commuted under S. 40, except under certain conditions. (*Fazl Ali, C.J. and Imam, J.*) Mahomed Yasin *v.* Tara Mahton. 24 Pat. 597=1946 P.W.N. 31=226 I.C. 144 =12 B.R. 692=1946 Pat. (Rul.) 349=A.I.R. 1946 Pat. 15.

——**S. 112-A**—*Appeal—Jurisdiction of Rent Reduction Officer—Assumption of rent at particular figure and reduction—No protest by landlord—Appeal Interference.*

Where the Rent Reduction Officer assumed the rental in one case at Rs. 206-15-0 and in another at Rs. 124, and reduced the same to Rs. 113; it was found that the landlord was a party to the proceedings and was actually cognizant thereof and there was no protest made to him.

Held, in appeal that no question of jurisdiction was involved, and that when no protest was made the Rent Reduction Officer was right in assuming that the rent which he was asked to reduce was the rental at the lower figure and not at the higher figure and there was therefore no ground for interference. (*Manohar Lall and Ramaswami, JJ.*) Kumar Rani Sayeed Khatoon *v.* Basdeo Pandey. 4 D.L.R. (Pat.) 215.

——**S. 112-A**—*Application by tenant as karta of joint family on behalf of family—Maintainability.*

A tenant as karta of a joint Hindu family can in law present on behalf of the family an application to the revenue Court for reduction of rent under S. 112-A of the Bihar Tenancy Act, and the application is not defective for non-joinder of the other members. (*Sinha and Mahabir Prasad, JJ.*) Kumar Gope *v.* Jagehwar Prasad. A.I.R. 1948 Pat. 403.

——**S. 112-A**—*Application by tenant decided* ex parte—*Rehearing—Jurisdiction of Rent Reduction Officer.*

Where an application by a tenant under S. 112-A of the Bihar Tenancy Act for reduction of rent was taken upon a date of which he had no notice and was disposed of *ex parte,* the Rent Reduction Officer has jurisdiction to rehear the application and decide it afresh, as the procedure laid down in the Civil Procedure Code for the trial of suits is applicable to a proceeding under S. 112-A of the Bihar Tenancy Act by virtue of R. 82 of the Rules framed under that Act. (*Fazl Ali, C.J., Shearer and Sinha, JJ.*) Ram Ran Bijoy Prasad Singh *v.* Ramayya Kuer. 226 I.C. 363=1946 P.W.N. 304=12 B.R. 736 =1946 Pat. (Rul.) 381=A.I.R. 1946 Pat. 354 (F.B.).

——**Ss. 112-A and 115**—*Notice—Period of one month between notice and initiation of proceedings—Necessity.*

Proceedings for reduction of rent under S. 112-A of the Bihar Tenancy Act cannot be started within a month of the notice required by the rules under S. 112-A and 115 of the Bihar Tenancy Act. One clear month should be allowed between the notice and the initiation of proceedings for reduction of rent. (*Varma, J.*)

TETAR MAHTON *v.* RAM BABU. 227 I.C. 639=13 B.R. 112=1947 Pat. (Rul.) 56.

———**S. 112-A**—*Order of Collector without jurisdiction—Jurisdiction of Board to vacate—Civil Court—If bound by order of Collector made without jurisdiction and subsequently set aside by Board.*

Though the order of the Collector confirming the order of the Rent Reduction Officer cannot be interfered with on merits by the Commissioner or the Board of Revenue, the Board has power to vacate it if the order is without jurisdiction, in the exercise of its power of superintendence and an order of the Collector which has been so vacated by a Court of competent jurisdiction (the Board of Revenue) cannot stand in the way of the Civil Court coming to its own independent conclusion unaffected by the decision of the Collector. (*Fazl Ali, C.J. and Pande, J.*) TAHAL MAHTO *v.* LACHOO MAHTO. 25 Pat. 84=1946 P.W.N. 15=A.I.R. 1946 Pat. 298=223 I.C. 297=12 B.R. 385.

———**S. 112-A**—*Order reducing rent—Validity—Notice under R. 117 served on landlord's servant or on agent of karta of joint family.*

An order reducing the rent of an occupancy holding made under S. 112-A of the Bihar Tenancy Act is not without jurisdiction although the notice required to be given under R. 117 of the Government Rules made under that Act is served upon the landlord's servant or agent who has not been authorised in writing to receive the notice.

Nor is such an order without jurisdiction when the notice is served on the agent of the *karta* of a joint family where the collection of the family is joint. (*Imam and Das, JJ.*) ANANT LAL MANDER *v.* SURAJNARAIN SHAHU. A.I.R. 1947 Pat. 442.

———**S. 112-A**—*Parties to proceeding—Sudhbharnadar of one of proprietors not impleaded—Order, if void.*

Where in a proceeding under S. 112-A of the Bihar Tenancy Act for reduction of rent the entire proprietary interest in the holding in question was represented before the revenue Court, the mere fact that the sudhbharnadar of one of the proprietors was not impleaded does not render the order passed in the proceeding null and void, especially when the person adversely affected by that order, who could challenge it on the ground that he was not a party to it, has not chosen to do so. Persons who were parties to the proceedings and who did not raise that question in that proceeding, cannot subsequently do so. (*Sinha and Mahabir Prasad, JJ.*) KUMAR GOPE *v.* JAGESHWAR PRASAD. A.I.R. 1948 Pat. 403.

———**S. 112-A**—*Parties—Reduction of rent at tenant's instance—All co-sharers not impleaded or served with notice—Order reducing rent—Legality.*

Where in a proceeding for reduction of rent at the instance of a tenant, only one of several co-sharer landlords was made a party, and the other co-sharers were not impleaded or served with notices, the decision given in their absence would

be without jurisdiction and would not bind the co-sharers to whom notices were not issued. (*Imam and Das, JJ.*) RAJA SURAJPAL *v.* RAMGATI. 26 Pat. 353=A.I.R. 1948 Pat. 239.

———**S. 112-A**—*Reduction of rent—Jurisdiction of Rent Reduction Officer—Latter assuming rental at lower figure—Absence of protest by landlord.*

A reduction of rent by the Rent Reduction Officer assuming the rental to be at a lower figure is not without jurisdiction, if the landlord was a party to the proceedings and was actually cognisant of the proceedings. The Rent Reduction Officer was right in assuming when no protest was made before him that the rent which he was asked to reduce was the rental at the lower figure and not the higher figure alleged in the argument. (*Manohar Lall and Ramaswami, JJ.*) SAYEEDA KHATOON *v.* BASDEO PANDEY. A.I.R. 1950 Pat. 43.

———**S. 112-A**—*Rent reduction proceedings—Entire body of landlords not represented—Effect.*

If in fact, rent reduction proceedings are not prosecuted, against the entire body of landlords, the proceedings would be void and will not be binding even against the co-sharer landlords who have been impleaded. (*Ray, J.*) MADAN MOHAN PRASAD *v.* MST. BASO KUER. A.I.R. 1948 Pat. 161.

———**S. 112-A**—Res judicata—*Jurisdiction of Rent Reduction Officer—Basic rent of holding—Decision on—If operates as* res judicata.

There is nothing in S. 112-A, Bihar Tenancy Act, which authorises the Rent Reduction Officer to determine the basic rent of a holding and then to determine the further question of how much reduction should be given. He is vested with summary powers to determine the question of the quantum of reduction which a particular tenant is entitled to, there being no controversy as regards the rental or rate of rent borne by that particular holding. He is not competent to determine such a controversy as regards the basic rent of a holding; and therefore any decision by him on that matter cannot operate as *res judicata* whether actual or constructive. [24 Pat. 484, dist. 1946 Pat. 354 (F.B.), ref.] (*Sinha and Mahabir Prasad, JJ.*) BABURAM *v.* RAJA G. N. SINGH. 27 Pat. 325=A.I.R. 1949 Pat. 459.

———**S. 112-A**—*Rules framed by the Board of Revenue, Ch. 7-B, Rr. 115 and 117—Proceedings for reduction of rent—Necessity to serve notice on all landlords.*

Both according to general principles of law and the object of Rr. 115 and 117 of Ch. 7-B of the Rules framed by the Board of Revenue, notice has to be served on all landlords in the rent reduction proceedings. If it is served on only some, unless it is shown that they represented the others, any order passed in such proceedings would be without jurisdiction. (*Sinha and Mukharji, JJ.*) BASDEO NARAIN *v.* KARU MAHTON. 26 Pat. 592=A.I.R. 1948 Pat. 153.

———**S. 112-A**—*Scope and effect—Division of original holding on partition—Application for reduction of rent of original holding subsequently* *and reduction of rent—Application and order—If to be deemed to be in respect of divided holdings.*

Where, after the division of the original holding into three holdings with one-third of the original rent for each of them, an application for reduction of the rent of the original holding is made by all the tenants impleading all the landlords parties to the application and the rent of the original holding is reduced under S. 112-A of the Bihar Tenancy Act, the application must be taken to be an application in respect of the three holdings and the order of reduction of rent must be deemed to have been passed for reduction of the rent of the three new holdings. (*Manohar Lall and Das, JJ.*) SRIKISUN *v.* RAMJANAM. 25 Pat. 729=A.I.R. 1947 Pat. 402.

——**S. 112-A**—*Scope—Jurisdiction—Application for reduction of rent under S. 112-A (a)—Reduction ordered under S. 112-A (d)—If with jurisdiction.*

In an application for reduction of rent under Cl. (*a*) of S. 112-A, Bihar Tenancy Act, the Rent Reduction Officer has jurisdiction to order reduction under Cl. (*d*). The mere fact that the reason for the reduction ordered is some ground other than that asserted by the applicant (tenant) does not at all affect the jurisdiction of the Rent Reduction Officer. (*Agarwala, C.J. and Meredith, J.*) CHANDESHWAR *v.* JAGARNATH. 27 Pat. 192=A.I.R. 1949 Pat. 434.

——**S. 112-A (1) (d)**—*Duty of Collector—Prices during period subsequent to date of application for reduction—Relevancy of.*

Although the Collector, on an application by a raiyat for reduction of rent on the ground of a fall in the level of prices of grains during the currency of cash rent, has to base his judgment reducing rent on a consideration of the prices obtaining on the date of the application and not on any subsequent date, he cannot ignore the evidence of the period subsequent to the date of the application in deciding whether or not the alleged fall in prices was temporary. (*Godbole.*) BAIJNATH PRASAD *v.* RAMBILAS SINGH. 12 B.R. 767.

——**S. 112-A (1) (d)**—*Jurisdiction of Rent Reduction Officer—Rent liable to be reduced.*

The Rent Reduction Officer has no jurisdiction to deal with any other rental than that which is stated in the application for reduction and which is the admitted rent payable at the date of the application even according to the landlord. (*Beevor, J.*) DULHIN JAGTRAJ KUER *v.* SINGASAN PANDEY. 226 I.C. 21=1946 Pat. (Rul.) 315=12 B.R. 645=A.I.R. 1946 Pat. 174.

——**S. 112-A (4) (b)**—*Scope and effect of—Reduction of commuted rents.*

S. 112-A (4) (*b*) of the Bihar Tenancy Act permits reduction of rent of any occupancy holding which was commuted either under S. 40 or by agreement between the landlord and tenant between 1—1—1911 and 31—12—1936. (*Fazl Ali, C.J. and Imam, J.*) MAHOMED YASIN *v.* TARA MAHTON. 24 Pat. 597=1946 P.W.N. 31=226 I.C. 144=12 B.R. 692=1946 Pat. (Rul.) 349=A.I.R. 1946 Pat. 15.

——**S. 112-B**—*Applicability—"Decision"—Reduction of rent under S. 112-A (d)—Appeal to Collector—Dismissal for default—"If decision"—Remand by Board of Revenue after dismissal of revision by Commissioner—Rejection of application for reduction after hearing on remand—If* ultra vires.

The tenants filed an application for reduction of rent under S. 112-A, Bihar Tenancy Act. The rent was reduced by the Rent Reduction Officer under Cl. (*d*) of that section. An appeal to the Collector by the landlord was dismissed for default. The landlord then moved the Commissioner without success, and ultimately went up to the Board of Revenue who, in revision, remanded the case for fresh hearing. The case was heard by another Rent Reduction Officer who rejected the application for reduction of rent.

Held, the order of the Collector dismissing the appeal was not a decision which would render the order of rejection of the application for reduction on remand *ultra vires* or illegal on the ground that the Board of Revenue had no power to revise the order of the Collector. (*Manohar Lall and Bennett, JJ.*) MEDNI PRASAD SINGH *v.* SHAM SUNDER KUER. 25 Pat. 838=A.I.R. 1947 Pat. 401.

——**S. 112-B**—*Orders of Collector on appeal—Finality.*

The orders of the Collector on appeal under S. 112-B, Bihar Tenancy Act, are final except where they can be shown to have been passed without jurisdiction. It cannot be said when a Collector on appeal comes to a different conclusion as to whether a tenant was entitled to claim the benefit of cl. (*d*) of S. 112-A of the Act, that he has acted without jurisdiction though his decision may be wrong. (*Sinha and Mukharji, JJ.*) HARBANS PANDEY *v.* SOBHAN SINGH. A.I.R. 1948 Pat. 176.

——**S. 112-B**—*Order of Collector—Interference—Power of Board of Revenue—Jurisdiction of Civil Court.*

Though the order of the Collector in a rent reduction proceeding cannot be interfered with on merits by the Commissioner or the Board of Revenue, the Board of Revenue can vacate it if the order is without jurisdiction, in the exercise of its power of superintendence. Where the order of the Collector upholding an order of the Rent Reduction Officer reducing the rent of certain holdings was vacated by the Board of Revenue which held in substance that the Rent Reduction Officer had no jurisdiction to reduce the rent of *bhaoli* holdings, the order of the Collector having been vacated by a Court of competent jurisdiction, it cannot stand in the way of the Civil Court coming to its own independent conclusion in a title suit on the question whether the holdings were held on a cash rental or on *bhaoli* basis. (*Fazl Ali, C.J. and Pande, J.*) GANAURI MAHTON *v.* LACHOO MAHTON. 12 B.R. 385=223 I.C. 297=1946 Pat. (Rul.) 177.

——**S. 112-B**—Revision—Powers of Board of Revenue and Commissioner—Interference with orders of Subordinate Revenue Officers. [*See* Q.

D. 1941-1945, Vol. I, Col. 499.] Radha Krishnaji *v.* Ramkhelawan Singh. 12 B.R. 110 =1946 Pat. (Rul.) 22.

———S. 113—*Jurisdiction—Successive orders of reduction under S. 112-A (1) (d) on same ground at instance of same tenants—Legality—Jurisdiction of Civil Court to ignore second order.*

Where two successive orders are made under S. 112-A (1) (*d*) of the Bihar Tenancy Act, by the Rent Reduction Officer, reducing the rent of a holding at the instance of the same tenants and on the same grounds, there being only an interval of a few days, between the two orders, the second order must be held to be without jurisdiction and the Civil Court would therefore be acting within jurisdiction in ignoring the second order, in view of S. 113 of the Act. (*Manohar Lall, A.C.J. and Roy, J.*) Mahadeo *v.* Ramranbijoy Prasad. 25 Pat. 593=27 P.L.T. 321=A.I.R. 1947 Pat. 276.

———S. 113—*Scope—Successive applications and reductions of rent within two years—Validity—Jurisdiction of Civil Court to interfere and declare* ultra vires.

In a suit for rent by the landlord against the tenant the latter pleaded reduction of rent under S. 112-A, Bihar Tenancy Act. It appeared that the rent of the occupancy holding in question was reduced under S. 112-A (1) (*d*) of the Bihar Tenancy Act to Rs. 194-8-0, by a Revenue Officer in the year 1938. Subsequently in 1940, the Revenue Officer again reduced the rent to Rs. 116-3-0, on the same ground, and the bar of S. 113 of the Act was not raised before him. It was contended that the second order reducing the rent was *ultra vires* and void.

Held, that S. 113 of the Tenancy Act merely raised a bar upon the Court which might be waived by a party affected; and when the attention of the Revenue Officer was not invited to the existence of the prior order of reduction, the subsequent order cannot be held to be *ultra vires,* and cannot be set aside by the Civil Court in a suit for rent, or treated as a nullity in a collateral proceeding. (*Agarwala, Ag. C.J., Meredith and Ramaswami, JJ.*) Ramranbijaya Prasad Singh *v.* Ramkamal Upadhya. 26 Pat. 748=A.I.R. 1949 Pat. 139=30 P.L.T. 129.

———S. 113—*Scope—Successive applications for reduction of rent—Jurisdiction to entertain—Order of reduction in second application—If void and challengeable.*

S. 113 of the Bihar Tenancy Act does not bar the jurisdiction of a Revenue Officer to entertain a second application for reduction of rent after the dismissal of a prior one. What the section prohibits is the reduction of rent when such rent has already been settled or reduced in a proceeding under Ch. X of the Act. An order reducing rent on such second application, when no question of any bar is raised before the Revenue Officer, is valid and cannot be challenged in collateral proceedings, such as a suit for rent. (*Agarwala, A. C. J. and Imam, J.*) Arbindabandhu *v.* Hargauritewari. 26 Pat. 113=A.I.R. 1948 Pat. 224.

———S. 115—*Scope—Landlord not made party and not served with notice—Effect on proceedings under S. 112-A.*

Where the landlord is not made a party to the rent reduction proceedings under S. 112-A of the Bihar Tenancy Act, and the notices required by the rules framed under Ss. 112-A and 115 are not served on him, the order of the Rent Reduction Officer reducing rent is *ultra vires* and without jurisdiction. (*Varma, J.*) Tetar Mahton *v.* Ram Babu. 227 I.C. 639=13 B.R. 112 1947 Pat. (Rul.) 56.

———S. 148-A—*Suit framed in accordance with—Decree—Appeal by tenant—Co-sharer landlords defendants, not impleaded—Competency of appeal.*

Where a suit framed in accordance with the provisions of S. 148-A of the Bihar Tenancy Act is decreed and a tenant appeals from the decree but fails to implead the other co-sharer landlords impleaded in the suit as defendants as party respondents, the appeal would be incompetent. Their presence could not be ignored on the ground that no relief was sought against them by the plaintiff. The whole object of the particular frame of the suit, enjoined by the provisions of S. 148-A of the Bihar Tenancy Act is that the question as to what is the rent payable and what is the rent due will be considered finally and once for all as between the landlords as a whole and the tenants. (*Ray, J.*) Madan Mohan Prasad *v.* Mst. Baso Kuer. A.I.R. 1948 Pat. 161.

———S. 153, Expl.—Intention of Legislature—Setting aside sale for irregularity—Fraud in conducting sale—Effect of—Appeal—If lies. [*See* Q.D. 1941-1945, Vol. I, Col. 503.] Ajodhya Singh *v.* Kameshwar Singh. 18 R.P. 168.

———S. 158-AA—*Rent decree—Essentials of—Rent suit—All parties interested in tenure not impleaded—Effect—Decree—Nature of.*

It is an undisputed principle that a decree, in order to operate as a rent decree, should be made against all the parties interested in the tenure. All the parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. Where all the parties interested are not so impleaded in the suit, the decree does not operate as a rent decree but only as a money decree and the tenure cannot be sold in execution of such a decree. 12 Pat. 626, rel. on. (*Ramaswami and Narayan, JJ.*) Surendra Nath *v.* Digambar Pathak. A.I.R. 1950 Pat. 391.

———S. 158-AA—*Scope—Application for execution within 45 days—If barred.*

There is nothing in S. 158-AA of the Bihar Tenancy Act which bars a decree-holder from putting in an application for execution of his decree within 45 days from the date of service of notice; nor is there anything in the section which prevents the Court from entertaining an application within the said period of 45 days. It does not prohibit the filing of an execution petition but merely bars the realisation of the decree by attachment and sale of the judgment-debtor's property within the said period of 45 days from the date of service of notice. (*Fazl Ali, C.J. and Pande, J.*) Kameshwar Singh *v.* JAIPARKASH NARAIN. 224 I.C. 411=12 B. R. 535=1946 Pat. (Rul.) 290=(1946) P.W. N. 112=27 P.L.T. 138=A.I.R. 1946 Pat. 403.

———**S. 158-B**—*Scope—Omission to issue notice under—Sale, if nullity or without jurisdiction.*

The omission to issue the notice under S. 158-B (2) of the Bihar Tenancy Act will not render the sale a nullity or without jurisdiction, when a notice has been issued and served under O. 21, R. 22, C. P. Code. It would at least take effect as a sale in execution of a money-decree. (*Meredith and Sinha, JJ.*) LAKSHMINARAYAN LAL *v.* BHUPENDRA PRASAD SHUKUL. (1947) P.W.N. 33=A.I.R. 1948 Pat. 143.

———**S. 158-B (2)**—*Scope—Non-compliance—Effect—C. P. Code, O. 21, R. 22—Applicability.*

Failure to comply with provisions of S. 158-B (2) of the Bihar Tenancy Act is fatal and has the same consequences as the failure to comply with the provisions of O. 21, R. 22, C. P. Code, where that rule is applicable. Since S. 158-B corresponds to O. 21, R. 22, C. P. Code, notice under O. 21, R. 22, is not necessary in a **rent execution case. (*Fazl Ali C.J. and Ray, J.*) KAMESHWAR SINGH *v.* B. JHA. 25 Pat.** 267=229 I.C. 52=13 B.R. 282=A.I.R. 1947 Pat. 33=1947 Pat. (Rul.) 189.

———**S. 158-B (2)**—*Scope—Non-compliance—If renders sale void or voidable.*

Omission or failure to comply with the procedure laid down by S. 158-B (2) of the Bihar Tenancy Act is merely an irregularity and not an illegality which renders the sale void as a sale held without jurisdiction. The irregularity only renders the sale voidable. 6 Pat. 458, ref. (*Shearer, J.*) BUNDI SINGH *v.* JAIPRAKASH SINGH. A.I.R. 1950 Pat. 375.

———**S. 162-A (as amended in 1939)**—*Applicability and scope—Execution started and sale proclamation issued before Amending Act—Sale of portion of plot in holding after Act—Legality.*

S. 162-A of the Bihar Tenancy Act would apply to all sales held after the date of its coming into force. The fact that the sale proclamation in respect of the sale had been issued before the Amending Act came into force would not render S. 162-A inapplicable to the sale which is actually to be held after the coming into force of the Amending Act. Hence a sale of a portion of a plot comprised in a holding after the Act came into force is illegal under the second proviso to S. 162-A. (*Fazl Ali, C.J. and Manohar Lal, J.*) **BHOLA MAHTON *v.* MST. KUER DEI.** 25 Pat. 100=222 I.C. 623=1946 Pat. (Rul.) 116=(1946) P.W.N. 46=12 B.R. 296=A.I.R. 1946 Pat. 284.

———**S. 162-A, last proviso**—*Applicability—Decree for rent executed as money decree—Sale of some plots in whole and some in portion—Entire sale, if void.*

S. 162-A of the Bihar Tenancy Act relates to all applications mention in S. 158-AA, that is to say it covers not only decrees executed as rent decrees but also decrees for rent executed as money decrees, because both these types of execution fall within the purview of S. 158-AA.

The last proviso means that there is no enabling provision authorising the Court to sell a portion of a plot whatever be the type of execution, so long as the decree was obtained in respect of arrears of rent.

Where some plots comprised in a holding were sold in whole and some in portion, the sale in regard to the latter is wholly void while the sale in regard to the former is only voidable. (*Manohar Lall, Meredith and Shearer, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* SUKAR AHIR. 26 Pat. 181=A.I.R. 1947 Pat. 334=1948 P.W.N. 33 (S.B.).

———**S. 162-A, last proviso**—*"Plot"—If means survey plot.*

The "plot" referred to in the last proviso to S. 162-A, Bihar Tenancy Act means the survey plot. The word "plot" and not "survey plot" is used to cover those areas where no survey record of rights has been prepared. (*Manohar Lall, Meredith and Shearer, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* DARSU PANDEY. A.I.R. 1947 Pat. 303 (S.B.).

———**S. 162-A, last proviso**—*Sale of portion of plot—Validity.*

A sale of a portion of a plot comprised in a holding contrary to the provision of the last proviso to S. 162-A, Bihar Tenancy Act is without jurisdiction and therefore, null and void. The proviso is a clear direction of the statute that the Court is not auhorised to sell a portion of the plot and this goes to the jurisdiction of the Court which sells the property. It is inserted as a matter of public policy so as to prevent excessive sub-division of plots, and is not merely for the benefit of the judgment-debtor and therefore, cannot be waived by him, and it is distinguishable from the provisions of S. 163-A which are purely for the benefit of the judgment-debtor and can be waived by him. (*Manohar Lall, Meredith and Shearer, JJ.*) RAM RANBIJAYA PRASAD SINGH *v.* DARSU PANDEY. A.I.R. 1947 Pat. 303 (S. B.).

———**S. 163**—*Sale in execution of rent decree—Valuation—Omission to make in accordance with S. 163 (5)—Effect on sale.*

Where the judgment-debtors who had been served with notice of sale in execution of a rent decree have not raised any objection before a sale it is impossible to treat the omission of the **Court in valuing the property as required by** S. 163 (5) of the Bihar tenancy Act as anything more than an irregularity which might have enabled the Court to set aside the sale if the application had been made within 30 days of the sale and before its confirmation. If the objection on that ground is barred by time the sale cannot be interfered with. (*Manohar Lall and Reuben, JJ.*) BECHUMISSER *v.* KAMESHWAR SINGH BAHADUR. 225 I.C. 408=27 P.L.T. 169=12 B.R. 604=A.I.R. 1947 Pat. 65=1947 P. W.R. 49.

———**S. 163 (2) (b)**—*Scope—Non-compliance with—If renders sale a nullity.*

The failure to observe the provisions of S. 163 (2) (*b*) of the Bihar Tenancy Act does not render the sale a complete nullity. (***Meredith*** *and Sinha, JJ.*) Lakshminarayan Lal *v.* Bhupendra Prasad Shukul. (1947) P.W.N. 33=A.I.R. 1948 Pat. 143.

———S. 163 (5)—*Applicability—Sale of tenure.*

S. 163 (5) of the Bihar Tenancy Act is not applicable to the case of a tenure. It has reference only to the sale of a holding. (*Meredith and Sinha, JJ.*) Lakshminarayan Lal *v.* Bhupendra Prasad Shukul. (1947) P.W.N. 33=A.I.R. 1948 Pat. 143.

———S. 163-A—*Scope and effect of—Sale in contravention—If void or voidable.*

Manohar Lal and Meredith, JJ.—A sale held in violation of the provisions of S. 163-A of the Bihar Tenancy Act is not void, but only voidable.

Shearer, J.—Non-compliance with the provisions of S. 163-A, is not an irregularity in conducting the sale and is therefore not a ground on which the sale can be set aside. (*Manohar Lall, Meredith and Shearer, JJ.*) Baleswar *v.* Ramranvijaya Pd. Singh. 26 Pat. 201=A.I.R. 1947 Pat. 461=1948 P.W.N. 41=29 P.L.T. 55 (S. B.).

———S. 167—*Annulment of encumbrance—Necessity—Sale of holding charged for maintenance in execution of rent decree and purchase by landlord himself.*

If a holding charged for maintenance is sold in execution of a rent decree and the landlord himself purchases it, there is nothing to prevent him from ignoring the charge without formally annulling the encumbrance under S. 167 of the Bihar Tenancy Act. (*Agarwala, Ag. C.J. and Manoharlal, J.*) Prem Kuer *v.* Ram Lagan. A.I.R. 1948 Pat. 199.

———(as amended in 1938), S. 167—Scope and effect of—Landlord purchasing occupancy holding in execution of rent decree—Failure to annul mortgage on holding—If bound by same. *See* Bihar Tenancy Act (as amended in 1938), S. 26-A. 29 P.L.T. 408.

———S. 170—*Scope—Rent decree against recorded tenant in suit by all landlords in respect of entire holding—Execution—Claim by purchaser of part of holding before suit under O. 21, R. 58, C. P. Code—Maintainability.*

Where in execution of a decree for rent of a holding obtained by all the landlords owning the entire holding, against the recorded tenant, a person claiming to be a purchaser of a part of the holding before the rent suit files a claim petition under O. 21, R. 58, C. P. Code, after service of the writ of attachment and sale proclamation, praying for release of the area purchased by him, the claim is not sustainable as S. 170, Bihar Tenancy Act, bars the investigation of such a claim under O. 21, R. 58, C. P. Code. A.I.R. 1946 Pat. 292, dist.; 28 Cal. 382; 11 Pat. 790; 15 Pat. 614; 15 Pat. 812; A.I.R. 1937 Pat. 341, rel. (*Sinha and Rai, JJ.*) Harihar Prasad Trivedi *v.* Prasad Mahton. 5 D.L.R. (Pat.) 164=A.I.R. 1950 Pat. 565.

———S. 170 (1)—*Scope and effect of—Claim under O. 21, R. 58, C. P. Code—When barred—Rent decree-When decree amounts to and when not.*

It is apparent from S. 170 (1) of the Bihar Tenancy Act that Rr. 58 to 63 of O. 21, C. P. Code, are not to apply only to such cases where the execution is of a rent. decree, that is to say, where it is the holding that is sold in execution and not merely the right, title and interest of the judgment-debtor. S. 170 (1) bars a claim under O. 21, R. 58, C.P. Code, in all cases where it is shown that the decree is one for arrears due in respect of a tenure or holding. A clear distinction exists and must be drawn between cases where the claimant attempts to show that the decree is not a rent decree because the suit was against a wrong person and not against the tenant of the holding, and cases where he can show that the decree is not a rent decree at all as the suit had not been properly constituted under the Tenancy Act. (*Meredith and Kay, JJ.*) Maharaj Singh *v.* Rai Ananth Nath Bose. 25 Pat. 199=(1946) P.W.N. 52=13 B.R. 54=A.I.R. 1946 Pat. 292=227 I.C. 413=1947 Pat. (Rul.) 18.

———S. 171—*Co-owner paying entire arrears of road cess—certificate officer wrongly putting him in possession of entire property as statutory mortgagee for the amount—Liability to account to other co-sharer for profits.*

X, a co-owner of a jagir to prevent its being sold for arrears of road cess paid the entire amount and obtained possession of the whole jagir by applying to the certificate officer under S. 171 of Bihar Tenancy Act. Subsequently the other co-owner on the assumption that *X* was a statutory mortgagee sought to redeem the share and have accounts.

Held: The certificate officer had no jurisdiction to make *X* a statutory mortgagee. Treating *X* as having been placed in possession of the entire property so that he might recover with interest what he had paid for road cess, and interest, *X* is liable to account for any profits he has made. (*Shearer, J.*) Kauleswari Prasad Bhaiya *v.* Bihari Lal Missir. 225 I.C. 380=A.I.R. 1947 Pat. 121=12 B.R. 600.

———171-A—*Applicability—Conditions to be satisfied—Tenant's right to deposit arrears and to claim compensation.*

S. 171-A, Bihar Tenancy Act, can only apply if two conditions are satisfied; (1) there must be a contract between the person who makes the deposit and the mortgagees that the mortgagees have to pay the arrears of rent for which the rent decree was obtained; (2) the mortgagor must not be in default, but the default must be of the mortgagees alone. If these two conditions are satisfied, then, and only then, can the tenant mortgagor be allowed to make the deposit in Court and after the deposit be entitled to 50 per cent. of the amount by way of compensation from the mortgagee. (*Manohar Lall and Mahabir Prasad, JJ.*) Net Lal Sah *v.* Ucheshwar Jha. 28 Pat. 344=4 D.L.R. (Pat.) 180=A.I.R. 1949 Pat. 497.

———Ss. 171-A and 174—*Applicability and relative Scope—Sale of holding under rent decree—Tenant depositing decretal amount and five per cent.—Sale set aside—Tenant's claim to posses-*

sion by eviction of zarpeshgidar *in possession of part of holding—Maintainability.*

S. 171-A of the Bihar Tenancy Act is narrower in its application than S. 174. It applies to cases where the deposit is made before the sale, and under that section it is necessary to deposit only the decretal amount. S. 174 on the other hand is intended to cover cases when the deposit is made after the sale, and under this section, over and above the decretal amount, it is necessary to deposit a sum equal to five per cent of the purchase money also. Where the deposit is made after the sale and includes not only the decretal amount but also 5 per cent. of the purchase money, S. 171-A cannot be applied. The case is covered by S. 174 and the tenant is not entitled to be put in possession by evicting a *zarpeshgidar* (mortgagee) in possession of a portion of the holding. **(*Fazl Ali, C.J. and Pande, J.*)** KHEALIRAI *v.* RAMPHAL. 25 Pat. 82=226 I.C. 463=12 B.R. 761=1946 Pat. (Rul.) 389=A.I.R. 1946 Pat. 372 =27 P.L.T. 376.

———**S. 173 (3)**—*"Interested in the sale"—Meaning of.*

Persons claiming to be owners of a portion of a shikmi holding are "interested in the sale' within the meaning of S. 173 (3) of the Bihar Tenancy Act. The words "interested in the sale" are much wider than the words "affected by the sale." (*Manohar Lall, A.C.J and Das, J.*) RADHABALLABH *v.* RAMRANBIJAY PRASAD SINGH. 25 Pat. 692=A I.R. 1947 Pat. 391

———**S. 173 (3)**—Limitation—Application to set aside sale—Period of limitation. *See* LIM. ACT, ART. 181. 25 Pat. 692.

———**S. 174**—*Scope—Compliance—Mere deposit—Sufficiency—Application—Form and contents of—Express prayer to set aside sale—Necessity.*

Under S. 174, Bihar Tenancy Act, the Courts must insist that an application to set aside the sale must accompany the deposit, and a mere deposit without an application would not entitle the Court to set aside a sale. The application need not be in any particular form and need not also contain a prayer in express words to set aside the sale. Where a petition filed with the deposit prays that justice may be done on the deposit being made, it amounts to a prayer to set aside the sale. The petition as a whole has to be considered. A.I.R. 1923 Pat. 159, expl; 43 C.W.N. 252; A.I.R. 1933 Lah. 210; 1917 Mad. 225; 1 P.L.J. 459; A.I.R. 1940 Pat. 87, rel. on. (*Imam and Das, JJ.*) PERMANAND *v.* SATNARAIN. 27 Pat. 435.

———**(as amended in 1937), Ss. 178-A and 178-B**—*Construction—"Produce of the holding"—Meaning—Landlord's right to price of* newari *and* bhusa.

The expression "the produce of the holding of the raiyat" in Ss. 178-A and 178-B must mean the actual produce removed from the land before the agricultural operations are completed in order to separate the *newari* and the *bhusa* from the grains. In a suit for recovery of *bhaoli* rent, a landlord is therefore entitled to claim the price of *newari* and *bhusa* apart from the price of paddy and other crops, after making an allowance for the expenses incurred in husking and thrashing. (*Manohar Lall and Imam, JJ.*) PARASNATH *v.* FAUJDAR. 25 Pat. 375=27 P.L.T. 202=13 B.R. 313=229 I.C. 372=A.I.R. 1947 Pat. 63=1947 Pat. (Rul.) 216.

———**S. 180**—Scope and effect of—Acquisition of occupancy right by tenant—If estinguished on transfer by him—Transferee's rights to claim occupancy. [*See* Q.D. 1941-1945, Vol. I, Col. 510.] MAHABIR *v.* JADUNANDAN. 27 P.L.T. 60.

———**S. 182**—Scope—If governs and controls S. 26-A. *See* Bihar Tenancy Act, S. 26-A. MAHADEOASHRAM PRASAD SAHI *v.* PARIKHA CHAUDHRI. 230 I.C. 304.

———**S. 188**—*Applicability—Suit by Co-sharer landlord to have fair and equitable rent assessed—Other co-sharers if to be joint plaintiffs.*

S. 188, Bihar Tenancy Act, does not apply to a suit by a co-sharer landlord to have fair and equitable rent assessed; it is therefore unnecessary to join the other co-sharer landlords as co-plaintiffs in such suit; it is enough if they are made party defendants. 54 C.L.J. 41, rel. on. (*Reuben and Jamuar, JJ.*) AWADH BIHARI SINGH. *v.* JADU RAI. A.I.R. 1950 Pat. 377.

———**S. 188**—*Scope—Joint landlords—Reduction of rent by some—Permissibility.*

S. 188, Bihar Tenancy Act, is not a bar to the alteration of rent by one or some of the joint landlords. If some of the landlords agree to receive rent at a reduced jama, that cannot be regarded as an act which the landlord is required or authorised to do under the Act, and consequently the section is no bar to some of the landlords reducing the rent in respect of their share, or condescending to receive rent for their share at a reduced jama. 38 C. 270, applied. (*Reuben and Narayan, JJ.*) TARAK NATH DUBEY *v.* RAGHUNANDAN PANDEY. A.I.R. 1950 Pat. 22.

———**S. 188**—*Scope—Tenant holding under two co-sharer landlords and paying rent to one—Liability to assessment of rent in respect of share or interest of other.*

A tenant holding under two co-sharer landlords and paying rent to one in respect of the latter's interest may be assessed to rent in respect of the interest of the other; it is well-settled that where a tenant holds under different sets of co-sharer landlords, each set can enter into a separate agreement with him as regards the rent payable to that set so far as the share of that set is concerned. The co-sharer landlords would still be joint landlords within the meaning of S. 188, Bihar Tenancy Act, though that section would be no obstacle in the way of a suit by one co-sharer landlord for fair rent, since a suit for assessment of rent is not governed by S. 188. 38 I.A. 1; 25 Cal. 917, (*n*); 32 C. W.N. 1238; 54 C.L.J. 74; 4 Pat. 604, rel. on. (*Reuben and Jamuar, JJ.*) AWADH BIHARI SINGH *v.* JADU. A.I.R. 1950 Pat. 377.

———**S. 189**—Rule making power—Extent—Rule conferring revisional powers on Board of Revenue —Validity. [*See* Q.D. 1941-1945, Vol. I, Col. 510.] RADHA KRISHNAJI *v.* RAMKHELAWAN SINGH. 12 B.R. 110=1946 Pat. (Rul.) 22.

———Sch. III—Applicability—Suit for *mokarrari* rent—Lease in perpetuity on fixed rent—Lessor parting with all rights in property to lessee—Limitation. *See* T. P. ACT, S. 108. 26 Pat. 321.

———Sch. III, Art. 2—*Applicability*—Mokuraridar *having right to collect rent from occupancy raiyats and to cultivate land in village—If tenure-holder—Suit for arrears of rent—Limitation.*

A *mukararidar* under a registered kabuliat entitling him to collect rent from the occupancy raiyats of a village and to cultivate the land in that village himself is a tenure holder and hence a suit, for recovery of arrears of *mokarari* rent from him is governed by the period of limitation prescribed in Sch. III to the Bihar Tenancy Act and not by Limitation Act, Art. 116. Sch. III of the Bihar Tenancy Act excludes the application of the Articles of the Limitation Act. (*Shearer and Reuben, JJ.*) MT. SAFIA *v.* YUSUF MD. MUZAFFAR. 26 Pat. 269=A.I.R. 1948. Pat. 328.

———Sch. III Art. 3—*Applicability—Dispossession by landlord"—Dispossession by person taking settlement from landlord and acting in collusion or concert with him—Effect of.*

It is well-settled that if a landlord, acting in collusion and conspiracy with a third person purports to grant a settlement to that person of lands in the possession of a tenant, and if the tenant is dispossessed by that third person in pursuance of the settlement, in concert or collusion with the landlord, then such dispossession may be regarded as dispossession by the landlord so as to attract the application of the provisions of Art. 3, Sch. III, to the Bihar Tenancy Act. (*Fazl Ali, C.J. and Reuben, J.*) JANAK SINGH *v.* ADYA SINGH. 13 B.R. 95=227 I.C. 575=1947 Pat. (Rul.) 39 =A.I.R. 1947 Pat. 261.

———Sch. III, Art. 3—*Applicability—Dispossession by "landlord"—Essentials—Landlord as auction-purchaser ejecting tenant—Suit by tenant—Article, if applies—Rival claimants to raiyat interest under same landlord—Limitation.*

The applicability of Art. 3 of Sch. III to the Bihar Tenancy Act is limited to suits in which the plaintiff claims to recover possession as a raiyat against the defendant who is his landlord or is one who resists his claim on the ground that the claimant is not his raiyat. The Article cannot apply to a case where the landlord defendant resists the plaintiff's claim to possession as a raiyat as an auction-purchaser of the holding, *i.e.*, when the tenant has been dispossessed by the landlord as auction-purchaser of the holding.

Where both the plaintiff and the tenant claim as raiyats under the same landlord, the special rule of limitation contained in Art. 3 of Sch. III cannot apply.

Manohar Lall, A.C.J.—Where the defendant alleges dispossession, the Court of fact must decide whether the landlord has a direct hand in the dispossession and not remotely. The doctrine of constructive dispossession by the landlord must not be pushed too far. (*Manohar Lall, A.C.J. and Ray, J.*) KAPIL SINGH *v.* FEDA ALI. 25 Pat. 695=A.I.R. 1947 Pat. 392.

———Sch. III, Art. 3—*Applicability—Suit by mortgagee of raiyat.*

Art. 3 of Sch. III, Bihar Tenancy Act, applies to a suit by a raiyat to recover possession of the land as against his landlord. It is wholly inapplicable to a suit for possession by a mortgagee of a raiyat, who was dispossessed as a result of the delivery of possession given through Court to the auction-purchaser at a sale held in execution of a decree for rent against the raiyat. To such a suit, the general rule of limitation laid down in the Limitation Act applies. (*Sinha and Mahabir Prasad, JJ.*) KASHI PRASAD SINGH *v.* RAM PRASAD SINGH. 3 D.L.R. (Pat.) 56=A.I.R. 1948 Pat. 390.

———Art. 6—Applicability—Rent decree—Provision for payment in instalments—Execution—Limitation—Limitation Act, Art, 182 (7). [*See* Q.D. 1941-1945, Vol I, Col. 513.] KEDAR NATH *v.* PARSIDH SINGH. 27 P.L.T. 107=227 I.C. 605 =1947 Pat. (Rul.) 43=13 B.R. 98.

BIHAR (AND ORISSA) VILLAGE ADMINISTRATION ACT (III OF 1923), S. 27—Applicability and construction—Power of chaukidar to arrest. [*See* Q.D. 1941-1945, Vol. I, Col. 513.] HIRDAY *v.* EMPEROR. 227 I.C. 404=1947 Pat. (Rul.) 11=48 Cr.L.J. 99=A.I.R. 1946 Pat. 40=13 B.R. 47.

———S. 78—Order of District Judge—Revision. *See* C. P. CODE, S. 115—SUBORDINATE COURT. A.I.R. 1949 Pat. 333.

BIHAR VILLAGE COLLECTIVE RESPONSIBILITY ACT (VI OF 1943), S. 7—Applicability—Failure to perform protective duty as required by village headman—Headman not authorised by District Magistrate—Effect—Offence—S. 5, if controlled by S. 7. [*See* Q.D. 1941-1945, Vol. I, Col. 514.] JANGLI MIAN *v.* EMPEROR. 12 B.R. 463=224 I.C. 88=47 Cr. L.J. 553=1946 Pat. (Rul.) 272=A.I.R. 1946 Pat. 79.

BIKANER PREVENTION OF EVICTION ORDER (1942) (as amended in 1947), Ss. 4 and 8—*House—If includes shop.*

The word "house" in the Notification of 1947 amending the Bikaner Prevention of Eviction Order, 1942, does not include shops, but refers only to residential houses. (*Bapna and Datta, JJ.*) MANACKCHAND *v.* BANSIDHAR.

JJ.) MANACKCHAND *v.* BANSIDHAR. 1950 R.L. W. 77=A.I.R. 1950 Raj. 29=51 Cr.L.J. 1321.

BOMBAY ACTS, ETC.

Abkari Act (V of 1878).
Abkari (Amendment) Act (VI of 1940).
Agricultural Debtors Relief Act (XXVIII of 1947).
Children Act (XIII of 1924).
City Civil Court Act (XL of 1948).
City Land Revenue Act (II of 1876).
City Municipal Act (III of 1888).
City Police Act (IV of 1902).
Civil Courts Act (XIV of 1869).
Civil Manual (1940).
Civil Service Conduct Discipline and Appeal Rules.

Co-operative Societies Act (VII of 1925).
Cotton Contracts Act (XII of 1932).
Court of Wards Act (I of 1905).
Criminal Procedure Code Amendment Act (XXX of 1946).
District Municipal Act (III of 1901).
District Police Act (IV of 1890).
General Clauses Act (I of 1904).
Harijan (Removal of Social Disabilities Act) (X of 1947).
Hereditary Offices Act (III of 1874).
High Court Letters Patent Amendment Act (XLI of 1948).
High Court Rules (A.S.).
High Court Rules (O.S.).
House Rent Restriction Order (1942).
Increase of Court-Fees Act (XV of 1943).
Industrial Disputes Act (XXV of 1938).
Industrial Relations Act (1947).
Khoti Settlement Act (I of 1880).
Land Requisition Act (XXXIII of 1948).
Land Requisition Ordinance (V of 1947).
Land Revenue Code (V of 1879).
Letters Patent. *See* LETTERS PATENT (BOM.).
Local Boards Act (VI of 1923).
Local Fund Audit Act (XXV of 1930).
Mamlatdars Courts Act (II of 1906).
Medical Practitioners Act (XXVI of 1938).
Money-Lenders Act (XXXI of 1947).
Municipal Boroughs Act (XVIII of 1925).
Pleaders Act (XVII of 1920).
Prevention of Gambling Act (IV of 1887).
Prevention of Hindu Bigamous Marriages Act (XXV of 1946).
Primary Education Act (IV of 1923).
Prize Competition Tax Act (XI of 1939).
Prohibition Act (XXV of 1949).
Public Security Measures Act (VI of 1947).
Public Trusts Registration Act (XXV of 1935).
Rationing Order (1943).
Rents, Hotels Rents and Lodging House Rates (Control) Act (VII of 1944).
Rents, Hotel Rents and Lodging House Rates (Control) Act (XLVII of 1947).
Rent Restriction Act (XVI of 1939).
Retail Trade Control and Licensing Order (1942).
Revenue Jurisdiction Act (X of 1876).
Smoke Nuisance Act (VII of 1912).
Summary Settlement Act (II of 1863).
Tenancy Act (XXIX of 1939).
Toda Giras Allowance Act (VII of 1887).
Watan Act (V of 1886).
Weights and Measures Act (XV of 1932).

BOMBAY ABKARI ACT (V OF 1878), as amended by the Bombay Abkari Amendment Act (XXIX of 1947), S. 14-B and Government of India Act (1935), S. 100 and List II, Entry 31—*Provincial Legislation in respect of possession of foreign liquor restricting or prohibiting their possession—Legality.*

On a contention that the Provincial Legislature had no power under the Government of India Act, 1935, to legislate with respect to the possession of foreign liquors and that S. 14-B of the Bombay Abkari Act, as amended by the Bombay Abkari (Amendment) Act of 1947, in so far as it purported to restrict or prohibit the possession of such liquors was void and inoperative:

Held: The legislative power given to the Provinces under Item 31 of List II of the Government of India Act, 1935, is expressed in wide and unqualified terms which in their natural and ordinary sense are apt to cover such an enactment as S. 14-B in its amended form and there is nothing in the Federal List and more particularly in Item 19, to lead the Court to cut down the full meaning of the Provincial Entry by excluding foreign liquors from its purview. There is no irreconcilable conflict here such as would necessitate recourse to the principle of Federal Supremacy laid down in S. 100 of the Government of India Act, 1935. S. 14-B does not purport to restrict or prohibit dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with *possession* of intoxicating liquors which, in the absence of limiting words, must include foreign liquors. It is far-fetched to suggest that, in so far as the provision covers foreign liquors, it is legislation with respect to import of liquors into British India by sea or land. Further, if an enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) MISS KISHORI SHETTY *v.* THE KING. 1950 M.W.N. 299=1950 R.L.W. 46=A. I. R. 1950 F.C. 69=5 D.L.R. (F.C.) 50=51 Cr.L.J. 1018=4 A.I.Cr.D. 278=52 Bom.L.R. 591=1950 S.C.J. 44 (F.C.).

———S. 14-B—Scope—If controlled or overridden by the Hoarding and Profiteering Prevention Ordinance—Possession of foreign liquor to unlimited extent—Offence. *See* HOARDING AND PROFITEERING PREVENTION ORDINANCE, S. 17. 50 Bom.L.R. 181.

———S. 43—*Basis of conviction—Police evidence—Value of without corroboration—Search and seizure made without panchas—Effect of—Principles—Duty of Court.*

Where the law makes it obligatory for a search to take place in the presence of panchas and a search has not taken place in the presence of panchas and the only evidence on which the prosecution ask for a conviction is police evidence, then the Court certainly should not ordinarily act on that evidence. There is a second class of cases where it is impossible to seize an article or arrest a person in presence of panchas. The police may suddenly come across incriminatory articles and offenders and they may have to seize the articles or to arrest the persons concerned. It is impossible in these cases to contend that the police should not do their duty till they found some panchas in whose presence they should seize the articles or arrest the suspected persons. In cases like these it would be open to the trial Court to accept the police evidence and convict the accused if the Court was satisfied that the evidence was satisfactory and the guilt of the accused was proved. There may be a third class of cases in which although the law does not make it obligatory for a search to take place in presence of panchas, still in view of the information already received there is sufficient time for panchas to be called and a seizure to be made in presence of panchas. It would be advisable on the part of the police in such cases to raid a place or seize incriminating articles accompanied by panchas. The police should as far as possible avoid any suggestion being made that they have not taken all the precautions which are necessary in order to safeguard the liberty of the subject. If in such cases the police do not avail themselves of panchas, the result would be that the police evidence must necessarily be discarded and no conviction can be based on that evidence. But the Court must very carefully scrutinise the police evidence which would be the only evidence before it on which a conviction could be based. If after careful scrutiny the Court is satisfied that the evidence is such as can be safely acted upon, it would certainly be open to the Court to act on that evidence.

The law does not require any corroboration of police evidence; and it is not the law that even in cases where a search in the presence of panchas is not obligatory the Court cannot act on the evidence of police officers. (*Chagla, C.J. and Gajendragadkar, J.*) EMPEROR *v.* SHANWAR MANU. 52 Bom.L.R. 38=A.I.R. 1950 Bom. 267=51 Cr.L.J. 1297.

———S. 43—*Basis of conviction—Police officer's evidence—Sufficiency—Search—Absence of panchnama—Effect—Procedure.*

Where the law requires that a search should be made in the presence of the panchas, a panchnama should usually be insisted upon and a conviction should not ordinarily be based on the uncorroborated testimony of police officers. Where it is not possible to make a search in the presence of the panchas or where property is found without a search being made or where under the law it is not obligatory to make a panchnama it would be open to the Court to convict the accused on the evidence of police officers alone, if, after examining that evidence carefully the Court feels satisfied that it is true. 43 Bom.L.R. 163; 52 Bom. L.R. 38; 20 Cr.L.J. 742, ref. (*Rajadhyaksha and Chainani, JJ.*) EMPEROR *v.* KISAN NARAYAN. 52 Bom.L.R. 280.

———**Ss. 43 (1) and 45-A**—*Scope and applicability.*

S. 43 (1) of the Bombay Abkari Act is the penal section which provides penalties for contravention of the Act or of any rule or order made under the Act or of any licence, permit, or pass obtained under the Act, with regard to the various matters contained in the section. S. 45-A is only a residuary section and provides penalties which are not otherwise provided for. If a case therefore falls under S. 43, it is unnecessary to look at S. 45-A, because S. 45-A, cannot apply when the case falls under S. 43. (*Chagla, C.J. and Gajendragadkar, J.*) EMPEROR *v.* KISHORI SHETTY. 52 Bom.L.R. 29=5 D.L.R. (Bom.) 39=4 A. I.Cr.D. 90=A.I.R. 1950 Bom. 221=51 Cr. L.J. 1207.

———**(as amended in 1947), S. 43 (1)**—*Construction and scope—Discretion of Court—Imprisonment and fine—Duty of Court to impose.*

The imprisonment of six months and the fine of Rs. 1,000, provided in S. 43 (1) of the Bombay Abkari Act, as amended, are not cumulative sentences, but are to be inflicted according to the discretion of the Court. It is not obligatory upon the Court to inflict both the sentence of imprisonment and the sentence of fine. It is left to the discretion of the Court to inflict imprisonment, or fine, or both. (*Chagla, C.J., Bavdekar and Gajendra Gadkar, JJ.*) EMPEROR *v.* PETER D'SOUZA. 50 Bom.L.R. 574=A.I.R. 1949 Bom. 41=50 Cr.L.J. 137 (F.B.).

———S. 45 (c)—*Applicability—Licence of liquor shop having licence to sell liquor for consumption at premises—Servant of licensee placing unopened bottles on counter for purchaser at orders of master—Offence.*

Where the servant of a person who holds a licence to sell foreign liquor to be drunk on the premises, hands over to, or places on the counter to be taken by a purchaser bottles of liquor unopened, on being asked to do so by his master, it must be presumed that the servant knew that the unopened bottles placed on the counter were to be taken away, and he will therefore be liable to conviction under S. 45 (*c*) of the Bombay Abkari Act, of the offence of abetting a breach of the licence. (*Constantine, J.*) REWACHAND BAGOMAL *v.* EMPEROR. 229 I.C. 289=1947 Sind (Rul.) 59=48 Cr.L.J. 364.

BOMBAY ABKARI (AMENDMENT) ACT (VI OF 1940)—*Scope—Repeal of Proviso to S. 14-B, Bombay Abkari Act* (1878)—*If* ultra vires—*Government of India Act* (1935), *Sch. VII, List I, Item* 19 *and List II, Item* 31—*Power of Provincial Legislature.*

A consideration of the Bombay Abkari Act, as it was before its amendment by Bombay Act VI of 1940, makes it perfectly clear that the Provincial Legislature always had the power to control, restrict, and even prohibit possession, in certain cases, of foreign liquor, and sub-S. (2) of S. 14-B of that Act makes it perfectly clear that the Provincial Government by a notification could always prohibit the possession of foreign liquor *quae* a person or a class of persons. It could not therefore be said that before the proviso to S. 14-B (1) was repealed by Bombay Act VI of 1940, the Provincial Government had no power to prohibit or control or restrict the possession of foreign liquor. The proviso to sub-S. (1) of S. 14-B cannot be read as a proviso to the whole section including sub-S. (2). The proviso specifically mentions that it is a, proviso to sub-S. (1) only of S. 14-B.

The repeal of the Proviso to S. 14-B (1) of the Act by Act VI of 1940, cannot be held to be *ultra vires*, to the extent that it affected a private consumer of foreign liquor. The legislative practice does not suggest that even incidentally or as an ancillary matter it is not competent to the Provincial Legislature to trespass upon Item 19 in List I of the 7th schedule to the Constitution Act of 1935. Item 31 in List II of that schedule gives power to the Provincial Legislature to legislate with regard to intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs, but subject, as respects opium, to the provisions of List I and, as respects poisons and dangerous drugs, to the provisions of List III. No distinction is made in this item between foreign liquor and country liquor. The right to deal with possession would include the right to prohibit possession, and cannot be restricted to merely regulate or control possession. The powers given to the Legislature are clear and explicit. In repealing S. 14-B (1), proviso, of the Abkari Act, the Provincial Legislature was only legislating with regard to a subject which clearly fell under Item 31 in List II and in substance the subject-matter dealt with falls under Item 31 of List II. The mere fact that in so legislating with regard to the subject in List II, a mere ancillary or incidental effect of that legislation is to affect a matter which falls in List I (Item 19, Import and export across customs, frontiers, etc.) by itself is not sufficient to lead the Court to hold that the impugned legislation is *ultra vires* the Provincial Legislature.

Quaere: Whether the Provincial Legislature is competent to prohibit possession on the part of a common carrier or warehouseman or restrict or regulate that possession, and whether the Provincial legislature was competent to repeal the first part of the Proviso to S. 16-B (1), dealing with common carriers or warehousemen. 42 Bom. L.R. 791 (S.B.), comm. and not foll. 74 I.A. 23, rel. on. *(Chagla, C.J. and Gajendragadkar, J.)* Emperor *v.* Kishore Shetty. 52 Bom.L.R. 29=5 D.L.R. (Bom.) 39=4 A.I.Cr.D. 90=A.I.R. 1950 Bom. 221=51 Cr.L.J. 1207.

BOMBAY AGRICULTURAL DEBTORS RELIEF ACT (XXVIII OF 1947), S. 1 (2)—*"City of Bombay"—Meaning of—If refers to Courts in City of Bombay or to resident in City of Bombay.*

The only proper interpretation of the expression "City of Bombay" in S. 1 (2) of the Bombay Act XXVIII of 1947 is not to apply it to the Courts in the City of Bombay but to the people residing in the City of Bombay. This exception only means that if there is an agriculturist ordinarily resident in the City of Bombay, then he would not be entitled to the benefits and privileges of the Act. It certainly does not mean that although an agriculturist may ordinarily reside in a part of the Province to which the Act applies, he would still not be entitled to the benefits and privileges of this Act merely because his creditor chooses to file a suit against him on the Original Side of the Bombay High Court.

The High Court has undoubted jurisdiction to entertain a suit against a debtor ordinarily resident in the moffasal, but it cannot decide the preliminary issues under S. 1. For that purpose the suit has to be transferred to the Special Court under the Act. If the defendant fails to satisfy that Court that he is a debtor within the meaning of the Act, the suit will go back to the High Court. But if he succeeds in establishing that he is a debtor under the Act, then the further proceedings will have to be taken in that Court as laid down in the Act. *(Chagla, C.J. and Bhagwati, J.)* Nagarmal Surajmal *v.* Gotulal Laxminarayan. 51 Bom.L.R. 525=A.I.R. 1949 Bom. 348.

———**Ss. 1 (2) and 19**—*Scope—"Civil or Revenue Courts"—Original side of High Court.*

The words of S. 19 of Bombay Act XXVIII of 1947, are wide enough and general enough to apply to the High Court on its original side as well as to the other Civil and Revenue Courts in the Province. S. 19 (1) expressly ousts the jurisdiction of the High Court to try those matters which involve the questions mentioned in the sub-section. The words "Civil or Revenue Courts" are wide enough to cover the High Court which would have jurisdiction by virtue of Cl. 12, Letters Patent. 51 Bom. L. R. 485, diss. *(Chagla, C.J. and Bhagwati, J.)* Nagarmal Surajmal *v.* Gotulal Laxminarayan. 51 Bom. L.R. 525=A.I.R. 1949 Bom. 348.

———**S. 2 (5) (a) and (b)**—*Applicability and construction—"Debtor"—Conditions in cl.* (iv) *of sub-Ss.* (a) *and* (b)*—If disjunctive or conjunctive—"Or" and "and"—In S.* 2 (5) (a) (iv) *and S.* 2 (5) (b) (iv)*—Interpretation and effect of.*

It is obvious that both under cl. (*a*) and cl. (*b*) of S. 2 (5) of the Bom. Agri. Debtors' Relief Act, the person claiming the status of a debtor (whether it be an individual debtor or an undivided Hindu family) must satisfy both the requirements, *viz.*, that the non-agricultural income must not exceed quantitatively and fractionally the specified maxima. The same sense could be brought about by using "and" in the place of "or" in S. 2 (5) (*a*) (iv) and by omitting the expression "whichever is greater". In any case the mere fact that "or" has been used in cl. (iv) of sub-S. (*a*) in the definition of an individual debtor cannot be a ground for ignoring the plain words of the statute which require that both the conditions provided under cl. (iv) of sub-S. (*a*) should be fulfilled or satisfied. The conjunction "and" in cl. (iv) of sub-S. (*b*) cannot in its context be understood to mean "or"; under S. 2 (5) (*a*) (iv), the Court must find out the income of the applicant from sources other than agriculture and manual labour (*i.e.*, the non-agricultural income) and also find out the aggregate of the income from all sources. If the aggregate income from non-agricultural sources exceeds Rs. 500, the applicant cannot claim the status of a debtor. He cannot also claim that status if the non-agricultural income exceeds a 33|100 fraction of the agricultural income. If the non-agricultural income does not exceed 33|100 fraction, but still exceeds Rs. 500, the applicant cannot claim the status of a debtor. Under S. 2 (5) (*b*) (iv), the Legislature has provided that an undivided family claiming the status of a debtor must, among other things, establish that the non-agricultural income of the family does not exceed forty per cent. of the total income of the family and the total non-agricultural income does not exceed Rs. 1,500. Both the conditions regarding the maximum limit and the percentage of the non-agricultural income must be satisfied before Hindu family can claim the status of a debtor within the meaning of the Act. Where the non-agricultural income of the family exceeds 40 per cent. of the total income of the family, one of the essential conditions of the right to claim the status of a "debtor" within the meaning of the Act is not satisfied and hence the application must fail. (*Shah, J.*) Anant Dharma *v.* Mangaldas Rupchand. 5 D.L.R. (Bom.) 181=52 Bom.L.R. 678.

———**S. 2 (6) (a) (iv)**—"Income"—Meaning of—Net income or gross income. [*See* Q.D. 1941-1945, Vol. I, Col. 518.] Kekhushru Edulji *v.* Jinabhai. I.L.R. (1945) Bom. 676.

———**Ss. 4 (1) and 19 (1)**—*Applicability and construction—Suit filed after date fixed for filing applications under S. 4 (1)—Application for transfer of suit to Debt Adjustment Board—Competency—Transfer—Legality.*

The Debt Adjustment Board was established in the District of Ahmedabad (where the suit originated) on 2—1—1947, and the last date for filing applications for adjustment of debts was accordingly 31—7—1947. On 3—9—1947, a debtor filed a suit for redemption against his creditor alleging that a deed of sale passed by him in favour of the defendant was really in the nature of a mortgage, and on 8—4—1948, he applied to the Court to transfer the suit to the Debt Adjustment Board on the ground that he was an agriculturist and had evidence to prove his status as such and that he should be held an agriculturist. It was never alleged that the plaintiff was a debtor. The defendant opposed the application on the ground that the suit having been filed after the expiry of the period for filing applications before the Board, the application for transfer did not lie and that the suit should not therefore be transferred. The Court overruled the plea and made an order for transfer.

Held, that under S. 19 (1) of the Act only such suits and proceedings could be transferred which were pending at the date when an application under S. 4 could be made to the Special Court set up under the Act. Merely because a suit is filed after the expiry of that period, the pendency of such suit would not give the debtor a better or higher right than would have been available to him if no such suit had been filed. Hence the order transferring the suit to the Board was erroneous and must be set aside. 51 Bom.L.R. 781, dist.; 51 Bom.L.R. 461, foll. (*Rajadhyaksha and Chainani, JJ.*) Bhogilal Fulchand *v.* Chhanaji Bakerji. 52 Bom.L.R. 408=A.I.R. 1950 Bom. 329.

———**Ss. 4 and 19**—*Relative scope—S. 4 if controls S. 19—Suit for declaration and accounts under Dekkhan Agriculturists Relief Act not transferable at time to Debt Adjustment Board under Agricultural Debtors Relief Act, 1939—If transferable to "Court" under S. 19 of Act of* 1947.

S. 19 of the Bombay Agricultural Debtors Act, 1947, is not controlled by S. 4 of the Act. S. 4 only deals with the applications that can be made directly to the Court, and its scope is limited, applying as it does to a limited class of debtors and creditors. S. 19 widens the scope of the proceedings under S. 4. There is no warrant for holding that the proceedings to be transferred under S. 19 (1) must satisfy the requirements of S. 4. To so hold would be to misread the two sections.

A suit filed in 1945 under the Dekkhan Agriculturists Relief Act, 1939, for a declaration that a transaction, dated 28th August, 1915, purporting to be a sale was in fact a mortgage, and for accounts, can therefore be transferred to the "Court" under the Bombay Agricultural Debtors Act, 1947, though no application to the Debt Adjustment Board could have been made at that time under the Agricultural Debtors Act, 1939, which was repealed by the Act of 1947. (*Jahagirdar, J.*) Chima Savalaram Lande *v.* Babulal Ravchand. I.L.R. (1948) Bom. 417=A.I.R. 1949 Bom. 33=50 Bom.L.R. 449=3 D.L.R. (Bom.) 43.

———**S. 9 (1)**—*Applicability—Award under S. 54—What is—Application by debtor—Sale deed in favour of one creditor held to be sale and not mortgage—Adjustment Board settling debts of other creditors and holding nothing was due to vendee-creditor—Appeal purporting to be against decision holding deed to be sale but accompanied by copy of award of Board—Competency.*

A debtor who had executed a sale deed in favour of one of his creditors applied for settlement of his debts including debts due to other creditors also. The Debt Adjustment Board first decided the preliminary issues under S. 35 in favour of the debtor, holding at the same time that the deed executed by him in favour of one of his creditors was an out-and-out sale and not a mortgage under S. 45. This was followed up later by an award comprising not only the debts of the vendee-creditor but also the debts of all the creditors and also holding that nothing was due to the vendee-creditor as the transaction was held to be an out-and-out sale. The debtor preferred an appeal which purported to be against the decision of the Board holding the transaction to be a sale but the memorandum of appeal was accompanied by the award of the Board.

Held: that the appeal in substance was an appeal against the award under S. 54 in which nothing was shown to be due to the vendee-creditor and not against the earlier decision under S. 45, holding the transaction to be a sale. (*Rajadhyaksha, J.*) Badevva Immamsab *v.* Hiriyenna. 49 Bom.L.R. 158=A.I.R. 1947 Bom. 389.

———**S. 17**—*Jurisdiction—Issue as to binding character of sale on debtor—Jurisdiction of Court under Act to decide.*

The Court established and acting under the Bombay Agricultural Debtors Act has no jurisdiction to decide a question as to whether a particular sale is binding on the debtor or not. The determination of such an issue is outside the scope of the Act. [26 Bom. 241; 30 Bom.L.R. 1099; 33 Bom.L.R. 603, ref.] (*Jahagirdar, J.*) Bharmagowda Bhimagowda *v.* Irappa Satyappa. I.L.R. (1949) Bom. 75=50 Bom.L.R. 708=A.I.R. 1949 Bom. 108.

———**S. 19**—*Applicability—Courts in City of Bombay—If bound to transfer suits to "Court" under S. 2 (3).*

The provisions of Bombay Act XXVIII of 1947, do not apply to the City of Bombay and therefore Courts in the City of Bombay are not bound to transfer suits against agriculturist debtors to the "Court" as defined in S. 2 (3) of the Act. (*Desai, J.*) Juharimal Senaji *v.* Liladhar Madhavji. 51 Bom.L.R. 485=A.I.R. 1949 Bom. 304.

———**S. 19**—*Applicability—One of several defendants (debtors) alone pleading privilege—Sufficiency—Duty of Court to transfer case to Special Court.*

Under S. 19 (1) of Bombay Act XXVIII of 1947, the Court is bound to transfer a suit to the Special Court even in a case where the question involved is whether one of two or more defendants in the suit is a debtor under the Act and whether the total amount of his debts did not exceed Rs. 15,000. The fact that the other defendants have not pleaded the privilege is immaterial. 48 Bom.L.R. 613, foll. (*Rajadhyaksha and Chainani, JJ.*) Champaklal Chhabilrai *v.* Commonwealth Assurance Co., Ltd. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L.R. 781.

———**S. 19 (1)**—*Applicability—Suits, etc., transferable to special Court.*

Under S. 19 (1) of the Bombay Act (XXVIII of 1947), the suits, etc., which can be transferred to the special Courts set up under the Act are only such suits, appeals, applications for execution and proceedings as were pending at the date when an application under S. 4 could be made to the special Court set up under the Act. (*Chagla, C.J. and Bavdekar, J.*) Somabhai Shanabai *v.* Narandas Laverdas. I.L.R. (1949) Bom. 229=51 Bom.L.R. 461=A.I.R. 1949 Bom. 308.

———**S. 19 (1)**—*Applicability—Transfer of case pending in Civil or Revenue Court to Special Court—Right of debtor to apply—If conditional on pendency of application in Special Court.*

It is open to a debtor to apply to a Civil or Revenue Court for transfer, under S. 19 (1) of Bombay Act XXVIII of 1947, of a pending matter which does not by itself involve the questions set out in S. 19, even though no application has been made to the Court under S. 4 of the Act. The questions as to whether a person from whom a debt is due, is a debtor or not and whether the total amount of his debts exceeds Rs. 15,000, or not, are questions which may be said to be involved in a suit, appeal or application for execution, etc., if they arise out of any application made in those proceedings and they need not necessarily arise out of the pleadings of the parties. The section does not in terms require that before the transfer can be ordered there must be in existence an application before the Court. 51 Bom.L.R. 461 R. (*Rajadhyaksha and Chainani, JJ.*) Champaklal Chhabilrai *v.* Commonwealth Assurance Co., Ltd. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L.R. 781.

———**S. 19 (1)**—*Construction—Transfer to Special Court—Application for by debtor—If sufficient—Court, if to be satisfied that questions could reasonably be said to arise.*

An application under S. 19 (1) of Bombay Act XXVIII of 1947 for a transfer of the proceedings would be sufficient to enable the Court to make an order of transfer, if the allegations justifying the transfer, *viz.*, that the applicant was a debtor and that the total of his debts did not exceed Rs. 15,000, were made in such application. S. 19 (1) only requires that the said questions should be involved and not that the Court should be satisfied that the questions could reasonably be said to arise. (*Rajadhyaksha and Chainani, JJ.*) Champaklal Chhabilrai *v.* Commonwealth Assurance Co., Ltd. I.L.R. (1950) Bom. 709=A.I.R. 1950 Bom. 84=51 Bom.L.R. 781.

———**S. 37**—*Scope—Suit to recover debts from several persons—Plea by one defendant that he is a debtor and his debts do not exceed Rs. 15,000—Procedure—Duty of Court to transfer suit to Board.*

Under the new S. 37 (1) of the Bombay Agricultural Debtors' Relief Act, as amended, as soon as the question is raised by any one of the defendants to a suit, that he is a debtor and that his debts do not exceed Rs. 15,000, then the suit has to be transferred to the Debt Adjustment Board. (*Rajadhyaksha, J.*) Musa Hasafji Usman *v.* Keshavlal. 48 Bom.L.R. 613=A.I.R. 1947 Bom. 88=230 I.C. 232=1947 Bom. (Rul.) 241.

———**S. 37 (1)**—*Applicability—Suit or application by debtor—Procedure.*

S. 37 (1) of the Bombay Act (XXVIII of 1939), is obviously intended to apply to suits filed by a creditor to recover his debts. It does not and cannot apply to a suit, application or proceeding started by a debtor. Such a suit, application or proceeding is governed by S. 37 (2). If a suit or other proceeding is started by the debtor, the proper remedy is for him to move the Debt Adjustment Board to give a notice in the prescribed form to the Court where any suit or application or proceeding is pending, and then the Court will transfer it to the Board. (*Lokur, J.*) Raghusing Bhavansing *v.* Ogeppa. 48 Bom.L.R. 615=A.I.R. 1947 Bom. 71=230 I.C. 95=1947 Bom. (Rul.) 236.

———**(as amended by Act VII of 1945), S. 37 (1)**—*Applicability and scope—Suits transferable to Debt Adjustment Board—Suit for accounts under S. 15-D, Dekkhan Agriculturists' Relief Act—Suit for sale on mortgage.*

S. 37 (1) of the Bom. Agri. Debtors' Relief Act, as amended in 1945, clearly refers to suits filed by creditors for the recovery of their debts against their debtors. A suit filed by an agriculturist debtor for accounts under S. 15-D of the Dekkhan Agriculturists' Relief Act is not a suit for recovery of a debt as contemplated by S. 37 (1) of the Act of 1939, as amended in 1945. It is only if the mortgagee applies for converting the suit into one for foreclosure or sale that it can be regarded as one for recovery of a debt.

A mortgage suit for sale ought not to be transferred to the Debt Adjustment Board under S. 37 (1) before the Court has found the transaction to be really in the nature of a mortgage. Even after the transaction is found to be a mortgage, it cannot be transferred to the Board unless it is duly converted into a suit for the recovery of a debt. (*Macklin and Gajendragadkar, JJ.*) Tuka Krishna *v.* Dhanu Krishna. 49 Bom. L.R. 219=A.I.R. 1947 Bom. 320=I. L. R. (1947) Bom. 60.

———**S. 56, proviso (c)**—*Scope and effect—Application under Act of 1939 and order thereon—Appeal—New Act of 1947 coming into effect pending appeal—Proceedings if governed by new Act or old Act.*

If proceedings under Bombay Act XXVIII of 1939 for adjustment of debts were initiated and they also terminated where that Act was in operation, and the later Act of 1947 has come into operation during the pendency of the appeal, the provisions of the new Act of 1947 must apply to and govern the proceedings. The appellate Court in such a case is not entitled to consider the status of the applicant (as to whether the applicant is "a debtor") by reference to the definition in S. 2 of the Act of 1939.. 51 Bom.L.R. 744, rel. (*Shah, J.*) Anant Dharma *v.* Mangaldas Rupchand. 5 D.L.R. (Bom.) 181=52 Bom.L.R. 678.

———**S. 56, Proviso 2**—*Scope—If retrospective—Pending appeals—Law and procedure as to.*

The language used in the second proviso to S. 56 of the Bombay Agricultural Debtors Act, 1947, by which the Act of 1939 was repealed, is fairly clear and explicit and makes it retrospective in its effect. Under that proviso the appeals pending shall be continued and disposed of as if they were appeals under the new Act, and the provisions of the new Act will therefore apply to pending appeals, both as regards the substantive law and also the procedural law. (*Chagla, C.J. and Gajendragadkar, J.*) Vishwanath Mahadev *v.* Krishnaji Ramchandra. 51 Bom. L.R. 744=A.I.R. 1949 Bom. 390.

———**Ss. 85 and 86**—*Construction and scope—Procedure under Dekkhan Agriculturists' Relief Act—Application to suits filed before establishment of Debt Adjustment Board—If excluded—"Any proceedings"—Meaning of.*

The effect of S. 85 of the Bom. Agri. Debtors Relief Act is that the Dekkhan Agriculturists' Relief Act would cease to have any operation from the date on which the Debt Adjustment Board is established. S. 86, however, provides an exception by laying down that the Dekkhan Agri. Relief Act will remain in force for a period of three years from the date on which a Board is established for any local area for the purpose of institution of suits in respect of transactions about which no application can be made under S. 17 of the Agricultural Debtors Relief Act, and that it will continue in force until the suits instituted before the expiry of the period of three years from the aforesaid date and the proceedings

arising in and out of the said suits terminate. "Any proceedings" in the final clause of S. 86 must be read as meaning the hearing and procedure of the suits as well as proceedings arising in and out of the suits.

There is no warrant for the contention that the Dek. Agri. Rel. Act will remain in force *only for the purposes of institution of suits,* and that the further procedure would be under the ordinary law with the result that S. 10-A of the Dek. Agri. Rel. Act will not apply to a suit for accounts in respect of a transaction of 1884 filed in 1944 before the establishment of a Board. Nor is it correct to contend that the provisions of the Dek. Agri. Rel. Act may be availed of, if at all, by persons who file suits between the date of the establishment of the Debt Adjustment Board and three years therefrom but that those provisions cannot be availed of for suits filed before the establishment of the Debt Adjustment Board. The emphasis really is on the word *"before"* and not on the word *"from"*. The three years are no doubt to be calculated from the date of the establishment of the Board, and the procedure laid down in the Dek. Agri. Rel. Act will be availed of for all suits which are filed before the expiry of three years from the date of the establishment of the Board, including suits which are filed before the establishment of the Board. (*Jahagirdar, J.*) Maruti Vithu *v.* Ganpat Genu. 51 Bom. L.R. 165=A.I.R. 1949 Bom. 170=I.L.R. (1949) Bom. 185.

———**S. 86**—Construction—"Any proceedings"—Meaning of—Suits filed before establishment of Debt Adjustment Board—Procedure under Dek. Agricultural Relief Act—If applicable. *See* Bombay Agricultural Debtors Relief Act, Ss. 85 and 86. 51 Bom.L.R. 165.

———**S. 86**—*Period of three years—If a period of limitation.*

S. 86, Bombay Agricultural Debtors Relief Act, does not provide any period of limitation, the period of three years mentioned therein is not a period of limitation. The section does not deal with the question of limitation at all, but merely keeps the Dekkhan Agricultural Relief Act alive as it were, for the purposes of instituting suits up to a particlar date. (*Chagla, C.J.*) Ramchandra Narayan *v.* Jijiba Rangnath. 51 Bom. L.R. 605=A.I.R. 1950 Bom. 16=5 D.L.R. (Bom.) 6=I.L.R. (1949) Bom. 560.

———**S. 86**—Scope and effect of—Period of three years expiring on holiday—Suit filed on re-opening day—Bar of—General Clauses Act, S. 11—Applicability. *See* Bombay General Clauses Act, S. 11. 51 Bom.L.R. 605.

BOMBAY CHILDREN ACT (XIII OF 1924)—*Applicability—Accused in murder case below 15 years of age.*

Where a person accused of murder is just below 15 years of age, he comes within the definition of "young person" in the Bombay Children Act and a sentence of transportation for life, in his case would be illegal. (*O'Sullivan and Thadani, JJ.*) Hiromal *v.* Emperor. 49 Cr.L.J. 191=A.I.R. 1948 Sind 63.

——**Ss. 23 (1) and 27 (3)**—*Applicability—Youthful offender—Theft by—Conviction—Sentence of fine and in default detention in certified school for three years—Legality—Proper sentence.*

S. 27 (3) of the Bombay Children Act does not apply to the case of a youthful offender who is convicted of the offence of theft under S. 379, I.P. Code. A sentence of fine and in default detention for three years in a certified school is, besides being incongruous, wrong in law. Such an offender has to be dealt with under Ss. 23 (1) and 27 (1) (*d*) of the Act and not under S. 27 (3). (*Davis, C.J. and Thadani, J.*) EMPEROR *v.* DEVLO MORIO. I.L.R. (1946) Kar. 93=A.I.R. 1947 Sind 35=1947 Sind (Rul.) 87=48 Cr. L.J. 513=230 I.C. 115.

——**S. 27-B**—*Construction—"Calculated to lead to the identification"—Meaning of.*

The intention of the legislature in enacting S. 27-B of the Bombay Children Act is that the future of a child should not be marred by any report which is likely to lead to its identification. The words "calculated to lead to the identification," in S. 27-B of the Act must be construed as mening "likely to lead to the identification of the child, though not by a large section of the public," at least by the relations and friends of the child's family. (*Divatia and Bavdekar, JJ.*) EMPEROR *v.* RUSTOM KARANJIA. I.L.R. (1946) Bom. 454=47 Bom.L.R. 986=A.I.R. 1946 Bom. 115.

——**S. 27-B**—*Scope and effect of—Leaves no discretion to Court.*

The provisions of 27-B of the Bombay Children Act are too wide and drastic and leaves no discretion to the Court; it applies to all reports connected with any offence, either by or against a child, of any proceedings in any Court. (*Divatia and Bavdekar, JJ.*) EMPEROR *v.* RUSTAM KARANJIA. I.L.R. (1946) Bom. 454=47 Bom. L.R. 986=A.I.R. 1946 Bom. 115.

——**S. 27-B**—*Sentence—Mitigation of—Publication of reports of same incident in other newspapers—Effect of.*

The publication of a report prohibited by S. 27-B of the Bombay Children Act in other newspapers affords no justification to the editor of a paper in which such a report is published; but it would affect the question of punishment to be awarded to the accused editor, because at the time of publication of the report in his paper the public was already aware of the incident by its publication in other papers. That is a mitigating factor in the matter of sentence. (*Divatia and Bavdekar, JJ.*) EMPEROR *v.* RUSTAM KARANJIA. I.L.R. (1946) Bom. 454=47 Bom.L.R. 986=A.I.R. 1946 Bom. 115.

——**S. 46**—Scope and effect—If abrogates S. 340 (1), Cr. P. Code—Juvenile offender—Right of to be defended by advocate—Counsel not permitted to cross-examine complainant and witnesses—Effect on conviction—Interference in appeal. *See* CR. P. CODE, S. 340 (1). A.I.R. 1950 Sind 16.

BOMBAY CITY CIVIL COURT ACT (XL OF 1948)—*Scope—If* ultra vires.

Bombay Act XL of 1948 is *intra vires* the Bombay Legislature and not *ultra vires.* 51 Bom.L.R. 86, ref. (*Chagla, C.J. and Tendolkar, J.*) NAROTTAMDAS JETHABHAI *v.* A. P. PHILLIPS. 5 D.L.R. (Bom.) 183=52 Bom.L.R. 571.

——*Scope—If* ultra vires—*Power of Provincial Legislature to deprive High Court of jurisdiction and to confer same on new City Civil Court.*

The Bombay City Civil Court Act (XL of 1948), conferring exclusive jurisdiction upon the new City Civil Court to try suits on promissory notes up to the value of Rs. 10,000, and taking away from the Original Side of the High Court jurisdiction in respect of such suits is *intra vires* the Provincial Legislature and not *ultra vires.* It is within the legislative competence of the Provincial Legislature to invest the new Court with jurisdiction to try such suits, and also to deprive the High Court of its jurisdiction in respect of such suits. (*Chagla, C.J. and Bhagwati, J.*) MULCHAND KUNDANMAL *v.* RAMAN HIRALAL. 51 Bom.L.R. 86=A.I.R. 1949 Bom. 197.

——**Ss. 3 and 4**—Scope—If may be read together—Powers of Provincial Legislature to delegate. *See* BOMBAY CITY CIVIL COURT ACT, S. 4. 52 Bom.L.R. 571.

——**S. 3**—*Scope—Suit to evict licensee from house of monthly letting value of Rs. 50—Valuation—Jurisdiction of High Court to try—Bombay Rents, etc., Act* (1947)—*Suits Valuation Act, S.* 8.

A suit to recover possession of a house or part of the house, on the allegation that the defendant was in possession as a licensee, the rent payable being Rs. 50 per month, and that the licence has been withdrawn, lies in the High Court of Bombay, as the valuation of the suit for purposes of jurisdiction is more than Rs. 10,000. Neither the City Civil Court nor the Small Causes Court has jurisdiction to try such a suit and the High Court alone has jurisdiction to try such a suit. Bombay Rents, etc., Act of 1947 has no application to such a suit. S. 8, Suits Valuation Act, does not apply to such a case and court-fee has to be paid under S. 7 (*v*) (*e*), Court-Fees Act. 24 Bom.L.R. 350; 33 Bom.L.R. 263; 39 Bom.L.R. 138, ref.; 49 Bom.L.R. 552, rel. (*Desai, J.*) BAI AIMAI LIMJIBHAI *v.* MINOO MANCHERSHAW. 51 Bom.L.R. 272=A.I.R. 1949 Bom. 254.

——**S. 4**—*Scope—If* ultra vires—*Notification, dated 20th January, 1950—Validity and effect of—Government of India Act (1935), 7th Schedule, List II, Item 2 and List III, Item 15—Power of Provincial Legislature—Delegation of legislative function to Provincial Government—Legality—S. 3—Scope.*

S. 4 of the Bombay City Civil Court Act is *ultra vires* the Provincial Legislature inasmuch it has purported to delegate to the Provincial Government the power to invest the City Civil Court with a jurisdiction exceeding Rs. 10,000 already conferred upon it by S. 3 of the Act. While under S. 3 the Legislature itself sets up a Court with a particular pecuniary jurisdiction, it does not under S. 4 invest the Court with any higher jurisdiction, but leaves it to the Provincial Legislature to exercise the function which the Government of India Act, 1935, lays down, should be exercised by the Provincial Legislature. It is not possible to read Ss. 3 and 4 together. The Provincial Legislature had no authority to divest itself of its rights and powers under the Government of India Act, 1935, to lay down the policy with regard to the jurisdiction of the Court and to delegate that power to the Provincial Government or to any other authority or agency. An absolute discretion is given to the Provincial Government under S. 4 whether or not to increase the jurisdiction of the Court from ten thousand rupees to twenty-five thousand rupees.

It is not open to a Legislature, supreme and sovereign as it may be within its own Province, to delegate to any other authority the power of legislation which has been entrusted to it under the Constitution. It is solely the privilege of the Legislature to make laws. In exercising that privilege it may entrust subordinates and agents with the power to carry out its policy and to give effect to the legislation, but the subordinates and agents must act within the policy laid down by the Legislature. It cannot create a parallel or alternative legislative authority.

Under S. 3 the Legislature has set up a Civil Court with a limited jurisdiction in the exercise of its legislative powers. Having done so, it has given to the Provincial Government under S. 4 the power to confer upon that Court a higher jurisdiction up to twenty-five thousand rupees, which power could only have been exercised by the Provincial Government itself under the Government of India Act, 1935, in view of Item 2, List II and Item 15, List III, in the Seventh Schedule to that Act. This legislative power cannot be transferred or delegated by the Provincial Legislature to any other authority, *i.e.*, the Provincial Government. What is left to the Provincial Government under S. 4 is not the carrying out of any details in deciding upon the territorial application of the Act nor fixing the time when the Act should come into force, but the power itself of legislation which, under the Government of India Act, the Provincial Legislature alone could exercise, *viz.*, conferring jurisdiction upon the Courts. Hence S. 4 of Bombay Act XL of 1948 is *ultra vires;* it follows that the notification No. 2346|5, issued by the Government of Bombay on 20th January, 1950, in pursuance of S. 4 is invalid and of no effect. The City Civil Court has not, therefore, been validly invested with jurisdiction beyond the pecuniary jurisdiction of ten thousand rupees and, that being so, the jurisdiction to receive, try and dispose of suits and other proceedings of the value of over ten thousand rupees continues to remain vested in the High Court. 5 I.A. 178; 72 I.A. 57, dist.; A.I.R. 1949 (F.C.) 175; A.I.R. 1950 (Mad.) 243, rel. on. (*Chagla, C.J. and Tendolkar, J.*) NAROTTAMDAS JETHABHAI *v.* A. P. PHILLIPS. 5 D.L.R. (Bom.) 183=52 Bom.L.R. 571.

——S. 18—*"Proceedings"—Execution proceedings in decree for money over Rs. 2,500 and below Rs. 10,000—Jurisdiction to entertain—High Court or City Civil Court.*

The expression "proceedings" in S. 18 of the Bombay City Civil Court Act (1948) includes execution proceedings also; the expression cannot be read in a limited or restricted sense, so as to include only original proceedings and to exclude execution proceedings. The High Court cannot consequently entertain proceedings in execution of a decree passed by it, for amount exceeding Rs. 2,000 and below Rs. 10,000. Such proceedings after the passing of Bombay Act (XL of 1948) lie only in the City Civil Court. 17 All. 105; 16 Cal. 267; 17 Bom. 162; 37 C.W.N. 679; (1942) 1 Cal. 289, ref. (*Bhagwati, J.*) VISHWANATH KESHAV *v.* B. M. SUTHADWALLA. 51 Bom. L.R. 276=A.I.R. 1949 Bom. 250.

BOMBAY CITY LAND REVENUE ACT (II OF 1876), S. 13—*Construction—Imprisonment in default of payment of arrears of income-tax—Duration—Limit under C. P. Code—Applicability—Powers of Collector—Extent and exercise of—Interpretation of statutes—Intention of legislature.*

The maximum period of detention, *viz.*, six months, laid down in the C. P. Code, does not apply in cases of persons arrested under S. 13, Bombay City Land Revenue Act. The maximum period for which a person can be detained under S. 13 (for default in payment of arrears of income-tax) is that laid down in the section itself, *i.e.*, one day for each rupee of the amount recoverable from him as an arrear of land revenue. The powers conferred upon the Collector are no doubt to be exercised reasonably and not capriciously or oppressively as it is an implied condition of the use of every discretionary power that the power will be exercised fairly and honestly. Merely because of the possibility that in some cases the powers might be abused, it will not be proper to hold that the powers do not exist, or to impose arbitrary restrictions on the exercise of the powers. The meaning of the words used in the proviso to the section are plain, and it is not the duty of the Court in such cases to busy itself with the supposed intention of the Legislature. 65 I.A. 158; 41 Bom.L.R. 428 (P.C.), rel. on. (*Rajadhyaksha and Chainani, JJ.*) SHAIKH ALI AHMED *v.* COLLECTOR OF BOMBAY. 51 Bom.L.R. 589=1949 I.T.R. 371=A.I.R. 1950 Bom. 33=51 Cr.L.J. 306.

——S. 13—*Scope—Compliance with—Power of Collector to order detention in civil prison—Condition precedent to—Defaulter adjudged insolvent—If renders condition impossible of performance—Special remedy—Procedure.*

The power of the Collector under S. 13 of the Bombay City Land Revenue Act, to cause a defaulter to be apprehended and confined in a civil jail is contingent upon the sale of the defaulter's property not realising an amount sufficient to satisfy the Government demand. The arrest and confinement are intended to secure, if possible the realization of the balance of the demand either from him or from some one interested in him. Until the amount of the balance is known, it would not be possible to determine the period for which the defaulter is to be confined. The condition precedent cannot be said to be impossible of performance merely because the defaulter (who has failed to pay arrears of income-tax) has been adjudged insolvent and his property has vested in the official assignee. The amount payable to Government for income-tax is a debt which is provable in insolvency and the Collector can move the Court to sell the property of the insolvent and in the distribution of the assets all debts due to the Crown shall be paid in priority under S. 49 of the Insolvency Act. When a special procedure is prescribed by law for taking a particular action (*e.g.*, under S. 13, Bombay City Land Revenue Act) that procedure must be followed and it is no answer to say that even if such procedure had been followed the result would not be different. When a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The procedure prescribed must be strictly followed, particularly where the consequences affect the liberty of a subject. If therefore the condition precedent to the Collector's exercising his powers to apprehend and confine the defaulter in a civil jail has not been satisfied the order of the Collector authorizing the detention of the defaulter in prison cannot be sustained in law. 38 Bom.L.R. 987 (P.C.), rel. on. (*Rajadhyaksha and Chainani, JJ.*) SHAIKH ALI AHMED *v.* COLLECTOR OF BOMBAY. 51 Bom.L.R. 589=1949 I.T.R. 371=A.I.R. 1950 Bom. 33=51 Cr.L. J. 306.

BOMBAY CITY MUNICIPAL ACT (III OF 1888), S. 70 (b)—*Construction—"Specify the price to be paid for such work," etc.—Meaning and interpretation of—Price, if to be specified in exact amount—Price fixed subject to certain fluctuations to be determined by Commissioner under certain eventualities—If in compliance with S. 70 (b).*

All that S. 70 (*b*) of the City of Bombay Municipal Act requires is that the price has got to be specified in the contract, or in other words perusing the contract, it should be clear as to what the price is which the Municipality has to pay to the contractors for carrying out the contract. The statute does not say that the contract must state a fixed price or a price ascertainable in rupees, annas and pies at the date when the contract is entered into. Nor is there any prohibition in the statute which precludes the Municipality from fixing a price which may be ascertained at a future date or may be ascertained by some person specially nominated by the parties in the contract. Although a fixed amount may not appear in a contract, the price may nevertheless be specified which would be fixed in the manner agreed to by the parties under the contract itself. Where a price is fixed, but the parties agree that it is subject to certain variations to be determined by the Commissioner of the Municipality, under certain eventualities, it is as much a price as a fixed price in terms of rupees, annas and pies. The price must therefore be regarded as specified as required by S. 70 (*b*). (*Chagla, C.J. and Gajendragadkar, J.*) MUNICIPAL CORPORATION, BOMBAY *v.* GOVIND LAXMAN. 51 Bom.L.R. 190=A.I.R. 1949 Bom. 229.

———Ss. 70 (b) and 72 (2)—*Scope—Discretion of Municipal authorities—Interference by Court—Grounds for.*

The judgment of the Municipal Commissioner, the standing committee and the Municipal Corporation, if arrived at in the exercise of the discretion vested in them, cannot be substituted by a judgment of the Court. It is open to any of them to come to a wrong conclusion in the honest exercise of their discretion, and merely because their decision happens to be wrong, the Court is not entitled to interfere. But if it appears, on a consideration of the facts and circumstances, that the discretion has not been properly exercised, but has been exercised arbitrarily in disregard of the purposes for which the same has been vested in them the Court would certainly be entitled to interfere. (*Bhagwati, J.*) GOVIND LAXMAN *v.* MUNICIPAL CORPORATION FOR CITY OF BOMBAY. 4 D.L.R. (Bom.) 22.

———S. 152—*"Annual letting value"—Meaning of—Mode of ascertainment—Cinema building run by owner himself—Ascertainment of annual letting value.*

In the case of land or building which is let to a tenant the actual rent is not necessarily the criterion in ascertaining its "annual letting value" for purposes of S. 154, Bombay City Municipal Act. The fact that the premises are occupied by the owner himself does not prevent the property from having an annual letting value. A comparison of the rents of adjoining lands or buildings is normally a useful guide. So also where a tenant takes the premises peculiarly suited to him for a particular business, the profits which he expects to make is a feature which may be taken into consideration. In the case of a cinema a percentage of the sitting accommodation is a recognised method. In cases where a cinema concern is run by the owner of the building, it is a recognised principle to fix seven and a half per cent. on fifty-three per cent. of the sitting capacity of the theatre. (*Kania, J.*) GLOBE THEATRES, LTD. *v.* CHIEF JUDGE OF SMALL CAUSES COURT. I.L.R. (1946) Bom. 963=A.I.R. 1947 Bom. 108=48 Bom.L.R. 691.

———Ss. 222 (1) and 265—*Crown, if bound by—Property not held* jure coronœ.

The Crown is not bound by Ss. 222 (1) and 265 of the City of Bombay Municipal Act. In this connection no distinction can be drawn between property held *jure coronoe* and other property of the Crown. ((*Lord du Parcq.*) PROVINCE OF BOMBAY *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY. (1946) F.L.J. 118=73 I.A. 271=228 I.C. 117=1947 M.W.N. 17=60 L.W. 1=13 B.R. 208=51 C.W.N. 317=1947 P.C. (Rul.) 35=49 Bom.L.R. 257=1947 A.L. J. 347=A.I.R. 1947 P.C. 34=I.L.R. 1947 Kar. (P.C.) 60=(1947) 1 M.L.J. 45 (P.C.).

———**S. 297**—*Construction—Regular line of a public street—Building line or boundary line the street.*

A consideration of the terms of S. 297 of the City of Bombay Municipal Act and of its setting in the Act, shows conclusively that it is dealing with the building line of a public street, as distinguished from the boundary line or intended boundary line of a public street. (*Lord Thankerton*). Shankar Dattatraya Prabhavalkar *v.* Municipal Corporation, Bombay. 73 I.A. 34=I.L.R. (1946) Bom. 505=I.L.R. (1946) Kar. (P.C.) 38=81 C.L.J. 350=48 Bom. L.R. 434=50 C.W.N. 912=1946 P.C. (Rul.) 144=1946 M.W.N. 191=223 I.C. 362=A.I.R. 1946 P.C. 53=(1946) 1 M.L.J. 364 (P.C.).

———**Ss. 401 and 471**—*Applicability—"Without a licence"—Licensee holding several stalls—Failure to pay higher stallage charges imposed during currency of licence—Offence—Nature of licence.*

S. 401 of the City of Bombay Municipal Act does not provide for a licence in respect of each or every stall. It is a personal licence. A person with a single licence may hold several stalls. A licensee who has paid the licence-fee, but fails to pay higher stallage charges imposed by the Municipality in respect of the stalls during the currency of his licence cannot be proceeded against under S. 401, read with S. 471 of the Act. (*Stone, C.J. and Gajendragadkar, J.*) Emperor *v.* Jehangir B. Irani. 49 Bom.L.R. 811=A.I.R. 1948 Bom. 161=49 Cr.L.J. 193.

BOMBAY CITY POLICE ACT (IV OF 1902), S. 2—*"Public place"—Street.*

Any street which is a public highway is a public place within the meaning of S. 2 of the City of Bombay Police Act. (*Stone, C.J. and Lokur, J.*) Emperor *v.* Abdul Latif. 49 Bom. L.R. 340=A.I.R. 1947 Bom. 438=231 I.C. 264 =48 Cr.L.J. 731.

———**(as amended by Act III of 1942), S. 23 (2)**—*Object and scope—Weapon—Intention of Legislature.*

The intention of the Legislature in S. 23 (2) of the Bombay City Police Act as amended in 1942, is that all the specified articles including knives are to be regarded as weapons "capable of being used as a weapon of offence;" anything which is normally designated as a knife, the condition of which renders it capable of being used as a weapon of offence falls within the class of objects which may be prohibited. (*Stone, C.J. and Lokur, J.*) Emperor *v.* Abdul Latif. 49 Bom.L.R. 340=A.I.R. 1947 Bom. 438=231 I.C. 264=48 Cr.L.J. 731.

———**(as amended by Act III of 1942), S. 23 (2) (a)**—*"Carrying"—Meaning and interpretation of.*

"Carrying" in S. 23 (2) of the City of Bombay Police Act is of the widest import and would cover transportation of a weapon with or by the person concerned, however he may attach it to his person. It is not necessary that it should be displayed openly. (*Stone, C.J. and Lokur, J.*) Emperor *v.* Abdul Latif. 49 Bom.L.R. 340=

A.I.R. 1947 Bom. 438=231 I.C. 264=48 Cr. L.J. 731.

———**S. 45**—Inquiry under—Nature of—If judicial or executive act—Interference with order of Chief Presidency Magistrate—*Certiorari*—Writ of—Jurisdiction. *See* Certiorari. 49 Bom. L.R. 889.

BOMBAY CITY POLICE ACT (IV OF 1902), S. 63 (1)—Scope of—Panchnama at identification parade—Oral statements of witnesses recorded in—Admissibility. *See* Evidence Act, S. 157. 47 Bom.L.R. 992.

———**S. 63 (2)**—*Scope—Dying declaration—Statement at identification parade pointing out assailant—Admissibility—Evidence Act, S.* **32 (1).**

A statement made by the deceased person at an identification parade pointing ont the person who caused him injuries (which resulted in his death) is admissible in evidence as his dying declaration under S. 32 (1) of the Evidence Act, S. 63 (2) of the Bombay City Police Act excludes such a dying declaration from the prohibition contained in sub-S. (1); such a statement is therefore admissible, though made in the presence of the police in the course of the investigation. (*Lokur, J.*) Emperor *v.* Mahadeo Dewoo. 224 I.C. 261=47 Cr.L.J. 590=1946 Bom. (Rul.) 215=47 Bom.L.R. 992=A.I.R. 1946 Bom. 189.

BOMBAY CIVIL COURTS ACT (XIV OF 1869), Ss. 8 and 26—*Applicability—Administration—Suit valued at Rs.* 130 *for court-fee —Jurisdiction value wrongly stated as Rs.* 5,000 *—Decree for over Rs.* 25,000*—Appeal—Forum—District Court or High Court.*

A suit for administration is a suit for accounts governed by S. 7 (*iv*) (*f*) of the Court-Fees Act; where a suit for administration is valued for purposes of court-fee at Rs. 130, and normally an appeal from the decree in that suit lies to the District Court and not to the High Court, under S. 8 of the Bombay Civil Courts Act. The fact that the suit is by mistake valued at Rs. 5,500 for purposes of jurisdiction and that a decree is passed for over Rs. 25,000, would not make any difference; an appeal would still lie only to the District Court and not to the High Court; because S. 26 of the Bombay Civil Courts Act would not apply. The value of the subject-matter is the amount of Rs. 130 put by the plaintiff; and under S. 8, Suits Valuation Act, that is the value for purpose of jurisdiction also. (*Rajadhyaksha, J.*) Ahmedbhai *v.* Badruddin. I.L.R. (1946) Bom. 245=227 I.C. 515=48 Bom.L.R. 110=A.I.R. 1946 Bom. 356=1947 Bom. (Rul.) 34.

———**S. 24**—*Jurisdiction—Sale deed—Allegation that deed really is a mortgage—Suit for accounts—Consideration more than Rs.* 5,000*—Jurisdiction of Civil Judge (junior division).*

A suit for accounts under S. 15-D of the Dekkhan Agriculturists' Relief Act, alleging and to have it declared that an ostensible sale-deed executed by the plaintiff was really a mortgage, is one which is cognizable in the Court of Civil Judge (Junior division), even though the amount of consideration for the disputed document is more than Rs. 5,000. (*Kania, A.C.J., Divatia and Gajendragadkar, JJ.*) Sanabhai Nathabhai *v.* Gordhandas. I.L.R. (1946) Bom. 726=226 I.C. 73=1946 Bom. (Rul.) 273=48 Bom.L.R. 171=A.I.R. 1946 Bom. 319 (F.B.).

BOMBAY CIVIL MANUAL (1940), Vol. I, Ch. II, R. 95—*Government Notifications—Applicability—Conditions—Status of agriculturist—Determination—Material date.*

The Government Notifications referred to in R. 95 of Ch. II of Vol. I of the Bombay Civil Manual, 1940, which provide that decrees against agriculturists should be transferred to the Collector for execution will apply only if the decree itself orders the sale of property. The expression "property belonging to a person who is an agriculturist" in R. 95 would mean property belonging to a person who is an agriculturist on the date of the order for sale, which is the critical date. It is not enough if the judgment-debtor is an agriculturist at the time of execution. (*Macklin and Bavdekar, JJ.*) Nawalmal Chaturbhuj *v.* Dagaduram. 50 Bom.L.R. 602=A.I.R. 1949 Bom. 77=I.L.R. (1947) Bom. 479.

BOMBAY CIVIL SERVICE CONDUCT, DISCIPLINE AND APPEAL RULES, R. 21—"Trade"—Meaning of. *See* Penal Code, S. 168. 52 Bom.L.R. 648.

——**R. 49**—Scope—If exhaustive—Public servant engaging in trade in breach of R. 21 of Bombay Civil Service, Conduct, Discipline and Appeal Rules—Liability to prosecution under I.P. Code, in addition to departmental punishment—Prosecution—If barred. *See* Penal Code, S. 168. 52 Bom.L.R. 648.

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), S. 51—*Applicability—"Legal proceeding"—Darkhast—Leave of Registrar—Necessity—Leave—Grant of in appeal or second appeal—Permissibility.*

A darkhast (execution petition) is undoubtedly a legal proceeding within the meaning of S. 51 of the Bombay Co-operative Societies Act and requires the leave of the Registrar before it is started or before it is proceeded with. In a proper case, however, leave may be granted in appeal or in second appeal. (*Lokur and Bavdekar, JJ.*) Digambar Narayan *v.* Malegaon Co-operative Credit Society. 49 Bom.L.R. 746=A.I.R. 1948 Bom. 131.

——**S. 54**—*"Dispute"—Meaning and implication of.*

The word "dispute" in S. 54, Bombay Co-operative Societies Act, is not the same thing as a cause of action or the mere incurring of a liability. It cannot be altogether divorced from the connotation of a claim or demand or a question at issue. "Dispute" implies some kind of disagreement between the parties concerned, some reference to a legal claim or liability. (*Sen and Rajadhyaksha, JJ.*) Dinkar Wasudeo *v.* Registrar, Co-operative Societies. I.L.R. (1946) Bom. 444=226 I.C. 210=1946 Bom. (Rul.) 290=48 Bom.L.R. 104=A.I.R. 1946 Bom. 346.

——**S. 54**—*"Servant of the society"—Past servant—Legal representatives of past servant—If servants.*

The expression "servant of the society" in S. 54 of the Bombay Co-operative Societies Act, does not include a past servant; the legal representatives of a past servant cannot be held to be covered by the term "servant." A dispute between a society and the legal representatives of a deceased servant of the society cannot therefore be referred under S. 54 of the Act to the Registrar. (*Sen and Rajadhyaksha, JJ.*) Dinkar Wasudeo *v.* Registrar, Co-operative Societies. I.L.R. (1946) Bom. 444=226 I.C. 210=1946 Bom. (Rul.) 290=48 Bom.L.R. 104=A.I.R. 1946 Bom. 346.

——**(as amended by Act XVI of 1943), S. 59 (1) (a)**—*Scope—Retrospective operation—Award — Execution — Limitation — Limitation Act, Art.* 182.

Both under S. 59 (1) (*a*) of the Bombay Co-operative Societies Act of 1925, as it stood before its amendment in 1943 and under the section after it was amended by Act XVI of 1943, the award made under S. 54 of the Act which is sought to be executed must be treated as a decree of a Civil Court within the meaning of Art. 182, Limitation Act. The amendment has not made any change in the section, but has only clarified the position and is in that sense purely declaratory, and must be given retrospective effect. Art. 182 and not Art. 181 applies. (*Rajadhyaksha and Gajendragadkar, JJ.*) Bhimsen Hanmant *v.* Urban Bank, Muddebihal. 49 Bom.L.R. 160=A.I.R. 1947 Bom. 370=I.L.R. (1947) Bom. 44.

——**S. 59 (1) (a) and (b)**—*Remedies under—If alternative—Recourse to remedy under Cl.* (a)—*When bars recourse to remedy under Cl.* (b).

The effect of the word "or" occurring between Cls. (*a*) and (*b*) of S. 59 (1) of the Bombay Co-operative Societies Act is that the person in whose favour an award has been given under S. 54 is given two alternative remedies, either of which it is open to him to pursue. If he obtains satisfaction after resorting to the remedy under Cl. (*a*), he would thereafter be precluded from resorting to the other remedy provided under Cl. (*b*). But where on the darkhast filed in Court under S. 59 (1) (*a*) nothing has been recovered, there is nothing to prevent the holder of the award from obtaining a certificate from the Registrar under S. 59 (1) (*b*) and to proceed to execute the award by an application to the Collector for the recovery of the amounts due as if they were arrears of land revenue.

The award does not become a decree of a civil Court on the issue of a certificate by the Registrar under S. 59 (1) (*a*), and the award does not become infructuous by reason of the fact that the civil Court holds that execution is barred by limitation. (*Rajadhyaksha and Gajendragadkar, JJ.*) Muppanna Malkappa *v.* Gajanan Urban Co-operative Bank. 49 Bom.L.R. 168=A.I.R. 1947 Bom. 375=I.L.R. (1947) Bom 143.

BOMBAY COTTON CONTRACTS ACT (IV OF 1932), S. 8—*Applicability and construction—Contract under bye-law of East India*

Cotton Association bye-laws—Contract note rendered in form different from that provided by bye-law—If void.

S. 8 of the Bombay Cotton Contracts Act prescribes that any contract which is not in accordance with the bye-laws of a Cotton Association shall be void. Where a bye-law of the East India Cotton Association provides for a specific form of a contract note being rendered in respect of a contract, but the contract note actually rendered differs materially from the form so specified by the bye-law, though it be the result of oversight or accident, the contract must be held to be made "not in accordance with the bye-laws, etc.," within the meaning of S. 8, and is therefore void and of no legal effect. (*Stone, C.J. and Coyajee, J.*) BALDEVDAS C. PARIKH *v.* KHIMJI POONJA & CO. 49 Bom.L.R. 649=A.I.R. 1948 Bom. 94.

———**S. 8**—***Scope and effect—Contract not in accordance with bye-laws of recognised cotton association and not in prescribed official form—Contract if rendered void—Arbitration agreement in such contract and award thereon—If also void.***

S. 8 (1) of the Bombay Cotton Contracts Act, 1932, provided that any contract (whether either party thereto is a member of a recognised cotton association or not) which is entered into after the date on which the Act came into operation and which was not in accordance with the bye-laws of any recognised cotton association shall be void. The appellants (who were members of the East India Cotton Association) were employed by the respondent (who however was not a member of that Association) to effect forward contracts for the sale and|or purchase of cotton according to the rules, regulations and bye-laws of that Association. The contract notes rendered by the appellants to the respondent omitted two new clauses which were in vogue in the form prescribed by the East India Cotton Association under its bye-laws. Further, the deposit payable in respect of margin by the constituent was fixed at not less than Rs. 25 per bale instead of Rs. 12½ per bale in the form prescribed by the Association. In respect of a claim by appellants against the respondent there was an arbitration and an *ex parte* award in pursuance of an arbitration clause in the contract. The respondent contended that the contracts were void under the provisions of the Bombay Cotton Contract Act and that being so, there was no arbitration agreement between the parties under which there could be any reference to arbitration on which any award could be made.

Held: Ordinarily, when a contract between the parties is reduced to writing, the writing only can be looked at to ascertain what the contract between the parties is, and if that writing is not in accordance with the bye-laws, the contract itself must be void. Even assuming that there was a pre-existing oral contract between the parties *dehors* the written contract note it has to be seen whether the so-called pre-existing oral contract was in accordance with the bye-laws, for if it were not, then it would be hit by section 8 of the Bombay Cotton Contracts Act, 1932. In this

case there was no suggestion that the terms of the so-called pre-existing oral contract were in any way different from the terms subsequently recorded in the contract notes actually issued. The provision for payment of deposit at Rs. 25 per bale was not in accordance with the bye-laws. Further, by reason of the omission of the two new clauses prescribed in the form in the contract note actually issued by the appellants, it was not in accordance with the bye-laws. Accordingly the contracts were void and there was no arbitration agreement between the parties under which there could be any reference to arbitration on which any award could be made. (*Kania, C.J., Fazl Ali, Patanjali Sastry, Mehrchand Mahajan, Mukherjea and Das, JJ.*) KHIMJI POONJA AND COMPANY *v.* BALDEV DAS C. PARIKH. 1950 S.C.R. 64=A.I.R. 1950 S.C. 7=5 D.L.R. (S.C.) 5=52 Bom.L.R. 515=(1950) S.C.J. 311 (S.C.).

BOMBAY COURT OF WARDS ACT (I OF 1905), S. 32—***Applicability—Suit against ward brought before assumption of superintendence by Court of Wards.***

S. 32 of the Bombay Court of Wards Act applies to pending suits brought against a Government ward before the superintendence of his property was assumed by the Court of Wards. The scheme of the Act suggests a broad rather than a narrow construction of S. 32 and the requirements of the section should therefore be held to apply irrespective of whether the suit is brought before or after the assumption of superintendence by the Court of Wards. (*Sen, Weston and Gajendragadkar, JJ.*) RAGHAVENDRA SADASHIV *v.* SADASHIVRAO. I.L.R. (1946) Bom. 1023=48 Bom.L.R. 616=228 I.C. 338=1947 Bom. (Rul.) 88=A.I.R. 1947 Bom. 33 (F.B.).

———**S. 40, Proviso, thirdly**—***Scope and effect of—Sale by holder in contravention of—Effect of—Death of vendor—Suit by heir against vendee to recover property—Decree and execution—Dispossession of vendee—Suit by latter for damages—Maintainability—Limitation—Starting point—Limitation Act, Art. 116—Transfer of Property Act, S. 55 (2).***

The third proviso to S. 40 of the Bombay Court of Wards Act imposes a disqualification upon the rights of a person whose estate has passed under the superintendence of the Court of Wards and which has since been withdrawn. Without the previous sanction of the Collector such a person is not entitled to dispose of his property beyond his natural lifetime. The Act, however, does not impose a general incapacity upon such a person to contract with regard to his property. Nor is a contract with regard to property declared void by the Act.

If an owner of property, which is made non-transferable by statute, agrees to transfer that property in a manner intended to circumvent the provision of the statute, the agreement is void in law and unenforceable and damages cannot be awarded for breach of such an agreement. But, if a person purports to convey what he has no authority to convey and agrees to guarantee quiet enjoyment to the vendee (*e.g.*, when in contravention of proviso 3 to S. 40, Bombay Court of

Wards Act, an absolute sale is made by the transferor without the consent of the Collector, which transfer will not be good beyond his life), the vendor or the person claiming under him cannot avoid an obligation to pay damages for breach of the covenant on the ground that the vendor had either no interest or had a limited interest which has since the date of the sale ceased. The vendor cannot escape from his obligation when he guarantees to the vendee that he has title to the property which he has disposed of and ultimately it is found that either he had no title or that his interest was not as extensive as he purported to convey. In such a case the fact that the conveyance is void to the extent to which it exceeds the authority of the vendor by reason of the absence of title in him or by reason of a personal disqualification imposed upon him does not affect the liability of the vendor or persons claiming under him to compensate the vendee for breach of covenant of title and quiet enjoyment. The restrictions imposed by the Court of Wards Act are not a part of the tenure of the land but are imposed personally against the holder as the Act contains no general restrictions on the right to contract with regard to the estate and the covenant of quiet enjoyment cannot be regarded as an attempt to defeat the policy of the law.

Where, after the death of the vendor, the heir of the vendor sues for recovery of the property on the ground of the transfer being ineffective and inoperative beyond the lifetime of the last holder, obtains a decree and dispossesses the vendee, the latter can sue for damages for breach of covenant of title and quiet enjoyment, the suit is governed by Art. 116 of the Limitation Act, the sale-deed containing the covenants being registered; and the cause of action or right to sue arises only on the date of such dispossession and not on the date of the death of the last holder, that being the date of the transfer ceasing to be valid or operative. The vendee in such a case can rely upon a covenant of title and quiet enjoyment arising by implication under S. 55 (2), Transfer of Property Act, as well as by the express words of the sale deed itself. So long as the vendee remains in peaceful possession of the property there is no breach of the covenant. The possibility of a person, who has, since the date of the sale, acquired title to the property, initiating steps to obtain possession of the property, cannot amount to a breach of the covenant. The period of limitation for a suit for damages for the breach of the covenant of quiet enjoyment commences to run from the date of actual dispossession and a suit filed within six years from the date of actual dispossession is within time and not barred. 44 I.A. 54; 40 Bom. 614; 19 All. 35; 22 All. 205; 44 All. 486; 44 Bom. 500, dist.; 37 Bom. 538; 33 Bom. L.R. 1092; 17 Luck. 289; 38 Mad. 887; A.I.R. 1940 All. 480; A.I.R. 1932 Nag. 5 (F.B.), foll.; 67 I.A. 431; 70 I.A. 1, ref. (*Rajadhyaksha and Shah, JJ.*) GULABCHAND DAULATRAM *v.* SURYAJIRAO. 52 Bom.L.R. 614=A.I.R. 1950 Bom. 401.

BOMBAY CRIMINAL PROCEDURE CODE AMENDMENT ACT (XXX OF (1946), S. 3—Scope—If repugnant to prevention of Corruption Act (II of 1947), S. 3—Arrest of offender and investigation of offence of corruption in Bombay City—Law applicable—India Act or Bombay Act—Sub-Inspector of Police—Arrest, detention, investigation and charge-sheet by—Legality—Trial by Presidency Magistrate on such charge—Jurisdiction—Cr. P. Code, Ss. 156 (2), 190 (1) (*a*) and (*b*). *See* PREVENTION OF CORRUPTION ACT, S. 3. 49 Bom.L.R. 821.

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), Ss. 46 and 48—Rules under, Appendix D, Serial Nos. 29 and 20-A—Raw cocoanut oil—Terminal-tax payable. *See* BOMBAY DISTRICT MUNICIPAL ACT, S. 59 (*b*) (xi). 223 I.C. 107.

———S. 59 (b) (xi)—*Raw cocoanut oil—Terminal-tax payable—Rules, Appendix D, Serial Nos. 29 and 20-A.*

Raw cocoanut oil is an oil within the category of oils covered by Serial No. 29 and not by Serial No. 20-A of Appendix D to Rules and Bye-laws framed under Ss. 46 and 48 relating to Terminal Tax levied under S. 59 (*b*) (*xi*) of the Bombay District Municipal Act. It is therefore chargeable to terminal-tax under Serial No. 29. An oil might or might not be a vegetable product. The fact that it happens to be of vegetable origin does not make it chargeable under Serial No. 20-A because there is a separate Serial No. 29 for all oils, including vegetable oils, prescribing a lower rate of taxation. If the Municipal corporation taxes cocoanut oil as a substitute for ghee under Serial No. 20-A, the burden is on them to prove that it is a substitute for ghee. The fact that some people use raw cocoanut oil in their cooking does not make it a substitute for ghee. A substitute for ghee must necessarily be a derivative of ghee. (*Thadani, J.*) GANESH KHOPRA MILLS CO. *v.* MUNICIPAL CORPORATION OF KARACHI. 223 I.C. 107=1946 Sind (Rul.) 137=A.I.R. 1946 Sind 112.

———Ss. 64, 65 and 67, and R. 175 of the Vengurla Municipal Rules—*Construction and scope—Levy of tax from 1st April—Legality when assessment list prepared, published and authenticated after that date.*

According to the scheme of levying house tax under the Bombay District Municipal Act, there is no obligation on a Municipality to prepare the assessment list prior to the 1st of April, in order that it may be entitled to levy tax in respect of the official year commencing from April 1st. If the Municipality gets a list authenticated and follows the procedure laid down in Ss. 64, 65 and 67, then such list would govern the levy of tax throughout the official year, though that list might have been published after 1st April, and have been authenticated and become conclusive subsequent to April 1st. The mere fact that a rule framed by the Municipality fixes the date on which the liability to tax arises does not necessarily mean that the quantum of the tax has to be determined prior to that date. 23 Bom.L.R. 48; 50 Bom. L. R. 701, ref. (*Chagla, C. J.*) SHANTARAM BALAji *v.* Vengurla Municipality. 5 D.L.R. (Bom.) 153=A.I.R. 1950 Bom. 352=52 Bom.L.R. 411.

———**Ss. 70 (1), 46 and 113**—*Permission for putting up balcony—Power of Municipality to charge recurring annual fee, and to enhance amount of fee.*

The words 'put up' have been used in S. 113 of the Bombay District Municipal Act as a compendious expression for 'putting up and keeping up'. The Municipality is, therefore, empowered under S. 70 (1) of that Act to charge a recurring annual fee for permission to put up a balcony. It is also at liberty to enhance the amount of that fee. As permission is granted in exercise of the powers granted by the Act, the legal effect and consequence of the permission is governed by the Act and not by the law of contract. S. 46 states that the Municipality may from time to time alter or revise rules in respect of the fees to be charged for permission granted under S. 70 (1) of the Act. (*Thadani and Constantine, JJ.*) Municipal Corporation of Karachi *v.* Mooshboy Karimji & Sons. A. I.R. 1949 Sind 36.

———**S. 77 (2)**—*Applicability—"Octroi"—Terminal-tax imposed by Municipality under Bye-law—Evasion of payment—Offence.*

What is made punishable under S. 77 (2), Bombay District Municipal Act, is the non-payment of octroi with the particular intention described in the section and not the non-payment of terminal-tax. "Octroi" in S. 77 (2) must be given the same meaning as it has in S. 59 (1) (*iv*). A terminal-tax is not an "octroi" within the meaning of S. 59 (1) (*iv*) or S. 77 (2). While a Municipality may be competent to levy a terminal-tax under its Rules and Bye-laws, its evasion is not punishable under S. 77 (2). (*O'Sullivan and Thadani, JJ.*) Municipality of Kotri *v.* Abdul Rahman. 49 Cr.L.J. 91=A. I.R. 1948 Sind 57.

———**S. 77 (2)**—*Essence of offence—Intention to defraud—Absence of—Liability to conviction.*

Before a person can be convicted of an offence made punishable under S. 77 (2) of the Bombay District Municipal Act, it must be proved that the person importing the goods has the intention to defraud the Municipality. In the absence of any allegation or proof of such intention, there can be no conviction under S. 77 (2). (*O'Sullivan and Thadani, JJ.*) Municipality of Kotri *v.* Abdul Rahman. 49 Cr.L.J. 91=A.I.R. 1948 Sind 57.

BOMBAY DISTRICT POLICE ACT (IV OF 1890), S. 46—Scope—If void under Art. 13 of the Constitution of India as inconsistent with Art. 19. *See* Constitution of India, Arts. 13 and 19. 52 Bom.L.R. 558 (F.B.).

———**S. 46 (3)**—Scope—If void as dealing with subject-matter in List I of Seventh Schedule to Constitution. *See* Constitution of India, Seventh Schedule, List I, Items 17, 18 and 19 and List II, Item 1. 52 Bom.L.R. 558 (F.B.).

———**(as amended in 1946), S. 46 (3), Proviso I**—*Construction and scope—Powers of Government—Extension of period of detention of detenu under order of detention of District Magistrate—Legality.*

Under the first proviso to S. 46-B (3) of the Bombay District Police Act, the power of the Government is limited to make an order enabling the District Magistrate, who is solely responsible for making detention orders, to extend the period of detention in any particular detenu beyond the period of two months, if he thought fit to do so. The Government have no power to pass an order in a mandatory form, ordering that the total period of detention of any particular detenu under an order shall exceed two months. Such an order is *ultra vires* and illegal. (*Stone, C.J., Macklin, Sen, Chagla and Lokur, JJ.*) Yakubji Karimji, *In re.* 49 Bom.L.R. 397=48 Cr.L.J. 912=A.I.R. 1947 Bom. 364 (F.B.).

———**S. 46-B**—*Construction and scope—Powers of District Magistrate and of Provincial Government—Duration and validity of detention orders—Extension of detention order beyond two months by Government—Legality—"Illegal detention".*

S. 46-B, which was newly added to the Bombay District Police Act by the Amendment Act XVI of 1946, gives the power of detention and the responsibility for making orders to the District Magistrate. The powers are circumscribed by three safeguards, *viz.*, (1) that the orders are valid only for 15 days at a time; (2) that the detention ceases—when the emergency ceases; and (3) that the total period of detention shall not exceed two months. The responsibility for making detention orders is exclusively vested in the District Magistrate, and it is no part of the function of the Government to make such orders. Government's powers are limited to enlarging the maximum period of two months. The case of a detenu has to be reconsidered every fifteen days by the District Magistrate in the light of the then existing circumstances, but his power to make orders in any particular case is limited to two months. Then the Provincial Government is given power to enlarge the time limit of two months so that the District Magistrate may make further orders, during the extended period, but each of them is valid for a maximum of 15 days. An expired detention order of the District Magistrate cannot be extended by the Government indefinitely "until further orders of Government." Such an extension is *ultra vires* and detention under such extended order is "illegal" within the meaning of S. 491, Cr. P. Code. When the total period of two months is about to expire, a new order should be passed by the District Magistrate in continuation of the last order with the sanction of the Provincial Government. That is the proper course. (*Stone, C.J. and Lokur, J.*) Navnitlal Hiralal Gandhi, *In re.* 49 Bom.L.R. 386=A.I.R. 1947 Bom. 362.

———**S. 80**—*"Good faith"—Onus.*

S. 80 of the Bombay District Police Act gives statutory protection to Government servants, and a uniformed police party once assembled for duty and while on duty and returning from duty must be presumed to be acting in good faith, until the contrary is proved by strong and cogent evidence. The same is the case with **S. 17 (1) of the** Defence of India Act, 1939. (*Stone, C.J. and*

Lokur, J.) EMPEROR *v.* AMIMIYA IMAMMIYA. I.L.R. (1948) Bom. 103=49 Bom.L.R. 829=A.I.R. 1948 Bom. 197=49 Cr.L.J. 216.

———**S. 80**—*Scope of.*

S. 80 is limited in its scope. All acts done by a Police Officer as such do not necessarily fall within the scope of S. 80 (3) of the Bombay District Police Act. S. 80 (1) clearly applies only to acts done in good faith, although S. 80 (3) applies to acts done in bad faith.

Quaere: whether the investigation of a false complaint or a case of hurt would fall within the provisions of S. 80 (3)? (*Davis, C.J. and Thadani, J.*) EMPEROR *v.* SAMUEL N. GHANI. 229 I.C. 158=1947 Sind (Rul.) 55=48 Cr.L.J. 268.

———**S. 80**—*"Under colour of office"—Meaning and effect of—Wrongful act or unreasonable act or act done in mistaken exercise of duty—If protected.*

The words "under colour of" in S. 80 of the Bombay District Police Act do not mean the same thing as "by virtue of". Any rightful act in office is "by virtue of office", and a wrongful act in office may be "under colour of office". An act may none the less be under colour of office however unreasonable it might be, and although it might be done in mistaken exercise of duty or authority. (*Stone, C.J. and Lokur, J.*) EMPEROR *v.* AMIMIYA IMAMMIYA. 49 Bom.L.R. 829=A.I.R. 1948 Bom. 197=49 Cr.L.J. 216=I.L.R. (1948) Bom. 103.

BOMBAY GENERAL CLAUSES ACT (I OF 1904), S. 7—*Scope and effect—Repeal of Act—Effect on proceedings taken under repealed Act.*

S. 7 of the Bombay General Clauses Act only embodies the well-known canon of construction that when an Act has been repealed, the repeal does not affect its previous operation or any legal proceedings in respect of rights accruing under the repealed Act, provided that no contrary intention appears from the repealing Act. (*Tendolkar, J.*) SULEMAN *v.* PATEL. 3 D.L.R. (Bom.) 41.

———**S. 11**—*Applicability — Bombay Agricultural Debtors Act, S. 85—Scope and effect—Suit under Dekkhan Agricultural Debtors Act filed more than three years after period fixed by S. 85—Suit filed on day of re-opening of Court after holiday when period expired—If in time.*

S. 11, Bombay General Clauses Act, only applies to acts or proceedings which are directed or allowed to be done or taken. S. 86, Bombay Agricultural Debtors Act, does not, however, allow any suit to be filed in respect of his rights under the Dekkhan Agriculturists' Relief Act. The former Act only directs that latter Act shall cease to be in operation after a prescribed period. The Legislature has not allowed any suits to be filed after the Dekkhan Agri Rel. Act is repealed. It merely fixes a period when the Dekkhan Agri. Rel. Act shall stand repealed and once that Act is repealed, the right of a plaintiff to file a suit under that Act disappears. That right is not saved by the Bom. Agri. Debtors Relief Act, nor, is any permission given to the plaintiff to file a suit after the Dekkhan Agri. Rel. Act has been repealed. The fact that the period of three years fixed by S. 86 of the Bom. Agri. Debtors Relief Act expires on a holiday when the Court is closed, would not give a plaintiff a right to institute the suit which should have been filed within the period of three years on the day on which the Court re-opens after the holiday. When the date is passed, whether on a holiday or not the Dekkhan Agri. Rel. Act is no longer in force, and whatever rights a litigant may have under that disappear. (*Chagla, C.J.*) RAMCHANDRA NARAYAN *v.* JIJIBA RANGANATH. 51 Bom.L.R. 605=A.I.R. 1950 Bom. 16=5 D.L.R. (Bom.) 6=I.L.R. (1949) Bom. 560.

BOMBAY HARIJAN (REMOVAL OF SOCIAL DISABILITIES) ACT (X OF 1947)—*Scope if* ultra vires—*Government of India Act* (1935), *S.* 104 *and 7th Schedule, List III, Item* 1 *and List II, Item* 28.

The Bombay Harijan (Removal of Social Disabilities) Act is not *ultra vires*; it falls in Item 1 of List III of the Seventh Schedule to the Government of India Act (1935) and hence it was competent for the Provincial Legislature to pass this piece of legislation. The Act does not fall within Item 28 of List II of the 7th Schedule—nor can it be said that the Governor-General, by giving assent to the Act, by implication constituted this subject as a new subject on which the Provincial Legislature could legislate, though not originally included in Lists II and III, there having been no public notification as required by S. 104, Government of India Act. (*Chagla, C.J. and Gajendragadkar, J.*) EMPEROR *v.* KALIDAS AMTHARAM. 51 Bom.L.R. 100=A.I.R. 1949 Bom. 168=50 Cr.L.J. 635=I.L.R. (1949) Bom. 25.

BOMBAY HEREDITARY OFFICES ACT (III OF 1874), S. 2—*Scope of—Watan lands—Succession—Divided brothers—Death of one leaving widow and son—Death of son unmarried—Adoption by widow after son's death—Right of adopted son to succeed to watan lands in preference to divided brother—Hindu Law.*

S. 2 of the Bombay Watan Act prefers male heirs to female heirs excepting the case of the widow of the last owner, as far as succession to watan land is concerned. *M* died leaving two sons *S* and *G*, and some watan lands which devolved on his two sons. *G* died leaving his widow *P* and a son *R*, who died unmarried on 22nd July, 1921. *S* and *G* were divided in status. On 23rd April, 1928, *P* adopted *B*, to her husband. On 19th April, 1940, *S* filed a suit for a declaration that he was the reversionary heir to the watan lands and that the adopted son had no right to them.

Held: (1) that under the ordinary rule of succession under the Hindu Law, on the death of *R*, though the property would go to the next reversionary heir of *G*, namely, *S*, on the adoption of *B* by the widow *P*, he would be entitled to the property, divesting *S*;

(2) that there was nothing in S. 2 of the Watan Act which altered the line of male heirs as laid down under the ordinary Hindu Law as far as watan lands are concerned, and on the adoption therefore, the adopted son would divest the property vested in the reversioner;

(3) that the disability imposed by S. 2 was only on female heirs; there was no disability placed on the widow from adopting; *B* on his adoption became the male heir of *G* next in succession to *R*, and he being nearer in succession to *G* than *S*, was entitled to succeed to the lands divesting *S*, since he claimed not through the female heir *P*, but through *G*, and his heir;

(4) that the power of the widow of *G* to adopt was not exhausted as *R* died issueless and unmarried, without leaving a widow. 24 Bom. 484; 37 Bom. 598, not foll. 35 Bom.L.R. 859 (P.C.); 46 Bom.L.R. 1 (P.C.), ref. (*Chagla, C.J.*) SHRIPATRAO MADHAVRAO *v.* PARVATIBAI. 51 Bom.L.R. 162=A.I.R. 1949 Bom. 252=4 D.L.R. (Bom.) 56=I.L.R. (1949) Bom. 1.

———S. 4—Applicability—Office of Kazi—If hereditary—Alienation by holder of inam service lands—If prohibited. [*See* Q. D. 1941—1945, **Vol. I, Col. 539.**] PATALI BEGUM *v.* YESHWANT THITE. 1946 Bom. (Rul.) 3.

———S. 4—*"Watandar"—Meaning—Holder of watan property or hereditary interest without holding office and without liability to perform service—Position and status of.*

A person who acquires watan property or has hereditary interest in it, without acquiring the watan office and without being under any obligation to perform the service attached to the office, is a watandar within the meaning of the Bombay Watan Act of 1874. 37 Bom.L.R. 599, appr); 41 Bom.L.R. 924, overr.; 21 Bom. 787, ref. (*Chagla, C.J., Gajendragadkar and Tendolkar, JJ.*) VIJAYSINGRAO BALASAHEB *v.* JANARDANRAO. 51 Bom.L.R. 556=A.I.R. 1949 Bom. 314=4 D.L.R. (Bom.) 115=I. L. R. (1949) Bom. 565 (F.B.).

———S. 5—*Alienation sanctioned by Collector—Authority of Collector on behalf of Government—Presumption.*

If the legality of an alienation for want of sanction of the Government under S. 5 of the Bombay Hereditary Offices Act is challenged several years after the Collector had sanctioned the alienation, it must be presumed that the Collector had authority on behalf of the Government so to do. (*Sir John Beaumont.*) KANDAPPA BAPURAO *v.* LINGAPPA RAMCHANDRA. 75 I.A. 259=I.L.R. (1948) Bom. 639=62 L. W. 35=A. I. R. 1949 P.C. 35=51 Bom.L.R. 173=(1949) 1 M. L.J. 172 (P.C.).

———S. 9 (2)—*Watan land—Alienation—Order by Collector directing alienee to be in possession and to pay rent to watandar—Finality—Power to revise and vary rent—Extent of.*

The order of the Collector permitting the alienee of watan property to remain in possession and directing him to pay a fixed rent to the watandar, is final and is not open to appeal or revision, in view of S. 9 (2) of the Bombay Hereditary Offices Act. But this does not deprive the Collector of his power to revise the rent fixed from time to time having regard to the change in the value of the lands in the locality. It is therefore open to the Collector to call upon the alienee in possession of the land to pay such amount to the watandar as the Collector deems fit, even though such amount may happen to be in excess of the economic yield of the land. (*Macklin and Gajendragadkar, JJ.*) SHRI SOMASHEKHAR SWAMI *v.* BAPUSAHIB NARAYANRAO, 49 Bom.L.R. 784=A.I.R. 1948 Bom. 176.

BOMBAY HIGH COURT LETTERS PATENT AMENDMENT ACT (XLI OF 1948)—Scope—If retrospective—Suits already instituted and pending—Jurisdiction to try—If taken away. *See* LETTERS PATENT (BOM.), CL. 12. 51 Bom.L.R. 122.

BOMBAY HIGH COURT RULES (APPELLATE SIDE) (1936), R. 11 (n)—Power of Registrar—Stay of further proceedings—Power to grant. *See* C. P. CODE, O. 41, R. 5 (1). 52 Bom.L.R. 612.

BOMBAY HIGH COURT RULES (O.S.), R. 117—Filing appearance in Court—Effect of—If "step in proceedings" under S. 34, Arbitration Act—Practice of filing appearance under "protest"—If justified and legal. *See* ARBITRATION ACT, S. 34. 51 Bom.L.R. 1020.

———R. 180—*Discretion of Court—Affidavit by Government Officer as to exercise of discretion by him—Order for attendance for cross-examination—When to be made.*

It is not usual for the High Court under R. 180 of the Original Side Rules to compel a highly placed and responsible officer of the Government to submit himself to cross-examination. Ordinarily the statements made by him in his affidavit should be accepted, and it is only in very rare cases that the Court would not accept a statement of such an officer who has made a solemn affirmance that he has exercised his discretion properly after considering the merits of the case; it is not a normal practice or procedure that the Court should make an order under R. 180, against Government Officers. If the officer concerned contents himself by stating in his affidavit that he had considered the merits of the case and exercised his discretion fairly and properly, the Court will accept it and will not pass an order for his appearance. But when such officer goes further and says that in coming to the conclusion at which he arrived he has also taken into consideration the general policy of Government contained in a confidential circular issued for the guidance of officers, it is a matter for investigation to what extent the mind of that officer was dominated by the particular circular, and whether the domination was such as to make his discretion fettered, and the Court will then have to make an order for the attendance of the officer for his cross-examination. (*Chagla, C.J. and Gajendragadkar, J.*) Y. R. PARPIA *v.* CHAMARBAGWALLA. 4 D.L.R. (Bom.) 9=50 Bom.L.R. 728=A.I.R. 1949 Bom. 109.

———R. 199—*"Trader"—Meaning—Film producer or distributor—If "trader."*

The word "trader" as used in the definition of "commercial causes" in R. 199 of the Bombay High Court (O.S.) Rules, 1936, imports buying and selling of commodities and is not to be understood in the wide sense as including a manufacturer. It cannot be said that the business of a film producer which is that of a manufacturer of films or that of a distributor of films is that of buying and selling within the meaning of the word "trader" in R. 199. (*Bhagwati, J.*) ATTAR HUSSEIN *v.* FAZLI BROTHERS, LTD. 226 I.C. 329 =1946 Bom. (Rul.) 300=48 Bom.L.R. 377= A.I.R. 1946 Bom. 481.

———**R. 208**—*Affidavit in support of summons by plaintiff—Affidavit by plaintiff himself on information and belief—If in order—Necessity for personal knowledge—Practice.*

Where the affidavit in support of a summons for judgment taken out in summary suit under R. 208 of the Rules of the High Court (Original Side) is made by the plaintiff himself, he need not be in a position to swear to the facts of his own personal knowledge. He can make the affidavit on information and belief. The words "who can swear to the facts of his own personal knowledge" in R. 208, qualify "any other person" only. (*Tendolkar, J.*) ASHISH ARDESHIR NAMDAR *v.* RUTTONSHAW. 50 Bom.L.R. 143=A.I.R. 1948 Bom. 368=2 D.L.R. 701.

———**R. 350, Form No. VII**—*Scope—Mandatory nature—Omission to state grant of special leave under R. 350—Effect.*

The requirements of Form No. VII annexed to the Bombay High Court Rules (O.S.) are mandatory and if a notice of motion does not comply with those requirements, it is bad and is liable to be dismissed. The notice must make mention of the fact that leave under R. 350 of the rules had been granted by the Court to serve the notice of motion for the particular date, when such leave has been obtained. Non-mention of the same is fatal. (*Bhagwati, J.*) NAWROJI VIKAJI VAKHARIA *v.* CHUNILAL B. DESAI. 49 Bom.L.R. 447=A.I.R. 1947 Bom. 436.

———**R. 928**—*Scope—If* ultra vires—*Divorce Act, S. 62—Rules under—Scope of.*

R. 928 of the Bombay High Court (O.S.) Rules, 1929, in so far as it prohibits the High Court from entertaining an application for modification, etc., of an order for alimony, etc., unless the person on whose petition the decree was pronounced is, at the time of the application, resident in India, is *ultra vires* the rule-making power of the High Court under S. 62 of the Divorce Act, and is therefore of no effect. The High Court has therefore jurisdiction to modify or discharge an order for alimony notwithstanding the fact that the wife on whose petition the decree was pronounced is resident outside India. Rules made under S. 62 of the Act must be consistent with the provisions of the Act, and any rule which deprives a person of a remedy which exists under that Act is, to that extent, *ultra vires*. 50 Bom. L.R. 426, ref. (*Weston, J.*) R. H. FRIEDLANDER *v.* K. M. FRIEDLANDER. 51 Bom.L.R. 129=A.I.R. 1949 Bom. 173.

BOMBAY HOUSE RENT RESTRICTION ORDER (1942), Cl. 12—*Construction and scope—Collector—If bound to hear appellant.*

The expression "after making such further inquiry as he thinks fit" in Cl. 12 of the Bombay Rent Restriction Order really means "after making such further inquiries, if any, as he thinks fit." The Collector is not required to hear the

appellant in support of his appeal. Having read the memorandum of appeal and read the record and proceedings below, he would be entitled to decide the appeal without any further communication with the appellant. (*Blagden, J.*) MOHANDAS MULJI SICKA *v.* COLLECTOR OF BOMBAY. 49 Bom.L.R. 414=A.I.R. 1948 Bom. 63.

BOMBAY INCREASE OF COURT-FEES ACT (XV OF 1943)—*Applicability—Process fees leviable under rules under S.* **42,** *Bombay Civil Courts Act—If affected by surcharge.*

The fees that are increased by the surcharge under the Bombay Increase of Court-Fees Act (1943) are the fees leviable under the Court-Fees Act, 1870, the fees chargeable for serving and executing processes issued by the Civil Courts subordinate to the High Court, which are leviable under the rules made under S. 42 of the Bombay Civil Courts Act are not affected by the surcharge under the Bombay Increase of Court-Fees Act. (*Sen and Rajadhyksha, JJ.*) BABU NINGAPPA *v.* PARAGOUDA PARSAPPA. I.L.R. (1946) Bom. 273=227 I.C. 226=48 Bom.L.R. 108= A.I.R. 1946 Bom. 399.

———Scope—If retrospective—Application for probate made and court-fee paid before Act came into force—Grant of probate after Act—Increased fee—If payable—Court-Fees Act, S. 19 (i). [*See* Q.D. 1941-1945, Vol. I, Col. 545.] SORABHSHAW KAPADIA *v.* CHIEF CONTROLLING REVENUE AUTHORITY. I.L.R. (1945) Bom. 783.

BOMBAY INDUSTRIAL DISPUTES ACT (XXV OF 1938), S. 26 (1) and (8)—Standing orders—Force and effect of. *See* BOMBAY INDUSTRIAL DISPUTES ACT, S. 49-A. 52 Bom.L.R. 46.

———**S. 49-A**—*Jurisdiction of arbitrator—Scope of inquiry on reference—Liability beyond standing orders and relief based on humanitarian considerations—Power to consider and grant.*

Where standing orders have been framed under S. 26 (1) of the Bombay Industrial Disputes Act and settled, such standing orders, under S. 26 (8), are determinative of the relations between the employer and the employees and of the liability of the employer. There can be no liability on the employer outside the ambit of those standing orders. In a reference under S. 49-A of the Act, therefore, the only liability which the arbitrator has jurisdiction to determine is the liability flowing from and arising out of the standing orders which have been settled; he has no jurisdiction to determine any liability outside the standing orders, namely, questions as to what is fair and right as between the employer and the employee and to give relief on moral and humanitarian considerations. (*Chagla, C.J. and Bhagwati, J.*) DIGAMBAR RAMCHANDRA *v.* KHANDESH SPINNING AND WEAVING MILLS, CO., LTD. 52 Bom.L.R. 46 =A.I.R. 1950 Bom. 174=5 D.L.R. (Bom.) 45.

———**S. 60**—*Applicability and scope—Bar of civil suit—Order contrary to Act and without jurisdiction—Power of Civil Court to set aside.*

It is perfectly clear that the order contemplated by S. 60 of the Bombay Industrial Disputes Act is an order with jurisdiction. Any order passed by the Industrial Court which is without jurisdiction or which is in excess of the jurisdiction conferred upon it by statute can always be questioned in a Civil Court. S. 60 excludes jurisdiction of Civil Court and as such must be strictly construed. It also sets up a special Court of limited jurisdiction, and Courts of limited jurisdiction must be confined to the functions and powers which are conferred upon them by the statute which creates those Courts. Therefore if the Industrial Court acts contrary to the provisions of law which creates it or if it acts in excess of its statutory powers, a Civil Court can always correct the decision of the Industrial Court. If the arbitrator imposes by his award a liability upon the employer which the law does not permit him to impose, he acts contrary to the provisions of law and in excess of his jurisdiction, and the award is therefore illegal and may be set aside by the Civil Court. 42 Bom.L.R. 767; 50 Bom. L.R. 524, foll. (*Chagla, C.J. and Bhagwati, J.*) DIGAMBAR RAMCHANDRA *v.* KHANDESH SPINNING AND WEAVING MILLS CO., LTD. 52 Bom.L.R. 46=A.I.R. 1950 Bom. 174=5 D.L.R. (Bom.) 45.

BOMBAY INDUSTRIAL RELATIONS ACT (1947), Ss. 2 (3) and 122—***Applicability and scope—Act if applies to Textile Industry—Notification No.*** 2847|34|***A, dated*** 30—5—1939, ***issued under Bombay Industrial Disputes Act,*** 1938 ***—Force of.***

By reason of Ss. 2 (3) and 122 of the Bombay Industrial Relations Act, the Notification No. 2847|34|A, dated 30—5—1939, issued under the Bombay Industrial Disputes Act, 1938, which applied that Act to the Cotton Textile Industry, the Act of 1947 also applies to the Cotton Textile Industry as specified in that Notification, since no notification has been issued under the new Act of 1947 in respect of that Cotton Textile Industry. (*Tendolkar, J.*) SURYAPRAKASH WEAVING FACTORY *v.* THE INDUSTRIAL COURT. 5 D.L.R. (Bom.) 92.

———**S. 11 (1)**—***Scope—Recognition of concern as undertaking—If bar to plea of non-applicability of Act to concern so recognised.***

The recognition by the Registrar of any concern in any industry to be an undertaking, under S. 11 (1) of the Bombay Industrial Relations Act, is a recognition for the purposes of the Act only. Such recognition cannot prevent any concern so recognised from asserting that the Act does not apply in fact to it. (*Tendolkar, J.*) SURYAPRAKASH WEAVING FACTORY *v.* THE INDUSTRIAL COURT. 5 D.L.R. (Bom.) 92.

———**S. 73**—*Construction—If includes any industrial dispute.*

There is no warrant to restrict the operation of S. 73 of the Bombay Industrial Relations Act to industrial disputes arising out of notice of change under S. 42 (1) or (2); the language of the section is wide enough to include any industrial dispute. (*Tendolkar, J.*) SURYAPRAKASH WEAVING FACTORY *v.* THE INDUSTRIAL COURT. 5 D.L.R. (Bom.) 92.

———**S. 73**—Scope—Industrial Court—Status and authority—Notification referring dispute under S. 73—If creates Court—Person challenging notification as improper—Right to apply for writ under S. 45, Specific Relief Act. *See* SPECIFIC RELIEF ACT, S. 45. 5 D.L.R. (Bom.) 1=52 Bom.L.R. 53.

———**S. 92 (1) and (2)**—***Scope—"Procedure" —Provision for places of sitting of Bench of Industrial Court—Regulation 7, 1947—If ultra vires.***

The place of sitting of a Bench is a provision for the exercise by that Bench of its jurisdiction, and a regulation may well be made under S. 92 (2) for providing a place of sitting for any Bench. In any case the word "procedure" in S. 92 (1) includes the place of sitting. The Industrial Court Regulation 7, 1947, which authorises the making of provision for places of sitting of a Bench is therefore *intra vires* and within the power to make regulations conferred by S. 92 of the Act. (*Tendolkar, J.*). SURYAPRAKASH WEAVING FACTORY *v.* THE INDUSTRIAL COURT. 5 D.L. R. (Bom.) 92.

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880), S. 8—*Applicability—Dharekaris' tenants—"Tenants"—Bombay Land Revenue Code, S. 83.*

"Tenants" in S. 8 of the Bombay Khoti Settlement Act mean only tenants of the Khot, exclusive of the tenants of dharekaris. The latter are governed not by S. 8 of the Khoti Settlement Act but by S. 83 of the Land Revenue Code. (*Sen, J.*) WAMAN MAHADEV GADGIL *v.* PANDU GOVIND. 50 Bom.L.R. 257.

———**S. 20**—Scope and effect—Entries in settlement registers—If conclusive—Correctness—Jurisdiction of Civil Court to inquire into. [*See* Q.D. 1941-1945, Vol. I, Col. 546.] BHIKAJI YESHWANT *v.* SECRETARY OF STATE. 224 I. C. 148=1946 Bom. (Rul.) 167=A.I.R. 1946 Bom. 203.

BOMBAY LAND REQUISITION ACT (XXXIII OF 1948), Ss. 4 and 6 (4)—***Applicability—"Premises"—"Let" and "intended to be let"—Meaning and interpretation—Order of requisition of flat—Issue of—Conditions precedent to—Premises once let—Landlord changing mind and wishing to occupy same—If ceases to be intended to be let.***

The power of the Government to issue a requisitioning order under S. 6 (4) of Bombay Act XXXIII of 1948, is restricted to "premises" situated in the area referred to in the Act, and which premises become vacant. Hence in order to justify an order of requisition the Government would have to satisfy the Court that there was a vacancy in a building or a part of a building which was let or which was intended to be let and that such a building was situated in an area to which the Act had been applied. The term "let" in the Act must mean that the nature of possession is such as to create in the person to whom the building is let, an interest in the property. To be in possession of a building is very different from being a tenant in the building (when alone there is letting). "Intended to be let" cannot mean "capable of being let." "Intended" imports a volition on the part of the landlord. But that volition cannot be a fluctuating or an ambulatory volition. If a volition is once expressed by the owner or landlord *quae* a build-

ing, then that volition becomes an incident of the building itself, and it is not open then to the landlord, by changing his intention from time to time, to say that the particular building was not intended to be let. The relevant date when it must be determined as to whether the building was "intended to be let" is the date when the vacancy occurs. It is only if a building is intended to be let that it is "premises" within the definition of S. 4 (3) of the Act and it is only that building in respect of which the Government can issue a requisitioning order. A building once it has been let, does not cease to be intended to be let merely because when the vacancy occurs the landlord expresses his intention that he does not want to let it but wants to occupy it himself. When the evidence clearly shows that the building or flat was intended to be let and in fact was let for a considerable period of time before the vacancy occurred, the building must be held to be premises; and if it was intended to be let, a different intention shown by the landlord at the date of the vacancy does not and cannot change the characteristic of the building and does not make it one not intended to be let. Such a definition falls within the definition of "premises" and Government would be within their rights in issuing an order of requisition in respect of such a building. 46 Bom.L.R. 916; 50 Bom.L.R. 233, ref. (*Chagla, C.J. and Shah, J.*) State of Bombay *v.* Virendra Motabhoy. 52 Bom.L.R. 627.

———**S. 4 (3)**—"Premises"—Meaning of—"Let"—"Intended to be let"—Meaning—Intention of landlord or owner—If can be changed from time to time. *See* Bombay Land Requisition Act, Ss. 4 and 6 (4). 52 Bom.L.R. 627.

———**S. 5**—Scope—Order under—If judicial or *quasi*-judicial and subject to writ of *certiorari* or prohibition. *See* Certiorari—Writ of. 51 Bom. L.R. 993.

———**S. 6**—Nature of Order—If *quasi*-judicial and subject to writ of *certiorari*. *See* Certiorari, Writ of. 51 Bom.L.R. 997.

———**S. 6 (4)**—*Scope—Declaration—Effect of—Conclusive character—If extends to matters of law.*

The first proviso to S. 6 (4) of the Bombay Land Requisition Act requires the Government to hold such enquiry as it deems fit and to make a declaration that the premises were or had become vacant. It further says that such declaration shall be conclusive evidence that the premises were or had become vacant. Where a declaration has been so made, it is not open to any one to lead evidence in any Court which would lead to a contrary conclusion. But "evidence" can only relate to matters of fact and not matters of law. The declaration therefore is only conclusive of the facts determined but not of any law which may be involved in or incidental to such determination. (*Tendolkar, J.*) Jagatchandra N. Vora *v.* Province of Bombay. 51 Bom.L.R. 997=A.I. R. 1950 Bom. 144.

BOMBAY LAND REQUISITION ORDINANCE (V OF 1947)—*Scope—If* ultra vires.

Bombay Ordinance No. V of 1947, promulgated in pursuance of the powers conferred on the Provincial Legislature by the Governor-General by Notification No. F. 311-47-C. and O., dated 21st October, 1947, in the Ministry of Law, is valid and operative and is not *ultra vires*. (*Tendolkar, J.*) Ratanchand Hirachand *v.* D. R. Pradhan. 50 Bom.L.R. 614=A.I.R. 1949 Bom 93.

———**S. 3**—*Jurisdiction—"Public purpose"—Order depriving one refugee of premises in his possession in order to give same to another—Legality of.*

The jurisdiction of the Government to requisition any land, under Ordinance V of 1947, is conditioned by the land being required for a public purpose. If Government requisitions land for a purpose which is not a public purpose it acts in excess of its jurisdiction. Although the housing of refugees may be a public purpose, if Government chooses one refugee against another without any ostensible cause, that by itself would not constitute a public purpose for which land can be requisitioned. Where the Government by its order of requisition deprives one refugee of the premises of which he is in possession in order to give them to another refugee, the order cannot be justified as being for a public purpose, unless sufficient reasons are established for the preference shown. (*Chagla, C.J. and Tendolkar, J.*) P. V. Rao *v.* Khushaldas S. Advani. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

———**S. 3**—Order under—Availability of writ of certiorari to quash. *See* Certiorari, writ of. (1950) 2 M.L.J. 703=1950 S.C.J. 451 (S.C.).

———**Ss. 3 and 11**—*Scope—Order of requisition not served on person affected and not addressed to any one—If bad.*

The validity of a requisition order under S. 3 of Ordinance V of 1947 does not depend upon its service upon all persons affected by that order. The utmost that can be said is that it may not be effective against a person unless it is served upon him. But merely because it is not served on a particular person it does not follow that the order is not in accordance with law. Nor can it be said that an order is bad because it is not addressed to any particular person or persons. S. 3 does not require that the order of requisition should be addressed to any person. (*Chagla, C.J. and Tendolkar, J.*) P. V. Rao *v.* Khushaldas S. Advani. 51 Bom.L.R. 342=A.I. R. 1949 Bom. 277.

———**S. 3**—*Scope—Power of Government under—Order of requisition—When to be made.*

Under S. 3 of the Bombay Land Requisition Ordinance (1947), the Legislature has left it to the Provincial Government to decide whether it is necessary or expedient to requisition any land. The opinion of the Government on the question is conclusive. It is, however, incumbent on the Government to decide objectively that the land is required for a public purpose. The element of determination and decision indisputably enters in the order of requisition to be made under S. 3, which also circumscribes the jurisdiction of the Government to make an order under the section, *i.e.*, it is only when land is required for a public purpose that Government is entitled to exercise its power to requisition land. (*Chagla, C.J. and Tendolkar, J.*) P. V. RAO *v.* KHUSHALDAS S. ADVANI. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

———**S. 4 (1) and (3)**—*Applicability—Premises not in existence on date of notification but coming into existence after such date—Jurisdiction to requisition.*

S. 4 of the Bombay Land Requisition Ordinance would not apply to premises which come into existence after the date of the notification by Government. The expression "become vacant" in S. 4 (1) only applies to such premises as were in existence at the date of the notification and not to premises which come into existence after that date. The Government have therefore no jurisdiction to requisition premises which do not exist on that date but which come into existence after such date. (*Chagla, C.J. and Tendolkar, J.*) P. V. RAO *v.* GIRDHARLAL LALLUBHAI. 51 Bom. L.R. 418=A.I.R. 1949 Bom. 303.

———**S. 4 (4)**—*Order of requisition—If quasi-judicial—Writ of* certiorari—*Jurisdiction to issue.*

Under S. 4 (4) of the Bombay Land Requisition Ordinance, an objective fact has got to be determined before an order of requisition can be made, and that objective fact is whether the premises are vacant or become vacant. The fact of premises being vacant or becoming vacant is not something which is capable of ascertainment by mere physical demonstration. Premises are only vacant or become vacant (1) by the landlord ceasing to occupy the premises, (2) by the termination of a tenancy, (3) by the eviction of a tenant, (4) by the release of premises from requisition, etc. An order of requisition under S. 4 is therefore a *quasi*-judicial act, and if Government act in excess of their jurisdiction a writ of *certiorari* will be rightly directed to issue against them. 51 Bom.L.R. 342, ref. (*Chagla, C.J. and Tendolkar, J.*) P. V. RAO *v.* GIRDHARLAL LALLUBHAI. 51 Bom.L.R. 418=A.I.R. 1949 Bom. 303.

BOMBAY LAND REVENUE CODE (V OF 1879), S. 37 (3)—*Limitation for civil suit—Starting point—Order passed by Revenue Commissioner in second appeal—Revision application preferred to Revenue Tribunal from his order.*

Where the Revenue Commissioner has passed an order in second appeal filed under S. 203 of the Bombay Land Revenue Code, from the appellate order of the Collector, a suit in the Civil Court must be instituted within one year from the date of that order under S. 37 (3) of the Code. For the purposes of S. 37 (3), an application for revision of that order filed before the Revenue Tribunal is irrelevant. (*Thadani and Constantine, JJ.*) PROVINCE OF SIND *v.* MT. JAVAT KHATUN. A.I.R. 1949 Sind 10.

———**S. 48**—*Construction—"Land used for the purpose of building"—Meaning—If limited to area actually covered by structure—Non-agricultural assessment in respect of four times the area covered by building—Levy of—Legality.*

The terms of S. 48 of the Bombay Land Revenue Code clearly show that assessment shall be deemed to have been imposed according to the purpose for

which the land is used; and in the case of land used for the purpose of construction, it cannot be said that the area actually built upon or covered by a building is alone used "for the purpose of building". The expression "land used for the purpose of building" refers to all land covered by a structure, as well as land either necessary or required for occupation or use of the structure for the purpose for which it is intended. As it would be impossible to use a structure without using some area of land surrounding it, such surrounding land which renders the enjoyment possible or comfortable would be deemed to be included in the land which is used for the purpose of building. It would be legal for the Collector to impose non-agricultural assessment not only with reference to land actually covered by building but also to land required for using the building. An estimate of a total requirement of four times the area of land actually covered by structures, as being land used for the purpose of building and levy of non-agricultural assessment on that basis would not be erroneous or illegal or *ultra vires.* 29 Bom.L.R. 1350, dist.; 20 Bom.L.R. 29, expl. (*Shah, J.*) DAMJI JAVER CHAND *v.* PROVINCE OF BOMBAY. 52 Bom.L.R. 138=A.I.R. 1950 Bom. 227.

———**S. 48 (2)**—*Introduction of non-agricultural assessment—Condition pre-requisite.*

Under S. 48 (2) of the Bombay Land Revenue Code, it is only when an agricultural assessment has been fixed "*under the provisions of this Act*" that the Provincial Government can introduce non-agricultural assessment (*i.e.*) "altered" assessment under the Act. The fixing of agricultural assessment can be proved either by direct evidence or by circumstances such as the fact that the assessment has continued for about fifty years and that an announcement was made by the Government to the grantee that a survey settlement was made in the village. (*Sir Madhavan Nair.*) GOVERNMENT OF THE PROVINCE OF BOMBAY *v.* PESTONJI ARDESHIR WADIA. 76 I.A. 85 I.L.R. (1949) Bom. 110=A.I.R. 1940 P.C. 143=53 C.W.N. 489=4 D.L.R. (P.C.) 187=62 L.W. 444=1949 M.W.N. 407=51 Bom.L.R. 635=(1949) 2 M.L.J. 161 (P.C.).

———**Ss. 73 and 74**—Requirements—Sufficient compliance with. *See* IMPARTIBLE ESTATE. 75 I.A. 259=(1949) 1 M.L.J. 172 (P.C.).

———**S. 74**—*Written agreement by person in whose favour relinquishment is made—What amounts to—Failure of Government to substitute his name—Effect of.*

S. 74 of the Bombay Land Revenue Code does not say with whom the written agreement is to be made, but clearly it must be with Government, since the Collector has to accept it. If the person in whose favour the right of occupancy is relinquished makes a written statement to the Mamlatdar asking that the name of the person who has given the notice of relinquishment might be removed from the *Pali* register and his own name might be entered, it constitutes a written agreement to accept the relinquishment, and the transaction so far as the parties are concerned is complete. The rights of the parties cannot be affected by the failure of Government to carry out its statutory duty to substitute his name in the *Pali* register or by their action after the death of the person who gave the notice of relinquishment in entering his name in the mutation register as taking by inheritance. 27 Bom.L.R. 1253, disapproved. (*Sir John Beaumont.*) KANDAPPA BAPURAO *v.* LINGAPPA RAMCHANDRA. 75 I.A. 259=I.L.R. (1948) Bom. 639=51 Bom.L.R. 173=A.L.R. 1949 P.C. 35=62 L.W. 35=(1949) 1 M.L.J. 172 (P.C.).

———S. 74—*Notice of relinquishment not in prescribed form—Validity.*

A notice of relinquishment of right of occupancy, although not in the form prescribed by S. 74, is valid if it contains all the essentials required by such form. The Government is entitled to accept such notice without insisting on the prescribed form. (*Sir John Beaumont*). KANDAPPA BAPU RAO *v.* LINGAPPA RAMCHANDRA. 75 I.A. 259=I.L.R. (1948) Bom. 639=51 Bom.L.R. 173=A.I.R. 1949 (P.C.) 35=62 L. W. 35=(1949) 1 M.L.J. 172 (P.C.).

———S. 83—Applicability—Tenants of dharkaris—Khoti Settlement Act, S. 8—Application of. *See* BOMBAY KHOTI SETTLEMENT ACT, S. 8. 50 Bom.L.R. 257.

———S. 83—*Scope and object of—Burden of proof—Denial of permanent tenancy—What has to be proved.*

The object of S. 83 of the Bombay Land Revenue Code is to protect the possession of tenants who show the antiquity of their tenancy and who are able to claim that it is by reason of such antiquity that the commencement of that tenancy cannot be proved. A landlord cannot successfully resist the claim of his tenant to be regarded as a permanent tenant if he shows that the tenancy commenced within a reasonably short period of years. The landlord must prove the *commencement* of the tenancy, *i.e.,* the year if not the date and month, in which the tenancy commenced. (*Kania, Ag. C.J. and Gajendragadkar, J.*) NAGAPPA BALAPPA *v.* RAMCHANDRA. I.L.R. (1946) Bom. 794=227 I.C. 276=48 Bom.L.R. 225=A.I.R. 1946 Bom. 365=1946 Bom. (Rul.) 37.

———S. 155—*Abkari contract—Default in payment of amount due to Government—Notice of sale of defaulter's lands—Reserve price not fixed—Purchase by Government for Re.* 1 *in the absence of bidders—Sale—If valid or nullity.*

The plaintiff, an Abkari contractor, having failed to pay the Government dues, the Government gave notice to the defaulter on 5—8—1938, that they would recover the amount by an auction-sale of his lands under S. 153, Bombay Land Revenue Code, on a nominal bid and that he should be present and arrange to bid at the auction-sale or to bring the money, *i.e.*, the amount due by him. A proclamation was issued on the same date stating that if the amount due to the Government was not obtained, all the property of the defaulter as a last resort shall be sold on a nominal bid of Re. 1. The auction-sale was held on 21—9—38, and as no bidders were forthcoming the lands were purchased by the Government for Re. 1. There was no reserve price fixed. The plaintiff sued for a declaration that the sale was a nullity.

Held: that the sale was a valid sale, though the procedure followed by Government was inequitable. 49 Bom.L.R. 209, Dist. (*Chagla, C. J., Gagendragadkar and Dixit, JJ.*) LADURAM HAJARIMAL *v.* RAMRAO JANKIRAM. 5 D. L. R. (Bom.) 104=A.I.R. 1950 Bom. 195=52 Bom. L.R. 263 (F.B.).

———Ss. 165, 167 and 181—*Powers of Government to forfeit or foreclose defaulter's property—Sale of property to agent of Government for one rupee—Legality—Right of purchaser.*

The Bombay Land Revenue Code contains no power by which the Government can either forfeit or foreclose a defaulter's property. Where the property of a defaulter is put up for sale under a proclamation reserving no right in Government to bid at it, and there being no bidders, the property is sold to an agent of the Government for the nominal value of rupee one, it must be held that the sale is a nullity and of no effect and does not give to the purchaser or to the Government (the principal) any right, estate and interest in the property sold. (*Stone, C.J. and Divatia, J.*) TUMDU DHANSINGH *v.* PROVINCE OF BOMBAY. I.L.R. 1947 Bom. 75=49 Bom.L.R. 209=A.I.R. 1947 Bom. 403.

———Ss. 178 and 179—*Applicability and scope—Award under Bombay Co-operative Societies Act—Sale by Collector in execution of—Payment of amount after sale—If ground for not confirming sale and for setting it aside—Discretion of Collector.*

Under S. 179, Bombay Land Revenue Code, the Collector is given a discretion to refuse to confirm the sale, but if he does not exercise that discretion in favour of the debtor, his jurisdiction to confirm the sale is not lost. Even if the full amount is paid after the sale, the Collector is not bound to set aside the sale. Subsequent payment does not oust the jurisdiction of the Collector to confirm the sale. Even if the sale is not for arrears of Government Revenue as such, but for demand recoverable as arrears of revenue, *e.g.*, an award under the Bombay Co-operative Societies Act, the sale can be set aside only under S. 178. The debtor has no right to get the sale set aside by paying off the debt after the sale. (*Lokur, J.*) LAXMAN GOVIND *v.* BHUT ASHTE CO-OPERATIVE CREDIT SOCIETY. 48 Bom.L.R. 610=A. I. R. 1947 Bom. 144=231 I.C. 131.

BOMBAY LOCAL BOARDS ACT (VI OF 1923), S. 19—*"District Judge"—Judge of Chief Court of Sind—If District Judge—Application with reference to election of Local Board of Karachi district—Forum.*

A judge of the Chief Court of Sind is not a District Judge; in any case, he is not "the District Judge" within the meaning of S. 19 (1) of the Bombay Local Boards Act. An application under S. 19 of the Act with reference to the election of a member of a Local Board held for the revenue district of Karachi, even though it may have taken place in the city or the taluka of Karachi, must be made to the District Judge of Hyderabad, and not to the Chief Court of Sind. (*Thadani, J.*) ELIAS DADLA KHAN *v.* MAHFOOZ SHAH. I.L.R. (1946) Kar. 164=1946 Sind (Rul.) 63=221 I. C. 646=A. I. R. 1946 Sind 86.

——**S. 72**—Applicability and scope—Octroi—Nature and incidents of—Suit for octroi—Maintainability by Local Board. [*See* Q.D. 1941-1945, Vol. I, Col. 554.] DISTRICT LOCAL BOARD, RATNAGIRI *v.* SHANTARAM. I.L.R. (1946) Bom. 712=A.I.R. 1946 Bom. 117.

BOMBAY LOCAL FUND AUDIT ACT (XXV OF 1930), S. 13 (a)—*Application under—Jurisdiction to entertain—Chief Court of Sind.*

As the Chief Court of Sind is not a District Court, it has no jurisdiction to entertain an application under S. 13 (*a*), Bombay Local Fund Audit Act. (*Thadani, J.*) *In the matter of* MD. OSMAN SUMRO. I.L.R. (1947) Kar. 164=A.I.R. 1948 Sind 89.

BOMBAY MAMLATDARS COURTS ACT (II OF 1906), S. 18 (3)—Application—Revisional application under S. 23—Application to bring on record legal representative of deceased party—Limitation—C. P. Code, O. 32—Application of. [*See* Q.D. 1941-1945, Vol. I, Col. 555.] HAFASJI IBRAHIM *v.* MANGALGIRJI. I.L.R. (1945) Bom. 905=224 I.C. 306=1946 Bom. (Rul.) 205=A.I.R. 1946 Bom. 201.

BOMBAY MEDICAL PRACTITIONERS' ACT (XXVI OF 1938), S. 36 (c)—*Applicability—Person registered under S. 7 of Bombay Medical Act,* 1912, *and removed from register under S. 9 of that Act—If entitled to registration—Exemption from application of Ss.* 32 *and* 34*—Right to.*

It is clear from the structure of the Bombay Medical Practitioners' Act (1938), (as also of the Bombay Medical Act (1912), that two classes of practitioners are envisaged, *viz.*, persons who are "registered" and persons who are "entitled to registration," or "entitled to be registered." Every person who possesses the qualifications referred to in S. 7 (2)' of the Act of 1912 is as a matter of status a person entitled to registration under the Act. The Acts (of 1912 and of 1938) give persons "registered" certain privileges which are denied to the other class, *i.e.*, those who are entitled to registration or entitled to be registered. A person whose name has been struck off the Register under S. 9 of the Act of 1912, but who is in possession of the scholastic qualification entitling him to registration can claim the benefit of the exception contained in S. 36 (*c*) of the Act of 1938, as being a person "entitled to registration" under the 1912 Act, and it cannot be held that by the removal of his name from the register he has been deprived of that status. He is therefore exempt from the application of Ss. 32 and 34 of the Act of 1938. (*Stone, C.J., Lokur and Gajendragadkar, JJ.*) EMPEROR *v.* JOSEPH D'SILVA. I.L.R. (1946) Bom. 1069=229 I.C. 178=1947 Bom. (Rul.) 146=48 Cr.L.J. 305=49 Bom.L.R. 6=A.I.R. 1947 Bom. 310 (F.B.).

BOMBAY MONEY-LENDERS ACT (XXXI OF 1947), S. 2 (9)—*"Loan"—Meaning of—"By way of credit"—If restricts true meaning.*

A loan as defined in S. 2 (9) of the Bombay Money-Lenders Act covers a loan which is secured as well as a loan which is unsecured, and it is immaterial whether the lender advances the money on security which fully covers the loan advanced by him. In using the expression "by way of credit" in S. 2 (9) the Legislature has used an expression which is superfluous or unnecessary and that expression does not in any way affect or restrict the true meaning of "loan." The expression is not a restrictive expression at all in the context. (*Chagla, C.J. and Gajendragadkar, J.*) EMPEROR *v.* JHAVERILAL MAGANLAL. 51 Bom.L.R. 991=4 D.L.R. (Bom.) 196=A.I.R. 1950 Bom. 119=51 Cr.L.J. 635.

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 3 (15) (e)—Public securities—Provident fund of municipal employees—Investment in debentures issued by Municipality—If justified—Trust Act, S. 20. [*See* Q.D. 1941-1945, Vol. I, Col. 555.] AHMEDABAD MUNICIPALITY *v.* GOVERNMENT OF BOMBAY. 223 I.C. 631=1946 Bom. (Rul.) 153=A.I.R. 1946 Bom. 159.

——**S. 3 (19)**—*"Street"—Vacant or open plot of land of private person—When "street."*

A vacant or open plot of land owned by a private party may be a "street" as defined by S. 3 (19) of the Bombay Municipal Boroughs Act, if houses about on such vacant space, if it is used by persons as a means of access to an adjacent thoroughfare and the occupiers of the houses which abut on the plot have no right at all hours to prevent any one from using it as a means of access to the thoroughfare. (*Davis, C.J. and Thadani, J.*) HYDERABAD MUNICIPALITY *v.* PANALAL. I.L.R. (1945) Kar. 301=222 I.C. 513=1946 Sind (Rul.) 120=A.I.R. 1946 Sind 10.

——**S. 19**—*Construction and scope—Notice—Expiry of term of president—Delay in electing successor—Effect—Notice after expiry of term—Convening meeting to elect president from prior date—Legality of.*

S. 19 of the Bombay Municipal Boroughs Act only provides that after the term of office of a president has come to an end, and until the election of the successor takes place, the retiring president shall continue to discharge all the functions of the office of the president and to that extent, no doubt, his term of office shall be deemed to have been extended. The proviso to S. 19 (1) cannot be read as meaning that the term of office as president must be deemed to extend to and to expire with the date of the election of his successor or that, on that account, the successor can be appointed only as from the date of such election. But when the period or term has in fact expired, and he continues, until the election of his successor, to discharge the functions of the president because that office has not been validly filled up by election, it is not correct to hold that the successor can be elected only as from the date of actual election. He can be elected for the period commencing from the date next after the date on which the term of the retiring president expired, though until the election, the latter can continue to act as president and discharge the functions of that office. Hence a notice by the Collector convening a meeting to elect a president for the period commencing from a date prior to the date of the notice (the date next after the date of expiry of the term of the retiring president) is perfectly valid and a *prima facie* good notice. A meeting assembled in pursuance of such notice is a duly convened meeting and is competent to proceed with the election. It cannot be held that the notice is illegal and therefore the meeting has no right to proceed with the election. (*Tendolkar, J.*) YUSUF *v.* VISHNUPRASAD. 2 D.L.R. 581.

———**S. 34 (5) (b)**—*Applicability—Health officer appointed on probation—If protected—Assent of two-thirds of whole number of Councillors—If necessary for removal from office.*

S. 34 (5) (*b*) of the Bombay Municipal Boroughs Act, requiring two-thirds of the whole number of Councillors for removing a health officer from service, applies only if the officer concerned has been appointed temporarily or permanently. It cannot apply to one who has been appointed on probation. An officer appointed on probation holds office until the appointing authority is able to come to a conclusion whether his work is satisfactory and whether he should be continued in service; till then he is holding his office at the pleasure of the appointing authority and his appointment can be terminated either by the efflux of time where a specified period has been fixed for probation or by the fixing of a date after probationer enters upon the office. The probation given to temporary and permanent health officers by S. 34 (5) (*b*) does not thereto an officer or probation. (*Machlin and Rajadhyaksha, JJ.*) BHASKAR WABLE *v.* NASIK CITY MUNICIPALITY. I.L.R. (1946) Bom. 1010=48 Bom.L.R. 604=A.I.R. 1947 Bom. 78=230 I. C. 77=1947 Bom. (Rul.) 228.

———**Ss. 78 and 82**—*Construction and scope—Assessment list—Correction—Effect—Corrected list—Retrospective effect—Tax for years before the year in which correction is made—Liability for—If arises on correction.*

The owner or occupier of a building in a borough municipality is not liable to pay tax for the years in which it was not included in the assessment list. Under S. 78 of the Bombay Municipal Boroughs Act, the preparation of the assessment list is essential to the arising of the liability to tax, and only those properties which are included in that list are liable to pay tax as set out therein. In the case of a mistaken omission of property from the assessment list, the correction including only on the first day of the current official year, if the building or property to be taxed was in existence before the beginning of that year; *i.e.*, 1st April of that year, and it has no retrospective effect so as to entitle the municipality to levy tax for the prior years in which the property was not included in the assessment list. The corrected list must be deemed to have come into force on the 1st of April of the year in which the correction is made and not earlier. (*Lokur, J.*) MUNICIPAL BOROUGH, SHOLAPUR *v.* GOVERNOR-GENERAL IN COUNCIL. 49 Bom.L.R. 752=A.I.R. 1948 Bom. 145.

———**Ss. 80, 81, 82 and 84**—*Scope and effect of—Revised assessment list—When become effective—Liability to tax—If arises on 1st April or after disposal of objections and amendments and final assessment list only.*

S. 84 (1) of the Bombay Municipal Boroughs Act contemplates (1) preparation of an assessment and (2) complete revision of an assessment list once in every four years. S. 84 (2) shows that the provisions of Ss. 80, 81 and 82 are to be applied every year as though a new assessment list has been completed at the commencement of the official year, *i.e.*, 1st April. S. 84 (2) therefore applies both to an annual assessment list as well as to a revised assessment list prepared once in every four years; so that an annual assessment list or a revised assessment list becomes effective at the commencement of the official year, *i.e.*, 1st April, S. 84 cannot be construed as meaning that the assessment list or revised assessment list becomes effective only after it is made final, that is to say, after the objections are considered and amendments made as contemplated by S. 81 (3) (*c*) and after the result of an appeal or revision, if any, under S. 110. The liability to pay arises on the 1st of April and not after the objections are considered and disposed of and a final assessment list is made. The liability to pay the tax arises independently of the objections or of the disposal of the objections. (23 Bom.L.R. 48, Dist. (*Sen and Dixit, JJ.*) SUBBAPPA MALLAPPA *v.* P. L. BONNI. I.L.R. (1948) Bom. 786=A.I.R. 1949 Bom. 119=50 Bom.L.R. 701.

———**S. 110**—*Jurisdiction—Order by Magistrate—Revision in High Court—Civil or Criminal—C. P. Code, S. 115—Cr. P. Code, S. 435.*

An application in revision, made against an order of a Magistrate, under S. 110 of the Bombay Municipal Boroughs Act (1925), lies to the High Court on the civil side and not on the criminal side.

A Criminal Court may be constituted as a Court *designata* and civil jurisdiction may be conferred upon that Court. If the Criminal Court exercises that jurisdiction, it is not necessarily an inferior criminal Court within the meaning of the Cr. P. Code, when a right of revision is given from a decision of such a Court, then that revisional application is civil in character and not criminal. The Special Jurisdiction under S. 110, Municipal Boroughs Act, is of a civil nature and therefore the revision application is one on the civil side. 43 Bom. 607, disappr.; 9 Bom.L.R. 1347; 30 Bom.L.R. 1084; 41 Bom.L.R. 937, foll. (*Chagla, C.J., Bavdekar and Shah, JJ.*) V. B. D'MONTE *v.* BANDRA BOROUGH MUNICIPALITY. 5 D.L.R. (Bom.) 125 =4 A.I.Cr.D. 357=A.I.R. 1950 Bom. 397=52 Bom.L.R. 537 (F.B.).

———**S. 178**—*Construction of—Sanction to prosecute—Power to grant—Standing Committee—Power of—Sanitary Committee having power under rule—Effect of on power of Standing Committee.*

The Standing Committee of a Municipality is competent to sanction a prosecution for a contravention of S. 178 of the Bombay Municipal Boroughs Act, in view of the power to sanction prosecutions given to it under S. 200 of the Act. The fact that under S. 58 (*a*) a Municipality has framed a rule by which the Sanitary Committee has been declared to be the controlling and executive committee in matters of the particular department does not take away the power of the Standing Committee. Both the Standing Committee and the Sanitary Committee would be competent in such a case to sanction the prosecution. 37 Bom.L.R. 184, ref. (*Bavdekar and Chainini, JJ.*) EMPEROR *v.* KHUMA ARJUN. 51 Bom.L.R. 850=A.I.R. 1950 Bom. 75=5 D.L.R. (Bom.) 29=51 Cr.L.J. 404.

———S. 206—*Applicability—"Anything done or purporting to have been done in pursuance of this Act"—Deposit with Municipality under contract made by private party—Forfeiture by Municipality—Suit by private party for recovery—If covered by section.*

When a Municipality has obtained powers under a Municipal Act to enter into a contract, the exercise of their power to enforce the contract is not an act "done iin pursuance of" the Municipal Act, for purposes of S. 206 of the Bombay Municipal Boroughs Act. Such an act is done in pursuance of the contract. S. 206 has to be strictly construed, as it constitutes a restriction on the ordinary rights of litigants. The forfeiture by a Municipality of a deposit made to it under a contract with it which the Municipality is empowered to enter into, but is not under any statutory obligation to do, is not an act falling within the ambit of the section. Hence a suit by a private individual to recover the amount deposited by him under a contract and forfeited by the Municipality is not a suit to which S. 206 applies. (*Chagla, Bavdekar and Gagendragodkar, JJ.*) MUNICIPAL BOROUGH OF AHMEDABAD *v.* JAYANTILAL CHHOTALAL. I.L.R. (1947) Bom. 841=49 Bom.L.R. 724=A.I.R. 1948 Bom. 98 (F.B.).

———S. 206—*Applicability—Anything done or purporting to have been done in pursuance of the Act—Meaning.*

There is no warrant for the view that the necessity for notice of suit under S. 206 of the Bombay Municipal Boroughs Act is limited to particular kinds of suits according to the relief claimed.

Where under an agreement with a Municipal Borough a person is allowed to occupy certain plots of municipal land for residential purposes but in pursuance of a town-planning scheme, the Municipal Borough gives notice to quit, and subsequently after an application by the applicant for a reconsideration of the matter, the Municipal Borough passes a resolution that the permit-holder (occupant) should be evicted in accordance with the notice already given, and communicate the same to the occupant, it must be held that the notice, the resolution and the subsequent communication sent to the occupant are all acts done or purporting to be done within the meaning of S. 206 of the Act. Hence a suit by the aggrieved occupant for an injunction restraining the Municipality from evicting him requires notice of suit as required by S. 206, and the omission to give the notice bars the suit. (*Sen and Weston, JJ.*) VITHOBA BABAJI NAROTE *v.* SHOLAPUR MUNICIPALITY. I.L.R. (1947) Bom. 94=48 Bom.L.R. 804=A.I.R. 1947 Bom. 241.

———S. 206—*Scope—Strict compliance—Necessity—Poona City Municipality Octroi Rules, R. 11—Construction—"Officer in charge of the work"—Refund of duty paid—Conditions of—Notice addressed to Octroi Superintendent—Validity—"Act complained of"—Meaning—Levy of Octroi or refusal to refund.*

R. 11 of the Poona City Municipality's Octroi Rules provided, *inter alia,* that in respect of goods declared at the time of their import to be required in fulfilment of a specified contract with a public authority, the refund shall be made to the credit of the public authority or to the contractor, if he has paid the duty, subject to the conditions: (1) that such goods shall have vested in such public authority; and (2) that a certificate to that effect signed by the officer in charge of the work to which such contract relates shall have been produced.

The plaintiffs who were contractors agreed to supply tents to the Stores Department of the Government of India in 1940-1941. They did business in Poona, but their contracts were for the supply of tents at the Kirkee Arsenal. They imported goods within the municipal limits of Poona City and after making tents out of such goods, delivered them to the Supply Department of the Government of India. While the raw materials were being imported they had to and did pay Octroi duty and thereafter they submitted a claim for refund, producing a certificate signed by the officer in charge of the Kirkee Arsenal. After protracted correspondence between the Octroi Superintendent of the Poona City Municipality, the plaintiff served a notice on the Superintendent under S. 206 of the Bombay Municipal Boroughs Act, and filed a suit within six months thereof.

Held: (1) that the rule made no reference as regards the form of the goods after they were imported within the city, and it was therefore not necessary that the form should have remained exactly the same before they were vested in a public authority. So long as the goods were required for the fulfilment of a specified contract with a public authority, the requirements of the rule were satisfied, and the rule did not require that the goods which ultimately vest in a public authority should remain precisely in the same form in which they were imported;

(2) that the expression "certificate signed by the officer in charge of the work to which the contract relates," in the rule must mean the certificate of the person who was to take delivery of the tents supplied by the plaintiffs, and that officer was obviously the officer in charge of the ordnance depot at Kirkee; and therefore the certificate signed by the officer in charge of the Kirkee Arsenal was a sufficient compliance with the rule;

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(3) that "the act complained of" in S. 206, of the Bombay Municipal Boroughs Act, was not the payment of Octroi duty by the plaintiffs, but the refusal on the part of the Municipality to refund the duty paid under the Refund Rule, which was the cause of action.' The suit being within six months of the date of the refusal to refund was in time;

(4) that the notice given to the Octroi Superintendent was not a valid notice; the notice should be given to the chief officer of the Municipality, as the requirement of the section should be strictly complied with; and even if the Octroi Superintendent had ultimately brought the notice to the attention of the Chief Officer, the address addressed to the Superintendent and not to the Chief Officer was not a valid notice on which the plaintiffs would be entitled to file suits. (*Rajadhyaksha and Chainani, JJ.*) K. M. D. THACKERSEY & **Co. v. POONA CITY MUNICIPALITY. 5 D.L.R. Bom. 192.**

BOMBAY PLEADERS ACT (XVII OF 1920), Ss. 3 and 4—Pleader removed from practice for misconduct and sanad cancelled subsequent readmission to practice—Procedure—Form of order to be made—Issue of new sanad bearing date of such issue. [*See* Q.D. 1941-1945, Vol. I, Col. 565.] LAXMAN GANESH RASTE, *In re*. 18 R.B. 137.

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), Ss. 5 and 6—*Jurisdiction—Magistrate issuing warrant under S. 6—Competency to try offence.*

It is wrong in principle that a Magistrate who issues the warrant under S. 6 of the Bombay Gambling Act should be the same judicial authority who should try the accused who has the right **to challenge the propriety off the warrant.** A trial of the accused by such a Magistrate is therefore vitiated and the conviction at such trial should **in consequence be set aside.** (*Changla and Gajendragadkar, JJ.*) EMPEROR *v.* VALLI MAHO**MED SHEIK MAHOMED. 49 Bom.L.R. 618=A.I.R. 1948 Bom. 72**=48 Cr.L.J. 1001=I.L.R. **(1947) Bom. 559.**

———**S. 6**—*Construction—Duty of magistrate issuing warrant for search—Warrant not issued on complaint or information on oath and not in proper form—Effect—Presumption under S. 7—If can be raised.*

S. 6 of the Bombay Prevention of Gambling Act must be construed strictly, because S. 7 **gives to an arrest and seizure under it an operation different from that of the general presumption of innocence in criminal cases.** A warrant for search has to be drawn up by the magistrate in a particular form after a complaint or information was given on oath. A magistrate issuing the warrant must take care to see that a proper, from is used and if he has to use any **other form (e.g., one under S. 96, Cr. P. C.),** he must make the necessary corrections so as to comply with the requirements of S. 6. If this is not done, and if the warrant is not in proper form and is issued without any complaint or information on oath, the presumption under S.

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6 will not arise. (***Lokur and Dixit, JJ.***) EMPEROR *v.* POKKA KUSLAPPA. 230 I.C. 424=1947 Bom. (Rul.) 256=48 Cr.L.J. 644=49 Bom.L.R. 150=A.I.R. 1947 Bom. 329.

———**S. 6**—*Scope—Warrant—Conditions for and contents of—Information or complaint in writing—If necessary—Warrant, if should show that information on oath was given.*

S. 6 of the Bombay Prevention of Gambling Act does not require that information should be given in writing. All that the section requires is that there should be a complaint or information on oath, and that may either be oral or in writing. Nor is it necessary that it must appear in the warrant itself that a complaint or information **was given on oath.** (***Lokur and Dixit, JJ.***) EMPEROR *v.* POKKA KUSLAPPA. 230 I.C. 424=1947 Bom. (Rul.) 256=48 Cr.L.J. 644=49 Bom.L.**R. 150=A.I.R. 1947 Bom. 329.**

———**Ss. 6 and 7**—*Scope and effect of—Presumption orising under—Value and weight of.*

The combined effect of S. 6 (*ii*) (*a*) and S. 7 of the Bombay Prevention of Gambling Act is to create a wholly artificial method of proof, *i.e.*, in cases in which entry is effected by an officer duly authorised, he having "reason to suspect" that the place entered is a common gaming house, and in which an instrument of gaming is found on his entry taking place; the seizure of such instrument shall be, "until the contrary is proved" evidence that the place is "used as a common gaming house and that the persons found therein were present for the purpose of gaming." Though the result is that all the persons found therein are guilty of an offence under S. 5 of the Act until the contrary is proved, yet in the absence of something more, the artificial method of proof does not extend to making any one of them or **anyone else guilty of an offence or liable for the** penalties imposed by S. 4. (***Stone, C.J. and Lokur, J.***) EMPEROR *v.* MAHOMED DAWOOD. 49 Bom.L.R. 603=A.I.R. 1948 Bom. 67=48 Cr.L.J. 1002 (2).

———**(as amended in 1936), S. 6**—*"Specially empowered"—Meaning of—"Specially" empowered and "generally" empowered—Distinction.*

The expression "specially empowered" in S. 6 of the Bombay Prevention of Gambling Act means empowered by name or by virtue of holding a particular office. When a class of officials is **invested with powers to try certain offences or** to do certain functions, they are "generally empowered," but if any persons are so empowered by name or by virtue of their officers, they are said to be "specially empowered." (*Stone, C.J. and Lokur, J.*) EMPEROR *v.* SAVLARAM KASHINATH. 49 Bom.L.R. 798=A.I.R. 1948 Bom. 156=49 Cr.L.J. 165.

———**S. 6**—*Warrant under—Conditions of legality—Validity—If to be proved—Warrant, if should show on its face that conditions have been fulfilled—Statement in warrant to that effect—Presumption.*

It is not essential that a warrant issued under S. 6 of the Bombay Prevention of Gambling Act should show on the face of it that the **conditions**

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precedent required by the statute have been complied with; where the warrant, however commences with a preamble that the conditions required had been fulfilled, it has to be presumed that the officer issuing the warrant has discharged his duty correctly, having regard to the provisions of illustration (*e*) to S. 114, Evidence Act; and unless that presumption is rebutted by evidence contra, the Court may act on the basis of the warrant being legal; it is not necessary that there should be evidence adduced by the prosecution to prove that the requirements of proviso to S. 6 of the Act have been fulfilled. (*Stone, C. J. and Lokur, J.*) EMPEROR *v.* SAVGAPAM KSHINATH. 49 Bom.L.R. 798=A.I.R. 1948 Bom. 156=49 Cr.L.J. 165.

———**S. 6, Proviso**—*Scope—Fulfilment of requirements of—If condition precedent to legality of search warrant.*

Before a search warrant can issue under S. 6 of the Bombay Prevention of Gambling Act, the requirements of the proviso in that section must have been fulfilled, that is to say, the officer issuing the warrant must be satisfied, upon any complaint made before him on oath and upon making such inquiry as he thinks necessary, that there are good grounds to suspect that the house, room or place in question is being used as a common gaming house. That is a condition precedent, and unless it is complied with or fulfilled, the warrant would be *ultra vires*. (*Stone, C.J. and Lokur, J.*) EMPEROR *v.* SAVLARAM KASHINATH. 49 Bom.L.R. 798=A.I.R. 1948 Bom. 156=49 Cr.L.J. 165.

———**S. 7**—*Construction and scope—Finding of marked currency notes—If sufficient to raise presumption of place being common gaming house or persons present being there for gaming—Evidence of bogus punter—Value of.*

The finding of a marked coin or a marked currency note cannot lead to the presumption of the coin or note being an instrument of gaming or the place being a common gaming house under S. 7 of the Bombay Prevention of Gambling Act. If it is found as a fact that any marked note or coin has in fact been used as means of gaming, that particular coin or note can then be taken as an instrument of gaming. The evidence of a punter to the effect that the note or coin was in fact used for gaming is not of much value unless corroborated by independent evidence, he being an accomplice. The evidence of one bogus punter cannot be regarded or used as corroboration of another; nor can the finding of the marked coin or note be regarded as corroboration of the bogus punter's evidence.

What S. 7 really means is that where there was found in a raid an instrument of gaming, or something which in the Court's opinon was reasonably suspected to be an instrument of gaming, though it could not definitely be proved to be so, then the presumption would arise, and the burden is thrown upon the accused of proving that the suspected thing was not an instrument of gaming. That is the right construction to be put upon S. 7. (*Sen and Gajendragadkar, JJ.*)

BOM. PREV. OF HINDU BIG. MARR. ACT (1946), S. 9.

EMPEROR *v.* HORMAZDYAR A. IRANI. I.L.R. (1948) Bom. 199=50 Bom.L.R. 163=A.I.R. 1948 Bom. 250=49 Cr.L.J. 362.

———**S. 7**—*Presumption—Raising of—Facts to be proved before.*

Before a presumption under S. 7 of the Bombay Prevention of Gambling Act can be drawn, two things must be proved: (1) search of the premises and (2) the arrest of the persons found on the premises; these have to be proved by the evidence of the magistrate who issued the search warrant, if he has issued it in his own name and searched the place himself. (*Davis C.J. and Thadani, J.*) EMPEROR *v.* CHABALDAS. I.L.R. (1946) Kar. 174 =228 I.C. 170=48 Cr.L.J. 109=A.I.R. 1947. Sind 112=1947 Sind (Rul.) 26.

———**S. 7**—*Presumption—Rebuttal—Gambling on Satam day—Offence.*

A presumption which may be raised under S. 7 of the Bombay Prevention of Gambling Act must be held to be rebutted when the occasion for the gambling in question is the *Satam day*, a sacred day which the rich and poor alike celebrate by gambling with cards or dice. (*Davis, C.J. and Thadani, J.*) EMPEROR *v.* CHABALDAS. I.L.R. (1946) Kar. 174=228 I.C. 170=48 Cr.L.J. 109 =A.I.R. 1947 Sind 112=1947 Sind (Rul.) 26.

———**S. 7**—Presumption under—Nature and extent of—Rebuttal—Burden of proof. [*See* Q.D. 1941-1945, Vol. I, Col. 566.] EMPEROR *v.* CHIMANLAL SANKALCHAND. 1946 Bom. (Rul.) 40=47 Cr.L.J. 109.

BOMBAY PREVENTION OF HINDU BIGAMOUS MARRIAGES ACT (XXV OF 1946)—*Scope—If* ultra vires.

The Bombay Prevention of Hindu Bigamous Marriages Act is not *ultra vires* the Provincial Legislature or invalid. As far as marriage and divorce are concerned, the power is given to both the Central and Provincial Legislature to legislate about those subjects, and the Provincial Legislature has the right to modify the Hindu Law to the extent that it applies to the province. (*Chagla, C.J. and Bavadekar, J.*) EMPEROR *v.* ATMARAM NARAYAN. I.L.R. (1948) Bom. 631=50 Cr.L.J. 147=A.I.R. 1949 Bom. 71=50 Bom. L.R. 576=3 D.L.R. (Bom.) 87.

———**S. 5**—*Applicability—Second marriage alleged to be bigamous—If to be valid marriage—Going through form of marriage—Sufficiency to constitute offence.*

In order to constitute an offence under S. 5 of the Bombay Prevention of Hindu Bigamous Marriages Act (1946) of contracting a second marriage when the husband had another wife living, it is not necessary that a valid second marriage should be solemnised. It is enough if the parties accused of bogamous marriage go through a form of marriage when the first marriage is still subsisting. (*Chagla, C.J. and Bhagwati, J.*) EMPEROR *v.* MANJU HANUMANT NAIK. I.L.R. (1948) Bom. 412=50 Bom.L.R. 379=3 D.L.R. (Bom.) 49=A.I.R. 1948 Bom. 374=49 Cr.L.J. 685.

———**S. 9**—Scope—If controls, S. 198, I. P. Code—Offence of bigamy under S. 5 of Bombay Act, made offence under S. 494, I. P. Code—

Cognizance of—Complaint by person aggrieved—Necessity. *See* Cr. P. Code, S. 198. 50 Bom. L.R. 379.

BOMBAY PRIMARY EDUCATION ACT (IV OF 1923), S. 8 (2) and proviso (b)—*Construction—Allowances payable to teachers at time of transfer of employment to local authority—Power of local authority to discontinue or abolish.*

So far as the terms and conditions of the employment of the primary teachers taken over and employed by the local authorities under S. 8 (1) of the Bombay Primary Education Act are concerned, they are really meant to be absolutely safeguarded to them and not to be touched at all in spite of the general provision contained in S. 8 (2) except in the manner laid down in proviso (*b*) to S. 8 (2). The scale of allowances allowed to these teachers are a part of the terms on which they were employed by the Government, and the local authorities would be bound by these terms and conditions and no alteration could be effected unless such alteration came within the provision in S. 8 (2) and proviso (*b*) and unless the scale of such allowances was altered by the local authorities after the sanction of the Provincial Government in that behalf.

The word "alter" in proviso (*b*) can never mean or include abolition, extinction or effacement; it can only mean "to modify". S. 8 (2) and proviso (*b*) thereto should therefore be read as laying down that there is no absolute power in the local authority stepping into the shoes of the Government to discontinue the allowances which were payable to the teachers at the time of the transfer of their employment from the Government to the local authority and that the only thing open to the local authority to do is to alter or revise or change the scales of pay and allowances applicable to those teachers at the time when they were taken over and employed by them with the sanction of the Provincial Government, but not in a manner so as to involve the abolition or extinction or discontinuance thereof. (*Bhagwati and Dixit, JJ.*) District Local Board, Jalgaon *v.* Krishna Sakharam. I.L.R. (1949) Bom. 646=51 Bom.L.R. 746=4 D.L.R. (Bom.) 170=A.I.R. 1950 Bom. 18.

BOMBAY PRIZE COMPETITION TAX ACT (XI OF 1939), S. 4—*Discretion of Collector—Exercise of—Issue of licence—If compulsory—Power to refuse licence.*

S. 4 of the Bombay Prize Competition Act does not provide for the issue of any licence by the Collector; but there is implied and assumed in S. 4 a power on the part of the Collector to issue a licence. This power is discretionary, and is not coupled with a duty in the sense that the Collector is bound to exercise the power in favour of an applicant if he complies with the conditions laid down. There is no obligation on the Collector, on the face of the language used in S. 4, to issue a licence in favour of an applicant. The implied power to grant a licence also carries with it the implied power to refuse to grant a licence.

The discretion to be exercised is a discretion

of the Collector himself. He is the person nominated by the Legislature for the purpose. It has to be exercised properly, free from any caprice or arbitrariness. (*Chagla, C.J. and Gajendragadkar, J.*) Y. R. Parpia *v.* Chamarbagwalla. 4 D.L.R. (Bom.) 9=A.I.R. 1949 Bom. 109=50 Bom.L.R. 728.

———S. 10 (4)—*"In the public interest"—Interpretation of.*

The expression "in the public interest", in S. 10 (4) of the Bombay Prize Competition Act, cannot be read as *ejusdem generis* with what is contained in sub-cls. 1, 2 and 3 of S. 10. (*Chagla C.J. and Gajendragadkar, J.*) Y. R. Parpia *v.* Chamarbagwalla. 4 D.L.R. (Bom.) 9=A.I.R. 1949 Bom. 109=50 Bom.L.R. 728.

BOMBAY PROHIBITION ACT (XXV OF 1949), S. 116—*Scope—If controlled by Ss. 260, 261 and 262, Cr. P. Code—Trial of offence under S. 65 (f) of Bombay Act summarily by Magistrate not empowered under Cr. P. Code—Legality—Sentence of imprisonment exceeding three months—Legality.*

S. 116 of the Bombay Prohibition Act deals only with the mode of trial of offences under the Act and does not curtail the ordinary powers of Magistrates to take cognizance of and try offences. It authorises all Magistrates to follow the summary procedure while trying offences under the Act, whether or not they are empowered under S. 260, Cr. P. Code, to try cases in a summary manner. S. 262 (2), Cr. P. Code, will not apply in such cases. An offence under S. 65 (*f*) of Bombay Act XXV of 1949 can therefore be tried summarily not *only* by Magistrates who are empowered under Ss. 260 and 261 of the Cr. P. Code, but by any Magistrate who would be competent to try them under the second schedule to the Code. The Magistrates empowered under Ss. 260 and 261 can however try summarily only the offences mentioned in those sections, but they cannot try any other offences in a summary manner; the power to try summarily offences under the Prohibition Act is given not by the Code but by the Prohibition Act itself, in S. 116. A Magistrate trying an offence under the Bombay Prohibition Act is also competent to award a sentence of imprisonment for a term exceeding three months and his power to do so is not curtailed or taken away by S. 262 (2) of the Cr. P. Code. 52 Bom. 254, ref. (*Bavdekar and Chainani, JJ.*) Emperor *v.* Narji Bhalji. 52 Bom.L.R. 321=A.I.R. 1950 Bom. 273=51 Cr.L.J. 1303.

BOMBAY PUBLIC SECURITY MEASURES ACT (VI OF 1947), S. 2—*Burden of proof—Order of detention regular in form—Onus on detenu to show invalidity.*

Where an order of detention under the Bombay Public Security Measures Act is regular in point of form, the onus is cast on the person detained to show that it is in effect no order within the meaning of the Act either because the mind of the detaining authority had not been applied to the matter or because the order was made *mala fide*; and the onus unquestionably is a heavy one. (*Desai, *J.*) HIRJI SHIVRAM VYAS *v.* COMMISSIONER OF POLICE. 50 Bom.L.R. 210=A.I.R. 1948 Bom. 417=49 Cr.L.J. 579=3 A.I.Cr.D. 314=4 D.L.R. (Bom.) 75.

———Ss. 2 and 3—*Contents of order and statement—Omission of place of activities of detenu—Effect—If invalidates order of detention.*

One thing which the authority making an order of detention under S. 2 of the Bombay Public Security Measures Act has to apply its mind to, is the question of its jurisdiction. The place where the detenu is alleged to have been acting in any of the manners mentioned in the section is thus important, and this is one of the particulars which is required to be stated in the detention order and the statement of grounds under S. 3 of the Act. Where, therefore, the place of the detenu's activities is not mentioned either in the order under S. 2 or in the statement of grounds under S. 3, or even in the affidavits filed by the authority in Court such omission is fatal, as it indicates that the question of the place was not present in the mind of the authority which made the detention order when it made the order, and the order must therefore be held to be neither valid nor justifiable in law. (*Sen and Jahagirdar, JJ.*) PANDURANG GOVIND PHATAK, *In re.* I.L.R. (1948) Bom. 426=50 Bom.L.R. 446=3 D.L.R. (Bom.) 55=A.I.R. 1949 Bom. 84=50 Cr.L.J. 199.

———Ss. 2 and 3—*Grounds of detention—Duty to set out accurately and with care and caution—Error in grounds showing want of care and caution—Effect—Validity of order of detention.*

The detaining authority has such wide powers given to it under the Bombay Act VI of 1947, that the Court, where it is left with any discretion at all to investigate the grounds given for the detention, must do so vigilantly in order to find out whether the degree of care and caution exercised by the detaining authority is such as the law requires. The authority need give no particulars and need state no facts, taking refuge behind public interest and behind the language of Ss. 2 and 3 of the Act. But when the authority gives grounds which he is bound to give under S. 3, he must take meticulous care to see that they are stated with absolute accuracy. What matters is not so much the accuracy or the nature and extent of the error, but the state of mind of the detaining authority. If the state of mind discloses that he has been casual in his approach and that he has not applied his mind to the matter with that diligence which is necessary when the liberty of a subject is taken away, the Court will certainly interfere and will set the detenu at liberty. When there is an error which is by no means trivial and which shows want of due care and caution on the part of the detaining authority, the order of detention must be held to be illegal and the detenu set at liberty. (*Chagla, C.J. and Gajendragadkar, J.*) SHOILEN DEY. *In re.* I.L.R. (1948) Bom. 651=50 Bom. L.R. 596=A.I.R. 1949 Bom. 75=50 Cr.L.J. 173.

———S. 2—*"Is acting"—Acts done two months before date of order—If can form basis of order of detention.*

The expression "is acting" in S. 2 of the Bombay Public Security Measures Act refers to a period which could reasonably be regarded as present and not past, and acts done in the approximate and immediate past may be taken as legitimately forming the basis of an order of detention. A period of two months prior to the date of the order cannot be considered to be outside the scope of the expression is acting. (*Sen and Jahagirdar, JJ.*) MOINUDDIN ABDULLAMIA KOREISHI, *In re.* 50 Bom.L.R. 579=A.I.R. 1949 Bom. 86=50 Cr.L.J. 202.

———S. 2—*Jurisdiction—Order under—Omission to state place of activities of detenu—Effect—Defect—When fatal—Place mentioned in communication under S. 3—Sufficiency.*

An order under S. 2 of the Bombay Public Safety Measures Act must make it clear that the basis for taking action is the satisfaction of the District Magistrate or other authority making the order that the detenu is acting in a manner prejudicial, etc., of the Province or any part thereof. The omission to state the Province or part of it, that is, the place of the activities of the detenu, is a defect. But the defect is not fatal, if the order communicating the grounds under S. 3 specifies the place within the Province in which the detenu engages in his activities. In such a case the defect of omission of the place in the order under S. 2 is a mere technical one. (*Pajadhyaksha and Jahagirdar, JJ.*) KRISHNAJI GOPAL BRAHME, *In re.* 50 Bom.L.R. 175=A.I.R. 1948 Bom. 360=48 Cr.L.J. 524.

———Ss. 2 and 3—*Order of detention—Court's power to go behind—Falsity of fact stated in Effect—Right of detenu to prove falsity of fact stated.*

In the case of an order of detention under the Bombay Public Security Measures Act, the Court in suitable cases has power to go behind the order, if it is *ex facie* good, and enquire into the truth of the information on which the detaining authority has acted. Ordinarily, where the Court is satisfied that the facts and materials before the detaining authority were considered by him and that they were such as could lead to his satisfaction in the sense required by S. 2 of the Act, the Court will not go behind the order, but where a fact relied on, is found to be false different considerations will arise. The detenu can legitimately rely on the statement of grounds and particulars furnished to him under S. 3, in order to show that a fact alleged is false. For that purpose he is allowed to rely on his own affidavit and the affidavits of persons acquainted with the facts (*Sen and Jahagirdar, JJ.*) MOINUDDIN ABDULLAMIA KOREISHI, *In re.* 50 Bom.L.R. 579=A.I.R. 1949 Bom. 86=50 Cr.L.J. 202.

———S. 2—*Order under—Sufficiency of grounds for or propriety—Power of Court to consider or question.*

So long as the authority making an order under S. 2 of the Bombay Public Security Measures

Act purports to observe all the requirements of the law and applies its own mind to the facts of the case, and makes the order that it is satisfied that the person in question is acting in a manner prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, the Court will not sit in judgment over the propriety or wisdom of the order; and it is not open to the Court to question the decision of the authority making the order. (*Rajadhyaksha and Jahagirdar, JJ.*) Krishnaji Gopal Brahme, *In re*. 50 Bom.L.R. 175=A.I.R. 1948 Bom. 360=49 Cr.L.J. 524.

——**Ss. 2 and 3**—*Powers of Court—Order of detention—Grounds—Validity or sufficiency—Power of Court to scrutinise—Sufficiency of grounds set out—Court's power to interfere with detaining authority's discretion.*

The Court, when considering and examining the grounds set out in a detention order under S. 2 of the Bombay Public Security Measures Act, must invariably keep in mind the fact that the Act is a special Act investing the executive with very large powers and must therefore be construed narrowly and in favour of the subject. At the same time, if an order falls within the four corners of the Act, the Court is in duty bound to give force to the Act. In so far as the grounds mentioned are within the ambit of the Act and are sufficiently clear and in consonance with the prescribed sections as regards facts and particulars, the Court is not entitled to go behind the order for the purpose of scrutinising either the truth or otherwise of those facts, except in cases where the Court can spell out that the original detention was for a collateral purpose and the grounds supplied under S. 3 are merely supplied for the purpose of validating an irregular detention. The Court has certainly to look at all the grounds together to find out whether they are clear or vague. If some of the grounds are sufficient and clear, the fact that part of the grounds may be vague cannot make the detention invalid, if they are within the ambit of the Act. The detaining authority is, under the Act, the sole Judge as to what and how much particulars should be supplied. (*Coyajee, J.*) Prannath Pishorimal Chopra *v.* Commissioner of Police. 3 D.L.R. (Bom.) 24.

——**S. 2**—*Power of Court to consider sufficiency of grounds for detention—Duty of authority making order and of Court—Right of detenu to show that authority was not really satisfied about necessity for detention.*

Under S. 2 of the Bombay Public Security Measures Act, the authority or person to be satisfied that a person is acting in a manner prejudicial to the public safety, etc., is the authority making the order of detention of the person who is so acting. The Court is not entitled to consider whether the grounds of the order (so far as they can be ascertained) are such as would satisfy itself. But when the order is challenged the Court is entitled to inquire whether the alleged satisfaction of the authority making the order is a real satisfaction or something else indicating an omission on the part of that authority to apply its mind to the facts of the particular case and to draw legitimate conclusions therefrom. If it is found that the authority has not applied an unbiassed mind to the facts, it must be held that it is not a case of real satisfaction. It is for the authority to justify the exercise of the power of detention, when it is challenged, by showing that it applied its mind to the material facts and to the appropriate considerations, and the Court must scrutinize the justification thus offered with great care and anxiety. The application of the detaining authority's mind to the relevant facts and considerations being the necessary pre-requisite to its satisfaction, it is open to the detenu to contend and to show that the application of its mind was non-existent or so faulty as to render the alleged fact of its satisfaction questionable and uncertain. (*Sen and Jahagirdar, JJ.*) Pandurang Govind Phatak, *In re*. I.L.R. (1948) Bom. 426=50 Bom.L.R. 446=A.I.R. 1949 Bom. 84=50 Cr.L.J. 199=3 D.L.R. (Bom.) 55.

——**S. 2**—*Powers of police—Duty to act early and without delay—Recourse to prosecution—Order for release on bail—Subsequent detention order under special powers—Propriety.*

It is no doubt true that the words "is acting" in S. 2 of the Bombay Public Security Measures Act have not the effect of making it incumbent on the detaining authority to prove that at the very moment the order of detention is made the detenu was acting in a manner prejudicial to the public safety, etc. But the words have to be read necessarily as meaning that within a reasonable distance of time as compared with the date of the making of the order of detention, the detenu has acted or was acting in a manner prejudicial to public safety. It is not within the scope nor is it the intention of the Act, that for acts done by the detenu in the remote past or what may be considered as remote past, having regard to the distance of time which separates the alleged acts from the date of the making of the order, the detenu shall be kept in custody under the Act. In any case where the public interest demands that the detenu shall forfeit his individual liberty in the interests of public welfare, the authority making the order should act promptly in the exercise of the special powers, the due exercise of which has been left to his sole and uncontrolled and unquestionable decision. The Act does not contemplate that there should first be a prosecution for the purpose of securing conviction and then, when after that long drawn out process was over, the Police Commissioner should have recourse to the special powers, and arrest the person concerned on those very grounds which in the first instance should have been made the ground of detention. It is not for the police to usurp the functions of the magistrate and to keep the detenu in custody when the magistrate has granted bail to the detenu, and thus to arrogate the right to review the judgment of the magistrate. (*Desai, J.*) Hirji Shivaram Vyas *v.* Commissioner of Police. 50 Bom.L.R. 210=

A.I.R. 1948 Bom. 417=49 Cr.L.J. 579=3 A.I.Cr.D. 314=4 D.L.R. (Bom.) 75.

———**S. 2 (1)**—*Scope—Grounds for detention—Power of High Court to consider sufficiency of—Vagueness or lack of precision—Interference, if justified.*

It is well-settled that the High Court's powers to interfere with detention orders made under Bombay Public Security Measures Act are limited, and are confined to cases where it appears that the detaining authority has not properly applied its mind to the question as to whether the detention of the person is or is not justified under the Act. It is also true that it is not compulsory for the detaining authority to furnish to the detenu a statement of the ground or grounds upon which the order of detention has been made. But where the grounds are furnished, it is permissible for the High Court to consider the statement of those grounds together with the order made; and if the statement of grounds does show that the detaining authority has not properly applied its mind to the question of detention when the ground lacks precision and is bad, then the High Court has jurisdiction to interfere, as in such a case it shows that the detaining authority cannot have considered properly the facts or evidence placed before it on which such a ground is based. 50 Bom.L.R. 183, dist. (*Weston and Shah, JJ.*) **Bhaurao Karbhari Awari, *In re*. 51 Bom.L.R. 1038=5 D.L.R. (Bom.) 22=A.I.R. 1950 Bom. 126=51 Cr.L.J. 665.**

———**S. 2**—*Validity of order—Grounds for detention at variance with grounds specified in notice under S. 3—Effect of on validity of order of detention.*

Where the grounds mentioned in the order of detention under S. 2 of the Bombay Public Security Measures Act, are at variance with the grounds specified in the notice served on the detenu under S. 3 of the Act, it clearly shows that the authority passing the order of detention had not applied his mind to the facts of the case at the time when he signed his order, and the order must be held to be bad. (*Sen and Jahagirdar, JJ.*) **Emperor *v.* Bashan Madar Korbu. 50 Bom.L.R. 290=49 Cr.L.J. 645=A.I.R. 1949 Bom. 37=50 Cr.L.J. 129=3 D.L.R. (Bom.) 80.**

———**S. 2 (1)**—*Detention under—Condition precedent—Arrest effected before service of order for detention—Legality—Burden of proof—Form of order—Oral order—Sufficiency.*

The satisfaction of the detaining authority is a pre-requisite of the detention of a person under an order under S. 2 (1) of the Bombay Public Security Measures Act, and that satisfaction must come first and the detention must come subsequently. There is of course nothing in S. 2 (1) which prescribes that the order for detention should be in writing. It may be an oral order by the detaining authority made after taking into account all the circumstances of the case which go to satisfy him that the detenu is acting in the manner described in S. 2 (1). Where in any case it is found that the detenu was arrested before the order of detention was served on him, the burden is on the detaining authority to satisfy the Court on proper materials that in fact the satisfaction came before the actual arrest of the detenu was effected, and that the detention was in pursuance of such satisfaction on his part within the meaning of S. 2 (1), though the order might be actually served on the detenu later. (*Bhagwati, J.*) **Anwari Begam *v.* Commissioner of Police. 3 D.L.R. (Bom.) 67=50 Bom.L.R. 593=A.I.R. 1949 Bom. 82=50 Cr.L.J. 196.**

———**Ss. 2 (1) and (3)**—*Grounds for detention—Detenu known Mawali and having several Mawalis under him, trafficker in opium, extracting money from prostitutes, and responsible for a stabbing outrage—Sufficiency of—If vague or indefinite.*

"Mawali" has a well-known connotation meaning a "bully" and a person who is a menace to the peace and tranquillity of the locality where he may happen to be in power, and is not vague or indefinite. That a person is a "known Mawali of the locality", is a ground which would justify detention under S. 2 (1) of the Bombay Public Securities Act. That he is a trafficker in opium and that he extorts money from prostitutes or that he was responsible for a stabbing case, may not, if taken alone, necessarily lead to the conclusion that his activities are of the description mentioned in S. 2, but when taken in conjunction with other grounds such as 'he is a known Mawali' and 'that he has a number of Mawalis under him', would leave no doubt that the activities of that person would lead to a position which will be prejudicial, etc., within the meaning of S. 2. An order of detention giving the above grounds as the grounds of his detention is not therefore illegal or improper, but is one in compliance with the requirements of law. (*Bhagwati, J.*) **Anwari Begam *v.* Commissioner of Police. 3 D.L.R. (Bom.) 67=50 Bom.L.R. 593=A.I.R. 1949 Bom. 82=50 Cr.L.J. 196.**

———**S. 2 (1) (a) and (4)**—*Scope—Order by District Magistrate for detention outside his district—Legality—Jurisdiction—If can be revalidated by fresh order by Government.*

A District Magistrate passing an order under S. 2 (1) (*a*) of the Bombay Public Security Measures Act of 1947, has no power to order his detention outside the territorial limits of his jurisdiction. Two separate orders can be passed, one under S. 2 (1) (*a*) and another under S. 2 (4), but both have to be read together, and an order by the Magistrate of a District detaining a person not in his district but in a jail outside his own district is illegal and void as being *ultra vires* and beyond his jurisdiction. Such an order being illegal cannot be revalidated by a subsequent order made by the Government under S. 2 (4) of the Act. (*Sen and Jahagirdar, JJ.*) **Emperor *v.* Bashan Madar Korbu. 50 Bom.L.R. 290=49 Cr.L.J. 645=A.I.R. 1949 Bom. 37=50 Cr.L.J. 129=3 D.L.R. (Bom.) 80.**

———**S. 2 (1) (a)**—*Scope of inquiry—Powers and function of Court—"Satisfaction" of detaining authority—What amounts to—Power of Court to question—Burden of proof.*

S. 2 (1) (*a*) of Bombay Act VI of 1947 permits and authorises an order of detention to be made if the Provincial Government, or, where the power is delegated to its subordinate officer, then the said officer, is *satisfied* that the person who is to be detained is acting in a manner prejudicial to the public peace and the maintenance of public order, etc., and according to the well-established principle of interpretation, the "satisfaction" is a condition precedent to the exercise of the powers under the section. What the Courts have to see, however, when subsequently an application is made challenging the existence of that satisfaction, is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order, that is to say, an objective test of that satisfaction. The satisfaction of the mind is just as much a state of fact as, for example, the state of digestion, of the person who makes the order, and consequently if anyone challenges that on the ground that the authority which made the order had not the state of mind which could be described as a state of "satisfaction," it is open to the Court to say that it must be satisfied as to the state of mind of the authority which made the order and to take evidence as to the existence of the state of mind. But when the *bona fides* of the authority which made the order is challenged, the Court must not, when taking evidence, approach the order in question with prejudice which might arise from past experience.

The burden is upon the person who challenges the *bona fides* of the detaining authority to show as a matter of fact that the order was in fact passed without such "satisfaction", whatever the authority might state in the order with regard to its satisfaction.

The question of satisfaction being a question of fact, the Court is only concerned with the question whether the detaining authority was satisfied. In suitable cases the question may involve an investigation whether sufficient care was or was not exercised, but it is not open to the Court to sit in appeal over an order made by the authority. 50 Bom.L.R. 183 (F.B.), foll. (*Bavdekar, Dixit and Jahagirdar, JJ.*) JAYANTILAL NATHUBHAI PAREKH, *In re*. I.L.R. (1949) Bom. 508=51 Cr.L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

——**S. 2 (1) (b)**—*Scope—If void as contravening S. 19 (1), Constitution of India—"Reasonable" restriction—What is—Power of Court to judge—Considerations—Possibility of abuse of power to impose restriction and absence of opportunity of being heard—If ground for holding law to be void as being "unreasonable".*

Per *Chagla, C.J. and Bavdekar*, J.—S. 2 (1) (*b*) of the Bombay Public Security Measures Act is void under Art. 13 (1) of the Constitution of India, in as much as it imposes restrictions on the fundamental rights of the citizen under Art. 19 (1) (*d*) and (*e*), such a restriction being an unreasonable restriction. The Legislature has no doubt been given the power to impose restrictions on the exercise of the rights conferred by Art. 19 (1) (*d*) and (*e*), under Art. 19 (5). Such restrictions however have to be reasonable. It is not for the Legislature to determine whether the restrictions are reasonable or not. It is for the Court of law to determine the reasonableness of the restrictions. "Reasonable" is an objective expression and its objectivity is to be determined judicially by the Court of law. There is no limit to the power of the Court to consider the nature of the restrictions. The Court must look upon the restrictions from every point of view and it is its duty to scrutinise the restrictions placed by the Legislature as carefully as possible. The Court has to look to the nature of the restriction, the manner in which it is imposed, the extent thereof, both territorial and temporal, in order to determine whether it is reasonable or not, and if it finds that the restriction is not justified, it cannot uphold it. The power given to the Legislature under Art. 19 (5) is to abridge or curtail the fundamental rights of the citizen, and according to the well-established canon of construction of all constitutional documents, the Court must lean in favour of fundamental rights and must place the restrictions imposed by the Legislature in as narrow an ambit as possible. The wider the power given to the Legislature, the greater is the duty of Court to see that the restrictions placed upon the liberty of the citizens are reasonable restrictions. No period is laid down in the statute for the duration of an externment order under S. 2 (1) (*b*) of the Bombay Act (VI of 1947); secondly, the person against whom an order of externment is made has no right whatever to be heard in his defence before he is asked to leave his home; nor is there any obligation upon the authority to hear the person against whom the order is to be made in his defence before the order is made. If under a law a man can be sent away from his district without being heard and without having the right of being heard and without knowing why he is being sent away, the restriction imposed by that law upon the fundamental right is not a reasonable restriction covered by S. 19 (5) of the Constitution and therefore S. 2 (1) (*b*) of Bombay Act VI of 1947 which imposes such restriction must be held to be void under Art. 13 (1) of the Constitution.

Bavdekar, J.—It is not permissible to read Art. 19 (5) of the Constitution as if it read, "any law permitting the imposition of reasonable restrictions on the exercise of the rights." Only those laws will be valid, which impose reasonable restrictions on the exercise of the rights which each citizen is declared to possess under Art. 19 (1). The right of hearing before condemnation is admittedly a component of the rights which taken together constitute rules of natural justice, and if legislation which restricts the fundamental rights has to be pronounced to be reasonable, it must give the person whose freedom is restricted an opportunity to be heard. When the restriction is abridging the rights, the matter is for the Court to determine whether the restriction is "reasonable".

Shah, J. (*contra*).—The provisions of S. 2 (1) (*b*) of the Bombay Public Security Measures Act are not inconsistent with the provisions of Part III of the Constitution and the section is therefore not void. The effect of Art. 19 (5) of the Constitution is to prevent the provision of Art. 13 having any operation so as to render invalid any pre-existing legislation in any State in so far as it sought to impose reasonable restrictions on the exercise of the rights which have been conferred under Art. 19 or to prevent the State from hereafter making any law imposing any such restrictions. The Bombay Public Security Measures Act would not be affected either by Art. 13 or by Art. 19, provided the restrictions are reasonable and imposed in the interests of the general public.

Whether the restrictions are "reasonable" as contemplated in Art. 19 (5) has to be judged with reference not to individual cases which may arise or any hardship which may arise but by reference only to two considerations: (1) whether it is a restriction on the exercise of the right conferred by Art. 19 (2) and whether the restriction itself is reasonable having regard to the interests of the general public. The Court is not entitled to enter into an inquiry either that in the enforcement or imposition of the restriction by the authority entitled to impose it, the authority may possibly act unreasonably, or that the stage which provides for the imposition of the restrictions on fundamental rights, is an unreasonable statute. The word "reasonable" does not govern the word "law", nor does it qualify the word "imposes" in Art. 19 (5); it is intended to govern and does in fact govern the expression "restrictions." Having regard to the interests of the general public, if it appears that the restriction on the fundamental rights contemplated to be imposed under Bombay Act VI of 1947 is not reasonable, the provision for the imposition of the restriction must be deemed to be void. The High Court is the tribunal which is entitled to pronounce upon that question. But the reasonableness is the reasonableness of the restriction and not of the manner in which it is imposed. It is not within the province of the Court to examine a statute and to declare it void on the ground of possibility of an abuse of authority vested in a State or public servant, which might have the effect of curtailing the fundamental right of an individual. It is not open to the Court (apart from an allegation of *mala fides*) to enter upon the question whether the enforcement or imposition of the restrictions is reasonable or otherwise. Nor is it open to the Court to go into the question whether the law which provides for the imposition of the restrictions is a reasonable one. What the Court has to consider, is whether, when the Legislature provides for restrictions on the exercise of fundamental rights, the restrictions are reasonable having regard to the interests of the general public. There is nothing in the Constitution of India which enables the High Courts to declare a piece of legislation void merely because the Legislature thought it expedient to provide that the satisfaction of an executive officer instead of a Court should be a condition precedent to the issue of an order intended to protect either the security of the State or the interest of the general public. The sole ground of absence of a provision for being heard either before or after the passing of the order of externment cannot render the provision of S. 2 (1) (b) of Bombay Act VI of 1947 void or inoperative as from January 26, 1950. Since the restriction involved in an order of externment cannot be said to be unreasonable (what is a reasonable restriction has of course to be judged by the Court by reference to the character or nature of the restriction and not by reference to the fact that it may operate in a manner which may be called harsh), the Court cannot declare S. 2 (1) (*b*) void or illegal. (*Chagla, C.J., Bavdekar and Shah, JJ.*) EMPEROR *v.* JESHINGBHAI ISHWARLAL. A.I.R. 1950 Bom. 363=52 Bom.L.R. 544 (F.B.).

——**S. 2 (6)**—*Applicability—Order under S. 2 (1) (e) requiring person to give security—Failure to give security—If punishable.*

The words "contravenes an order made under the section" mean only contravention of what the order in substance asks a person to do or not to do: they cannot mean or include the contravention of an order requiring the person to give security. There is no intention on the part of the Legislature to punish the mere failure to give security as a contravention; and a person cannot be visited with a conviction for failure to do what may not be in his power. (*Bavdekar and Chainani, JJ.*) GOVERNMENT OF BOMBAY *v.* LAXMAN GOVIND DESHMUKH. A.I.R 1950 Bom. 257=51 Cr.L.J. 972=52 Bom.L.R. 226.

——**S. 2 (1) (6)**—*Burden of proof—Duty of prosecution—Validity of order under S. 2 (1) (6)—Duty of detaining authority to step into the box and swear to having been satisfied even when accused merely pleads guilty.*

In the case of a charge under S. 2 (1) (6) of the Bombay Act VI of 1947, the burden is upon the prosecution to establish every ingredient which goes to constitute the offence charged, one of the most important ingredients being that the detaining authority was satisfied as to the matters set out in S. 2 (1) before the order was made. It is not sufficient for the prosecution to tender the order which states that the detaining authority is satisfied. The detaining authority must step into the box and make a statement on oath in order to enable the accused to challenge that statement, if so advised, in cross-examination. No presumption can be drawn that the order *ex facie* has been validly made and that the detaining authority was satisfied as required by the law.

Nor is it necessary for the accused in order to challenge the validity of the order that he should suggest that the detaining authority was actuated by *mala fides* or that extraneous considerations weighed with that authority when the order was made before the prosecution can be called on to prove the ingredients of the offence. It is sufficient for the accused to plead not guilty. 51 Bom. 568, foll. (*Chagla, C.J. and Gajendragadkar, J.*) REX *v.* BHIKA RAMCHANDRA SHINDE. 52 Bom.L.R. 223=5 D.L.R. (Bom.) 55=4 A.I.Cr.D. 146=A.I.R. 1950 Bom. 330.

———S. 3—*Contents of communication under—Nature and requisites of—Vague allegations—Sufficiency—Need for precise information.*

Under S. 3 of the Public Safety Measures Act, the authority making an order under S. 2 must communicate to the detenu the grounds on which the order was made. The authority need not disclose all the facts, but the communication must give sufficient indication to the detenu as to the reasons which impelled the authority to take action. The section makes a distinction between the grounds and the particulars with regard to the latter, the section makes the authority the sole judge of their sufficiency or otherwise to enable the detenu to make a representation. The grounds and the particulars should be sufficiently precise, so as to make it possible for the detenu to make a representation and if possible, to remove any misapprehension on the part of the authority making the order of detention. It is necessary that the communication must give the detenu information which must be precise and adequate, giving the detenu sufficient details, on which he could make an effective and a satisfactory representation. It is not sufficient to state vague allegations. To merely state that the detenu was an active leader of a subversive organisation or that he had been carrying on subversive propaganda among the people to prepare and use illegal and violent ways, would be wholly insufficient. An order which states only so much is defective and bad. (*Rajadhyksha and Jahagirdar, JJ.*) KRISHNAJI GOPAL BRAHME, *In re*. 50 Bom.L.R. 175=A.I.R. 1948 Bom. 360=49 Cr.L.J. 524.

———S. 3—*Duty of Government—Grounds—Disclosure to detenu—What has to be disclosed.*

While it is the duty of the Government under S. 3 of the Bombay Act VI of 1947 to communicate to the detenu clear, precise and accurate grounds for his detention, the Government is not bound to disclose facts which it considers against the public interest to disclose. The Government is given a discretion to furnish only such particulars as are in its opinion sufficient to enable the detenu to make a representation to the Government. Grounds which are vague and indefinite and which contain no particulars are, however, no grounds at all within the meaning of S. 8 (*Chagla, Ag.C.J., Rajadhyaksha and Gajendragadkar, JJ.*) RAJDHAR KALU PATIL, *In re*. I.L.R. (1948) Bom. 213=2 D.L.R. 556=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183.

———S. 3—*Notice under—Validity—Particulars—Necessity—Allegation of incitement of workers without mention of class of workers or locality of their residence or work or of time of incitement—Sufficiency.*

Where a notice under S. 3 of the Bombay Public Security Measures Act gives the ground for detention of a person under an order under S. 2, as "that you have been inciting workers to commit acts of violence and thereby acting in a manner prejudicial to the public safety and tranquillity of Greater Bombay", it must be held that the notice is bad and invalid on the ground that it is vague and indefinite and that the particulars furnished are not such as could be said to be particulars at all, so as to enable the detenu to make a representation.

In as much as there is no mention of the class of workers or the locality in which the workers were residing or working, or of the time during which the detenu is supposed to have incited the workers, the notice must be held to be bad and the detention cannot therefore be justified. (*Desai, J.*) ANANT MAHADEV MANDEKAR, *In re*. 50 Bom.L.R. 590=A.I.R. 1949 Bom. 95=50 Cr.L.J. 320.

———S. 3—*Omission to inform detenu of right to make representation—If renders order illegal.*

The failure on the part of the detaining authority to inform the detenu that he had a right to make a representation to the Provincial Government will not and cannot affect the validity or legality of the order. At the most it can only be an irregularity. (*Bavdekar, Dixit and Jahagirdar, JJ.*) JAYANTILAL NATHUBHAI PAREKH, *In re*. I.L.R. (1949) Bom. 508=51 Cr.L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

———S. 3—*Scope—Compliance with—"Grounds and particulars"—Duty of detaining authority—Sufficiency of grounds and particulars—Power of Court to go into.*

It is not a sufficient compliance with S. 3 of Bombay Act VI of 1947 that there should be in the grounds furnished to the detenu a reproduction of the words of the section. The grounds should also include particulars. The grounds must be precise and not vague. If the detaining authority gives to the detenu its conclusions of fact and such particulars as are in its opinion sufficient to enable the detenu to make a representation and it could be said from the grounds and particulars furnished to the detenu that the order for detention could reasonably be made, it must be held that there has been compliance with the mandatory provisions of S. 3, and the grounds cannot be said to be bad.

The Court cannot go into the question of the sufficiency of the particulars, as it is left to the discretion of the detaining authority to supply such particulars and grounds as are in its opinion sufficient to enable the detenu to make a representation and the Court cannot subject the particulars to any objective test of sufficiency. (*Bavdekar, Dixit and Jahagirdar, JJ.*) JAYANTILAL NATHUBHAI PAREKH, *In re*. I.L.R. (1949) Bom. 508=51 Cr.L.J. 184=A.I.R. 1949 Bom. 319=51 Bom.L.R. 653 (F.B.).

———Ss. 3 and 4—*Scope and object of—Duty of Government and of Court—Power of Court to consider merits or sufficiency of grounds.*

The Bombay Public Security Measures Act undoubtedly confers upon the Government very wide powers. The duty of the Court must always be to protect the liberty of the subjec by seeing to it that the Government exercises its powers within the four corners of the statute, that the order made is within the ambit and scope of the Act, and that every formality required by the legislation is complied with before the subject is deprived of his liberty. But the Court, however anxious it may be to protect the liberty of the subject, cannot trespass upon that province which the legislature has marked out as belonging to the executive. Nor can it take upon itself the duty of considering questions of policy which are essentially for the executive and not for a judicial tribunal. The scheme of the Act is fairly clear, and it is the detaining authority that has to be satisfied that the person detained was acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the province or any part thereof, and not the Court. Under S. 3, it is incumbent upon the Government to communicate to the person affected by the order the grounds on which the order was made. That is a statutory duty cast upon the executive and the section thereby provides a very important and valuable safeguard to the subject. The grounds furnished must be clear, precise and accurate; otherwise they would fail to serve the purpose for which they are intended by the legislature. (*Chagla, Ag. C. J., Rajadhyaksha and Gajendragadkar, JJ.*) RAJDHAR KALU PATIL, *In re.* I. L.R. (1948) Bom. 213=2 D.L.R. 556=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

———S. 4—*Discretion of Government—Powers of Court to go into merits or consider propriety of order.*

Under S. 4 of the Bombay Act (VI of 1947), it is left to the discretion of the Government to annul or confirm the order or modify it or make any other order after considering the representation made to it by the detenu. The Court is not concerned with the merits of the representation or the propriety of the order made by the Government under the section. (*Chagla, Ag.C.J., Rajadhyaksha and Gajendragadkar, JJ.*) RAJDHAR KALU PATIL, *In re.* I.L.R (1948) Bom. 213=2 D.L.R. 556=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F.B.).

———S. 4—*Scope—Grounds for detention given by Government—Defect in some—Effect—Whole order if vitiated.*

Where there are several grounds given by Government for the detention of a person and some of them are good and some bad, it cannot be said that the whole order is vitiated If some of the grounds are not outside the scope and ambit of the Act but are merely vague and indefinite, the order is not thereby rendered invalid. If after eliminating grounds which lack precision and definiteness and which are therefore no grounds at all, there still remain any ground or grounds which are accurate and precise and which can justify the order then the order of detention must stand. If the Court comes to the conclusion that there is a ground or grounds which are within the ambit of the Act, and which the detaining authority can legitimately consider in order to be satisfied that it is necessary to detain the person concerned, the Court must uphold the order, notwithstanding that some of the grounds furnished are vague, indefinite and couched in slovenly language. It is only if a reason given for the detention is not within the scope and ambit of the Act, that the whole order would be vitiated notwithstanding the existence of other good reasons, because in that case something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purpose of the Act. (*Chagla, Ag. C.J., Rajadhyaksha and Gajendragadkar, JJ.*) RAJDHAR KALU PATIL, *In re.* I.L.R. (1948) Bom. 213=2 D.L.R. 556=A.I.R. 1948 Bom. 334=49 Cr.L.J. 465=50 Bom.L.R. 183 (F. B.).

———S. 6—*Burden of proof—Ingredients of offence—Duty of prosecution—Order under S. 2 (1) (b)—Contravention—When offence—Production of order contravened—If sufficient to discharge burden on prosecution—Proceedings under S. 491, Cr. P. Code—Distinction.*

S. 6 of the Bombay Act VI of 1947 speaks of contravening an order under S. 2 (1) of that Act. It is not any order made under that subsection which requires obedience on the part of the person to whom such order is addressed. It is only a valid order made under S. 2 (1), the contravention of which constitutes an offence. It must be an order which satisfies the conditions laid down in S. 2 (1), namely that the executive authority making the order must be satisfied in the manner contemplated by S. 2 (1) (*b*). S. 6 presupposes a judicial determination by the Court. The burden of proving the guilt of an accused person is upon the prosecution which must establish by evidence all the ingredients of the offence alleged and charged. When, therefore, a person is charged under S. 6 of the Act with the offence of contravention of an order made under S. 2 (1) (*b*) and he pleads not guilty by challenging the validity of the order which is contravened, one of the most important ingredients to be proved by the prosecution is that the Provincial Government has been satisfied on materials placed before it that the accused is acting in a manner which is prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, and that ingredient cannot be said to have been proved by the prosecution by merely furnishing in Court an order made by the Police Commissioner. The detaining authority must step into the witness-box in order to establish the validity of the order under S. 2 (1) (*b*) and to refute the objections of the accused against the validity of the order by satisfying the Court that the condition precedent to the making of the order was complied with. The position is not identical with, but is different from that in a case under S. 491, Cr. P. Code. While in proceedings under S. 491, Cr. P. Code, the petitioner has to make out and to state that the order under which he is detained is a bad order on any of the grounds on which it is open to him to attack or assail it, the Court, if it is satisfied that a *prima facie* valid order has been made by the production of the order, has to accept it as a valid order, unless challenged on some ground, that is not the position in a criminal trial on a charge of contravention of an order of detention under S. 2 (1) (*b*) of the Bombay Act VI of 1947. As in every criminal trial, the prosecution has got to prove the guilt of the accused and not merely make out a *prima facie* case; the accused is under no obligation to open his mouth, and the Court can only convict the accused if it is satisfied that the prosecution has succeeded in establishing that the accused has committed the offence with which he is charged. 40 Bom.L.R. 483 (F.B.), Dist. (*Chagla, C.J. and Gajendragadkar, J.*) REX *v.* ABDUL MAJID. I.L.R. (1949) Bom. 363=51 Bom.L.R. 568=A.I.R. 1949 Bom. 387=4 D.L.R. (Bom.) 106=3 A.I.Cr.D. 419=51 Cr.L.J. 47.

——**S. 6 (1)**—*"Inhabitants"—Meaning and interpretation of.*

The word "inhabitants" as used in the context in S. 6 (1) of the Bombay Public Security Measures Act is not used in the sense of residents of the locality or permanent residents thereof, but in the sense of persons who, besides being permanent residents, are also the occupants in the sense of carrying on business of some nature in the locality (*e.g.*, a pan shop.) (*Bhagwati, J.*) ABDUL GANI *v.* COMMISSIONER OF POLICE, BOMBAY. 51 Bom.L.R. 633=A.I.R. 1949 Bom. 365=51 Cr.L.J. 7.

——**S. 6 (1)**—*Order imposing collective fine—Validity—Use of printed form and omission to score out certain unnecessary letters or words—If renders order invalid.*

The fact that a cyclostyled or printed form, is used in the case of an order of collective fine under S. 6 (1) of the Bombay Public Security Measures Act and the omission to correct the printed word "building (s)" in that order cannot lead to the conclusion that the officer making the order did not apply his mind or bring to bear his independent judgment on the matter, and that the order is bad on the ground that it is a mechanical reproduction of the grounds set out in S. 6 (1). Where the order specifies certain acts as endangering public safety, etc., and the area in which each of the buildings is situate, it must be held that the officer concerned has applied his mind and considered everything according to law at the date of the passing of the order. If the order is valid on its face and shows that there was an exercise of a judicial mind, and that the officer concerned was satisfied that the order should be made for the reasons set out therein, the Court cannot challenge the opinion of the officer, but must hold the order to be a lawful one. (*Desai, J.*) SHIVRAM YESHWANT *v.* COMMISSIONER OF POLICE. 2 D.L.R. 375.

——**S. 9-A**—*Scope—Power of Government and of Court—Purpose of action under S. 9-A—Jurisdiction of Court to scrutinise*—Certiorari—*Government if sole judge.*

It is perfectly true that it is left to the Provincial Government's satisfaction what action to take under S. 9-A of the Bombay Public Security Measures Act. They are constituted the sole judges of the necessity of the action and therefore it would be for Government to determine whether they should take any action, and if so, what should be the nature of the action. I should decide subjectively what action should be taken. But the Legislature did not intend that the Government should also decide subjectively as to the existence of the purpose for which action has to be taken under S. 9-A. The purpose for which action has to be taken has got to be objectively decided or determined. The purpose laid down in S. 9-A, is a condition precedent to the exercise of the power given to the Provincial Government for taking any action under the section. It would not be enough for Government to come to its own conclusion as a mental act that action was necessary for the purpose laid down in S. 9-A. The Government has to determine objectively that the purpose of taking action was present and was established. That being so the Court has got power and has jurisdiction to determine whether in fact the condition precedent was satisfied or not. The action of the Government then becomes a judicial or a quasi-judicial act and not merely the performance of an executive act. In this respect if the Government decides wrongly or illegally, the High Court has jurisdiction to issue a writ of *certiorari*. 51 Bom.L.R. 342, rel. on. (*Chagla, C.J. and Tendolkar, J.*) RAMESH THOPER *v.* PROVINCE OF BOMBAY. 52 Bom.L.R. 62=5 D.L.R. (Bom.) 12=A.I.R. 1950 Bom. 213=51 Cr.L.J. 1184.

——**S. 21**—*Construction—"If any"—If govern only "such conditions" or "under such circumstances" also—General delegation of powers—Legality.*

A general delegation of the authority of the Provincial Government under S. 21 of the Bombay Public Safety Measures Act is not illegal or *ultra vires*. It is open to that Government to make an unconditional delegation. The words, if any, in the section cannot be read as qualifying the words "such conditions" only. The words "if any" govern both the clauses, "in such circumstances" and "under such conditions"; it is clear that the general delegation may, if the Provincial Government so choose, be qualified by such circumstances and conditions as may be specified. It is for the Provincial Government to decide whether the delegation is to be a general one or whether it is to be conditional or under certain specified conditions. (*Rajadhyaksha and Jahagirdar, JJ.*) KRISHNAJI GOPAL BRAHME, *In re.* 49 Cr.L.J. 524=A.I.R. 1948 Bom. 360=50 Bom. L.R. 175.

——**S. 21**—*Delegation—Powers of Provincial Government—Delegation—Order of—If should specify circumstances and conditions of delegation.*

An order of the Provincial Government under S. 21 of the Bombay Public Security Measures Act delegating its powers need not specify the circumstances and conditions under which the power is delegated. S. 21 makes it clear that it is an absolute power which the Provincial Government has to make, and it may, but is not bound to, specify the circumstances under which the power is delegated; and it may, but is not bound to, impose and set out the conditions under which the power may be exercised. (*Desai, J.*) USHA DURGA PRASAD BAKHALE *v.* COMMISSIONER OF POLICE, BOMBAY. A.I.R. 1949 Bom. 73=5 A.

I.Cr.D. 80=4 D.L.R. (Bom.) 38=50 Cr.L.J. 155=50 Bom.L.R. 588.

BOMBAY PUBLIC TRUSTS REGISTRATION ACT (XXV OF 1935), Ss. 3 (3) and 4—*Applicability—Society registered under Societies Registration Act—If registrable under Bombay Act XXV of* 1935.

A society which is registered under the Societies Registration Act is like a Club or a Joint Stock Company; and such a society whose object is to work for the education, maintenance and welfare of poor and deserving Hindu students, with a view mainly to make them useful public workers, is exempt from registration under the Bombay Public Trusts Registration Act, 1935. It is not a religious trust as contemplated in S. 3 (3) of the Bombay Act XXV of 1935 and cannot be treated as a public trust under the Act liable to be registered thereunder. (*Jahagirdar, J.*) BHASKAR SADASHIV *v.* REGISTRAR, BOMBAY PUBLIC TRUST REGISTRATION ACT. I.L.R. (1948) Bom. 553=A.I.R. 1949 Bom. 76=50 Bom.L.R. 612.

BOMBAY RATIONING ORDER (1943)—Validity of—Order signed by Secretary to Government by order of Governor—If irregular or ineffectual. *See* GOVERNMENT OF INDIA ACT (1935), S. 59 (3.) 49 Bom.L.R. 49.

BOMBAY RENTS, HOTEL RATES AND LODGING HOUSE RATES (CONTROL) ACT (VII OF 1944)—Scope—If *ultra vires*—Government of India Act (1935), Ss. 93 and 107 (2). [*See* Q.D. 1941-1945, Vol. I, Col. 568.] HIRJI LAXMIDAS *v.* FRANCIS FERNANDES. I.L.R. (1946) Bom. 119.

———*Scope—Jurisdiction of Rent Controller—Extent of.*

The Rent Controller, under the Bombay Act VII of 1944, has jurisdiction to decide not only whether a particular matter falls within his jurisdiction but also whether the applicant before him is a tenant or merely a licensee in occupation of the premises concerned. (*Bhagwati, J.*) MANIBHAI HATHIBHAI PATEL *v.* C.W.E. ARBUTHNOT. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

———**Ss. 9 and 10**—*Applicability—Tenant subletting in breach of agreement with landlord not to sublet—If protected.*

Where a tenant has let the premises leased to him without the previous consent of the landlord, in breach of a condition of the conditions of the tenancy that the lessee shall not sub-let or part with the possession of the demised premises or any part thereof to any other party or parties without the previous written consent of the lessor, etc., he is not protected under S. 9 or S. 10 of Bom. Act VII of 1944. (*Chagla, C.J. and Gajendragadkar, J.*) COOPER *v.* SHIAVAX COWASJI. 50 Bom.L.R. 718=A.I.R. 1949 Bom. 131.

———**S. 9**—*Termination of tenancy—Acceptance of rent by landlord—Effect—If creates new tenancy—Burden of proof.*

Under S. 116, T. P. Act, and before the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, came into force, acceptance of rent by the landlord from the tenant after the termination of the tenancy would lead only to one conclusion, namely that he had assented to the tenant remaining in possession. But the position in law has been altered since the Bombay Act came into force. Under the Act, unlike under S. 116, T. P. Act, the tenant becomes a statutory tenant whom the landlord cannot eject so long as the tenant carries out the conditions laid down in S. 9 of the Bombay Act VII of 1944. It cannot be said that mere acceptance of rent cannot by itself, under the Bombay Act, bring into existence a new tenancy as contemplated by S. 116, T. P. Act. Acceptance of rent is attributable either to the fact that in law the tenant has become a statutory tenant and he cannot get possession and so must accept rent from the statutory tenant, or to his agreeing to a new tenancy coming into existence and the tenant becoming his tenant under the new tenancy. It has therefore to be determined in every case whether the acceptance of rent is attributable to the statutory tenancy which came into exisence on the termination of the notice to quit, or to the landlord assenting to a new tenancy coming into existence. Acceptance of rent by itself is no longer as unequivocal an act as it used to be before Bombay Act VII of 1944 came into force. The tenant has the burden on him to prove that there was a new tenancy under S. 116, T. P. Act. He must prove more than mere acceptance of rent, because mere acceptance of rent does not constitute a waiver of the notice to quit, nor does it indicate the assent of the landlord to the tenant continuing in possession as a legal tenant. (*Chagla, C. J. and Gajendragadkar, J.*) BALDEODAS MAHAVIR PRASAD *v.* G. P. SONAVILLA. 50 Bom.L.R. 233=A.I.R. 1948 Bom. 385=3 D.L.R. (Bom.) 52=2 D.L.R. 866.

———**S. 10**—*Construction—If abrogates contract to the contrary.*

The words "notwithstanding any law to the contrary" in S. 10 of the Bombay Rents Hotel Rates and Lodging House Rates (Control) Act, cannot be read to mean also notwithstanding any contract to the contrary. (*Chagla, C.J. and Gajendragadkar, J.*) COOPER *v.* SHIAVAX COWASJI. 50 Bom.L.R. 718=A.I.R. 1949 Bom. 131.

———**S. 13 (b)**—*Applicability—Rent payable partly in cash and partly in form of services—Jurisdiction to fix standard rent—"Or for any other reasons, any difficulty arises, etc."—Interpretation of.*

S. 13 (*b*) of the Bombay Rents, Hotel Rates and Lodging Rates (Control) Act has no application to a case where the rent reserved is partly in cash, and partly in the form of services. The words, "or for any other reason, any difficulty arises in giving effect to this part", in cl. 13 (*b*) does not cover a case where the premises are let for a nominal rent or a rent in addition to services rendered by the lessee. The words are to be construed *ejusdem generis* with the words preceding. In a case, therefore, where the rent is to be paid partly in cash and partly in the form of services, the Rent Controller has no jurisdiction to fix the standard rent of the premises. (*Coyajee and Tendolkar, JJ.*) RUSTOMJI PESTONJI *v.*

SORABJI DADABHOY. I.L.R. (1948) Bom. 822=50 Bom.L.R. 115=A.I.R. 1948 Bom. 306.

———**S. 14 (3)**—*Construction—Order of Controller—How far final—Appeal to Collector—Effect of.*

Under S. 14 (3) of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, the order of the Controller is made final, but it is subject to the decision of the Collector made on appeal. The finality of the order of the controller, therefore, disappears as soon as an appeal is preferred to the Collector, and thereafter it is only the decision of the Collector that becomes final and operative. So long as there is no appeal, the order of the controller is final; but, the moment an appeal is preferred, the matter becomes *sub judice,* and it is then the decision of the Collector which has the finality under S. 14 (3) of the Act. (*Chagla, Ag. C. J., and Gajendragadkar, J.*) INDRA SINGH *v.* SHIAVAX CAWASJI CAMBATA. I.L.R. (1948) Bom. 346=50 Bom. L.R. 203=A.I.R. 1948 Bom. 347.

———**S. 14 (3)**—*Order of Controller—When final—Order of certificate by Collector—Collector setting aside on appeal—Quashing of Collector's order by High Court by writ of* certiorari—*Effect—Appeal before Collector—If pending—Certificate of Controller—If effective.*

The plaintiffs (landlords) obtained a certificate from the Rent Controller under the Bombay Act VII of 1944, certifying that the premises occupied by the defendants were reasonably and *bona fide* required by the plaintiffs for their own occupation. The defendants preferred an appeal to the Collector who allowed it and set aside the certificate granted by the Collector without hearing the plaintiffs or giving them an opportunity to be heard. On an application by the plaintiffs for a writ of *certiorari,* the High Court quashed the Collector's order made in the appeal. The plaintiffs then sued to eject the tenants on the ground that on the quashing of the Collector's order, the certificate of the Controller stood and was valid and effective.

Held, that the order of the Collector in the appeal having been quashed, it must be held that there was no appeal pending or filed before the Collector and that the order of the Controller granting the certificate must be held to be final under S. 14 (3) of the Act. (*Desai, J.*) SHIAVAX COWASJI CAMBATTA *v.* INDRA SINGH & SONS, LTD. 2 D.L.R. 379.

———**S. 38**—*Power of review—Extent of—Limits to—Review on ground not permitted—Jurisdiction*—Certiorari.

The power of review conferred by S. 38 of Bombay Act VII of 1944 is circumscribed by the provisions of O. 47, R. 1, C. P. Code and is not unlimited or absolute. The power can be exercised only on the grounds specified in R. 1 of O. 47, C. P. Code. If a review is allowed on any ground not permissible under O. 47, R. 1, C. P. Code, the order allowing review must be held to be without jurisdiction. The High Court can in such a case interfere by issuing a writ of *certiorari.* (*Tendolkar, J.*) CHARLES E. RING *v.* COLLECTOR OF BOMBAY. 50 Bom.L.R. 146=A.I.R. 1948 Bom. 387.

———**S. 38**—*Scope—If retrospective in operation.*

S. 38 of Bombay Act VII of 1944 is not retrospective in operation and hence orders made prior to the date on which the Act came into operation are not subject to a power of review under S. 38. (*Tendolkar, J.*) CHARLES E. RING *v.* COLLECTOR OF BOMBAY. 50 Bom.L.R. 146=A.I.R. 1948 Bom. 387.

———**(XLVII of 1947)**—Applicability—Suit for possession of house from defendant who was in possession as licencee on payment of Rs. 50 per month—Jurisdiction to try—Valuation. *See* BOMBAY CITY CIVIL COURT ACT (1948) S. 3. 51 Bom.L.R. 272.

———**S. 4 (1)**—*Construction—"Belonging to"—Meaning of—Lessee of land from Port Trust putting up building thereon and letting outflats—Suit in ejectment in respect of flats—Jurisdiction of High Court—Flats if belong to lessee or Port Trust.*

There is no doubt that the words "belonging to" in S. 4 (1) of Bombay Act LVII of 1947 import a concept of ownership. They mean very much the same thing as "of the ownership of" though not necessarily "of the absolute ownership of".

The plaintiff's predecessor took a lease of a plot of land from the Trustees of the Bombay Port Trust for 99 years for the purpose of putting up a building thereon. He put a building thereon and he let some of the flats therein to the defendants.

Held: (1) that the flats were not premises belonging to a local authority (Port Trust) within the meaning of S. 4 (1) of Bombay Act LVII of 1947;

(2) that the plaintiff as lessee of the land was the "owner" *qua* the defendants and the premises therefore belonged to him and not to the Port Trust or to any one else so long as the lease was subsisting; and

(3) therefore the premises were not excluded from the operation of Bombay Act LVII of 1947, so as to give jurisdiction to the High Court to entertain a suit in ejectment by the plaintiff in respect of the flats in the building. (1934) I.T.R. 209; (1946) I.T.R. 409, ref. (*Tendolkar, J.*) LAXMIPAT SINGHANIA *v.* LARSEN AND TOUBRO, LTD. 52 Bom.L.R. 688.

———**S. 12**—*Scope—If retrospective.*

S. 12 of the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (1947), is in terms prospective and not retrospective. The Act is retrospective only to the extent clearly provided in S. 50 of the Act. (*Chagla, C J., Gajendragadkar and Tendolkar, JJ.*) NILKANTH RAM CHANDRA *v.* RASIKLAL. I L.R. (1949) Bom. 265=A.I.R. 1949 Bom. 210=51 Bom.L.R. 280 (F.B.).

———**S. 12 (1)**—*Applicability—Ejectment suit—Consent decree before Act creating monthly tenancy—Effect—Right of tenant to claim benefit of S.* 12 (1).

If a decree is passed in *invitum* against the defendant in an ejectment suit after the termination of his tenancy, he cannot claim to be a tenant and would have a right to claim the protection of S. 12 (1) of Bombay Act LVII of 1947, contrary to the directions of the decree. But where there is a consent decree which creates a fresh contractual relation of landlord and tenant, the defendant gets the rights and privileges of a tenant under the Act which comes into force after such decree, and unless the protection of the statute is properly and validly withdrawn, he would not be liable to deliver possession under that decree in spite of the terms of the decree. Such a tenant can obtain the benefit of S. 12 (1) of the Act. (*Shah, J.*) GURUPADAPPA SHIVLINGAPPA *v.* SAYAD AKBAR. **5 D.L.R. (Bom.) 66=A.I.R. 1950 Bom. 252=52 Bom.L.R. 143.**

———**Ss. 28 and 50**—*Applicability—Suit under S. 9, Specific Relief Act, by dispossessed tenant against owner of premises—Jurisdiction of High Court to try.*

It is not every suit for possession that is liable to be transferred to the Small Causes Court under S. 50 of Bombay Act LVII of 1947 and to try which jurisdiction is conferred on the Court of Small Causes by S. 28 of that Act. It is only those suits for possession which are filed between a landlord and tenant that are so liable to be dealt with.

A simple suit for possession under S. 9, Specific Relief Act, by a tenant who had been dispossessed against the landlord, does not fall under Ss. 28 and 50 of the Bombay Act LVII of 1947, and can be tried by the High Court, if filed therein; and it is not liable to be transferred under S. 50 of the Act. (*Chagla, C.J. and Coyajee, J.*) SHIAVAX C. CAMBALA *v.* SUNDERDAS EBJI. **A.I.R. 1950 Bom. 343=5 D.L.R. (Bom.) 165=52 Bom.L.R. 381.**

———**Ss. 28, 29 and 50**—*Scope—If ultra vires—Suits between landlord and tenant—Jurisdiction of High Court to try—If taken away—Government of India Act* (1935), *Ss. 224 and 225.*

Ss. 28, 29 and 50 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1947, is not *ultra vires* the Provincial Legislature. The result of these sections is that High Court has ceased to possess ordinary original jurisdiction with regard to suits between a landlord and tenant which were cognizable by it under Cl. 12 of the Letters Patent, but its extraordinary original civil jurisdiction under Cl. 13 of the Letters Patent and its revisional powers under S. 115, C. P. Code, are continued as before and have not been affected or modified in any way. The prohibition enacted by these sections in not a total prohibition but only of a restricted character. Nor do these sections in any way affect the powers possessed by the High Court under Ss. 224 and 225 of the Government of India Act, 1935. The suits of the description mentioned in Ss. 28 and 50 pending in the High Court have, therefore, to be transferred to the Court of Small Causes, Bombay, as the jurisdiction of the High Court is taken away by the Bombay Act of 1947.

Tendolkar, J.—Under S. 224, Government of India Act, 1935, the High Court still retains the jurisdiction of judicial superintendence and correction, but such jurisdiction is excluded only in cases of judgments against which there is no appeal or revision. Therefore, where an appeal or revision against a judgment is permissible under the law, whether or not such an appeal or revision is filed, the High Court has power under S. 224 of judicial correction of such judgment. (*Chagla, C.J. and Tendolkar, J.*) KAVASJI PESTONJI DALAL *v.* RUSTOMJI SORABJI. **50 Bom.L.R. 450=A.I.R. 1949 Bom. 42.**

———**S. 50**—*Applicability—Suit by tenant to recover pugree paid to landlord—Jurisdiction of High Court to try.*

A suit by a tenant to recover money paid by him to his landlord as pugree does not full within the purview of S. 50 of Bombay Act XLVII of 1947, and therefore the High Court has jurisdiction to try the same and is not bound to transfer it to the Small Cause Court. (*Chagla, C.J. and Coyajee, J.*) SHIVJI BHARA & CO. *v.* KANJI VASANJI. **A.I.R. 1949 Bom. 337=51 Bom.L.R. 515.**

———**S. 50, Proviso**—*Applicability—Suit falling under Bombay Rent Restriction Act* (1939) *or Bombay Act* (*VII of* 1944), *pending on date of coming into force of Act XLVII of* 1947—*Jurisdiction to try.*

The words "to which the provisions of Part II apply" in the proviso to S. 50 of the Bombay Act (XLVII of 1947), qualify the word "premises" and not the words "suits and proceedings". A suit in respect of premises falling under the Bombay Rent Restriction Act, 1939, or the Bombay Act (VII of 1944), and pending in the High Court on the date of the coming into force of Act XLVII of 1947, must, therefore he transferred to the Bombay Court of Small Causes which under S. 28 is the appropriate Court. (*Tendolkar, J.*) SULEMAN *v.* PATEL. **3 D.L.R. (Bom.) 41.**

BOMBAY RENT RESTRICTION ACT (XVI OF 1939), S. 10—*Applicability—Clerk or manager accepting pugree—Offence.*

The words "any person" in S. 10 (1) of the Bombay Rent Restriction Act would include not only the landlord but also a mehta or clerk who gets the rents collected, keeps accounts and manages the property. Such a person comes within the expression "landlord". If such a clerk receives "pugree" or premium, he is liable to conviction under S. 10 (4). (*Rajadyaksha and Jahagirdar, JJ.*) EMPEROR *v.* DATTATRAYA SITARAM. **50 Bom.L.R. 169=A.I.R. 1948 Bom. 239=49 Cr.L.J. 341.**

———**S. 11**—Construction "His own occupation"—Meaning of. [*See* Q.D. 1941-1945, Vol. I, Col. 570.] INSTITUTE OF RADIO TECHNOLOGY *v.* PANDURANG BABURAO. **I.L.R. (1945) Bom. 1038=234 I.C. 18=1946 Bom. (Rul.) 150=A.I.R. 1946 Bom. 212.**

BOMBAY RETAIL TRADE CONTROL AND LICENSING ORDER (1942), Cl. (3)—*Applicability—"Undertaking"—Meaning of—Isolated sales of articles without licence—Offence.*

In order to sustain a charge of engaging in an undertaking of the nature referred to in Cl. (3) of the Bombay Retail Trade Control and Licensing Order (1942), what is required to be proved is a regular course of business or trade in respect of the controlled articles. Isolated instances of the sale of such articles would not amount to an offence punishable under the clause, because the offence consists not of selling without a licence or trading without a licence, but rather engaging in such an undertaking. What matters is the storage and not the selling and proof of sales is not an essential element. (*Macklin and Sen, JJ.*) Emperor *v.* Mahomed Musa Natali. 230 I.C. 48=1947 Bom. (Rul.) 226=48 Cr.L.J. 492=48 Bom.L.R. 761=A.I.R. 1947 Bom. 163.

BOMBAY REVENUE JURISDICTION ACT (X OF 1876), S. 4 (a) (1)—Applicability—Claim against Government—Resumption of *Kazi* inam from alienee by executive action—Suit for declaration and possession—Bar of. *See* Grant—Resumption. 51 Bom.L.R. 133.

——**S. 4 (b)**—*Jurisdiction of Court—Allegation that order under S.* 211, *Bombay Land Revenue Code, is* ultra vires.

The Civil Courts have jurisdiction to determine a question as to the excess of the statutory powers conferred by the Bombay Land Revenue Code. Such a question is raised when a plaintiff suing for a declaration that the Government is not entitled to recover from him an assessment of land revenue in excess of an amount payable by him under an agreement with it, maintains that the cancellation of that agreement by an order of the Governor-in-Council is not within the powers conferred by S. 211 of the Code under which it is sought to be justified.

But apart from the question of *ultra vires*, the claim of the plaintiff based on the agreement constitutes objections to the amount or incidence of assessment authorised by Government within the meaning of S. 4 (*b*), Bombay Revenue Jurisdiction Act and the jurisdiction of the Civil Court is thereby excluded. (*Lord Thankerton.*) Province of Bombay *v.* Hormusji Manekji. 74 I.A. 103=A.I.R. 1947 P.C. 200=50 Bom.L.R. 524=(1948) 1 M.L.J. 134 (P.C.).

——**S. 4 (d) (i)**—*Scope—Khoti Sarakati inam village—Mortgagee from inamdar—Suit to declare right to have name entered in revenue records as mortgagee and for payment direct to mortgagee by Government of amount due to inamdar until discharge of mortgage—Jurisdiction of Civil Court.*

S. 4 (*d*) (1) of the Bombay Revenue Jurisdiction Act excludes the jurisdiction of the civil court to deal with any matters where claims are made against the crown to be entered in the revenue survey or settlement records or village papers as liable for the land revenue, or as superior-holder, inferiod holder, occupant or tenant. Where a mortgagee from the inamdar of a khoti sarakati inam village brings a suit for a declaration of his right to get his name entered in the revenue records as mortgagee of the inam rights, and of his right to receive direct from the Government the amount due and payable to the inamdar in respect of the village till the mortgage debt is discharged, the jurisdiction of the civil Court is not barred in respect of the claim for receipt of the dues, though the claim for amendment of the records is not cognizable by the civil Court. (*Stone, C.J., Chagla and Gajendragadkar, JJ.*) Vinayak Hari Paranjape *v.* Province of Bombay. I.L.R. (1948) Bom. 264=50 Bom L.R. 21=A.I.R. 1948 Bom. 220=2 D.L.R. 548 (F.B.).

——**S. 11**—*Applicability—Administrative act of revenue authorities* ultra vires—*Suit—If barred.*

The bar imposed by S. 11 of the Bombay Revenue Jurisdiction Act applies only when there is an appealable order. An Administrative Act on the part of the revenue authorities, which is *ultra vires*, can be challenged in a suit without filing any appeal. Such a suit is not barred under S. 11. (*Stone, C.J. and Divatia, J.*) Tumdu Dhansingh *v.* Province of Bombay. 49 Bom. L.R. 209=A.I.R. 1947 Bom. 403=I.L.R. (1947) Bom. 75.

BOMBAY SMOKE NUISANCE ACT (VII OF 1912), S. 3 (5)—*"Owner"—Lessee—Liability of, under rules—Right to plead private contract with landlord in defence to charge of contravention of rule.*

There can be no doubt that the definition of the word 'owner' in S. 3 (5) of the Bombay Smoke Nuisance Act includes a lessee. The department is not directly concerned with private agreement between landlord and tenant and a lessee cannot be heard to say that his private contract with the landlord precludes him from strictly complying with the rules under the Act. (*Rajadhyaksha and Chainani, JJ.*) Emperor *v.* Fakirmahomed Currimji. A.I.R. 1949 Bom. 373=51 Bom.L.R. 573=51 Cr.L.J. 20.

——**S. 9 (1)**—*Rules under R. 26—Scope—Prosecution for non-compliance—Reasonableness or justice of notice to increase height of chimney—Relevancy of.*

When R. 26 of the Smoke Nuisance Rules made under the Bombay Smoke Nuisance Act, says that no smoke shall be emitted from a furnace at a lower altitude than 100 feet from the firing-floor level; it means, strictly speaking that an offence under S. 9 (1) of the Act would be committed whenever smoke is emitted from a furnace at a lower altitude than 100 feet from the firing-floor level unless any of the exceptions apply. But it does not mean that in every case the smoke nuisance department would undertake prosecution. It is within the power of the department to permit the emission of smoke at a lower altitude than 100 feet from the firing-floor level by the simple device of not taking any steps in such cases. Where, however, a prosecution is launched, such prosecution is not for non-compliance with a notice issued by the department to raise the height of the chimney to the required height or altitude, but for non-compliance with, or contravention of R. 26. No question at all arises in such a prosecution as to whether the requirements of the notice issued and served upon the accused were reasonable or unreasonable, just or unjust. (*Rajadhyaksha and Shainani, JJ.*) EMPEROR *v.* FAKIRMAHOMED CURRIMJI. A.I.R. 1949 Bom. 373 =51 Bom.L.R. 573=51 Cr.L.J. 20.

BOMBAY SUMMARY SETTLEMENT ACT (II OF 1863), Ss. 5 (3) and (16) (g)—*"Transfer"—Meaning of—Partition—Joint family owning interest in jahagir village—Partition of share and separate enjoyment of shares by co-sharers—If "transfer" by manager to others—"Notice of transfer"—Necessity under S. 5 (3).*

Where a joint Hindu family consisting of brothers hold an interest in a *jahagir* village, comprising a right to receive a sum of money out of the revenues of that village, the eldest member's name being entered in the inam register as the holder of the inam village, and subsequently disputes between them as regards division of ancestral property are referred to arbitration and an award is made which is made a decree of Court, as a result of which the interest in the inam village, is also divided, all the brothers become entitled to receive a portion of the amount each as his separate share on partition, and the names of the divided brothers are also entered in the revenue records, such partition does not amount to a "transfer" of the inam village by the eldest to the youngest brothers within the meaning of S. 16 (*g*) of the Bombay Summary Settlement Act II of 1863. It cannot be said that by the partition effect under the award decree something was conveyed to the younger brothers who were not entitled to it before the decree. Nor is the eldest brother a "transferor" and the younger brothers transferees within the meaning of S. 5 (3) so as to impose on the former the duty of giving notice to the Collector or Chief Revenue authority as required by S. 5 (3) and render him liable to a penalty in case of failure to give notice of the "transfer." 60 Bom. 34, cons. (*Bavdekar and Dixit, JJ.*) VISHNU VISHWANATH *v.* GOVERNMENT OF BOMBAY. A.I.R. 1949 Bom. 248=51 Bom.L.R. 238.

BOMBAY TENANCY ACT (XXIX OF 1939, as amended in 1946), S. 2-A—*Construction — "Lawfully" — Meaning — If retrospective.*

The word "lawfully" has to be interpreted in its ordinary meaning and cannot be given any other interpretation. The intention of the Legislature as indicated in S. 2-A is that where the person who was in possession of the land has shown that he was in lawful possession, he is entitled to have the determination of the question as to whether he was or was not a tenant made by the Mamlatdar or the Collector or the Provincial Government and not by the Civil Courts. What the Legislature as a matter of fact intended was that once the person who claimed to be a tenant showed that he was in lawful possession of the land whether he was in possession in the character of a tenant should be determined by the Mamlatdar, a Collector or the Provincial Government, and not by the Civil Courts. There was no other intention.

Quaere: whether S. 2-A is retrospective in operation. (*Bavdekar and Jahagirdar, JJ.*)

SUDKYA RAMJI *v.* MAHOMED ISAK. 52 Bom.L.R. 123=A.I.R. 1950 Bom. 236.

———S. 17—*Applicability—Decree in favour of landlord passed before Act—If affected—Retrospective operation of section.*

S. 17 of the Bombay Tenancy Act is not retrospective in operation and does not apply to cases in which a decree has been obtained by a landlord before the Act was enacted, even if it be assumed that the word "tenant" in S. 17 may sometimes denote an ex-tenant who is given certain privileges. (*Bavdekar and Jahagirdar, JJ.*) SUDKYA RAMJI *v.* MAHOMED ISAK. 52 Bom.L.R. 123=A.I.R. 1950 Bom. 236.

———S. 24—Revision—Jurisdiction—Order by Collector in appeal—Jurisdiction of High Court to revise. *See* C. P. CODE, S. 115. 49 Bom.L.R. 658.

———S. 24 (1-A)—*Scope—Retrospective operation—Decree for possession—Execution—Order for possession—Rights under—If affected.*

S. 24 (1-A) of Bombay Act XXIX of 1939, is not retrospective; there are no clear words used in the section which show a plain intention to give the section a retrospective operation, much less such a retrospective operation as to affect rights vested not only before an action is instituted, not only while the action was pending, not even while as a result of the decree obtained an application for execution was made but as a matter of fact after an order was obtained in execution that a party shall immediately be placed in possession of the property. Strong and distinct words would be necessary to alter or affect the rights vested under such an order after decree in a suit. (*Bavdekar and Jahagirdar, JJ.*) SUDKYA RAMJI *v.* MAHOMED ISAK. 52 Bom.L.R. 123=A.I.R. 1950 Bom. 236.

BOMBAY TODA GIRAS ALLOWANCE ACT (VII OF 1887)—*"Heir"—Adopted son.*

An adopted son is an "heir" within the meaning of S. 3 of the Toda Giras Allowance Act. (*Sen and Rajadhyaksha, JJ.*) NARENDRA SINGJI RANJIT SINGJI *v.* UDE SINGJI. 49 Bom.L.R. 318 =A.I.R. 1947 Bom. 451.

———S. 5 (1) (a)—*"Alienate—Disposition by will.*

The word "alienate" in S. 5 (1) (*a*) of the Toda Giras Allowance Act does not exclude a devise by will. (*Sen and Rajadhyaksha, JJ.*) NARENDRA SINGJI RANJIT SINGJI *v.* UDE SINGJI. 49 Bom.L.R. 318=A.I.R. 1947 Bom. 451.

BOMBAY WATAN ACT (V OF 1886), S. 4—*Watan property—Lease of watan property by watandar—Rent received by watandar's widow—Liability to attachment and sale in execution of decree against watandar.*

Rent cannot be regarded as anything but a benefit to arise out of land and as such it would be immovable property within the meaning of the General Clauses Act. It thus becomes equivalent to the land which passed under the lease. Rent of watan land under a lease executed by a deceased watandar which is received by the widow of the lessor-watandar is therefore watan property within the meaning of S. 4 of Watan Act, and cannot be attached and sold in execution of a decree against the deceased watandar. The Court has no power to issue execution against watan property in the hands of the watandar's widow. (*Macklin Rajadhyaksha, JJ.*) PURSHOTTAM DAMODAR *v.* ANANT MADHAV. 48 Bom.L.R. 625=230 I.C. 22=A.I.R. 1947 Bom. 75=1947 Bom. (Rul.) 222=I.L.R. (1946) Bom. 896.

BOMBAY WEIGHTS AND MEASURES ACT (XV OF 1932), Ss. 16 and 37—*"Delivery"—Meaning of.*

The word "delivery" in S. 16 of the Bombay Weights and Measures Act does not mean only actual, physical delivery. It is used in relation to the word "sold," and qualifies that word in this sense that what is meant in that section is delivery in pursuance of a sale. Where unstamped weights were sent by the seller at *A* by railway to the purchaser at *L* and the purchaser took delivery of them at *L* on production of the railway receipt, the delivery was not made by the carriers within the meaning of S. 16 but was made by the sellers through the carriers at *L* and the Magistrate at *L* has jurisdiction to try the seller for an offence under S. 16 read with S. 37 of the Act. (*Davies, C.J. and Thadani, J.*) KUNDANLAL *v.* EMPERPOR. 222 I.C. 610=I.L.R. 1946 Kar. 97=47 Cr.L.J. 335=1946 Sind (Rul.) 140=A.I.R. 1946 Sind 115.

BRITISH NORTH AMERICA ACT (1867), S. 96—*"Superior, District and County Courts"—Labour Relations Board set up under Trade Unions Act, 1944, of the Province of Saskatchewan—Whether Court analogous to such Courts—Trade Unions Act making orders of Labour Relations Board enforceable as orders of Court of King's Bench—If* ultra vires *of Saskatchewan Legislature.*

The jurisdiction exercisable by the Labour Relations Board set up under S. 4 of the Trade Unions Act, 1944, of the Province of Saskatchewan is not such as to constitute it a Court analogous to the superior, district or county Courts mentioned in S. 96 of the British North America Act. The power vested in the Board by S. 10 (3) of the Trade Unions Act to appeal in its own name from any judgment of any Court affecting any of its orders or decisions, emphasises the dissimilarity from those Courts.

Therefore the Trade Unions Act in so far as it purports to make the orders of the Labour Relations Board enforceable as orders of the Court of King's Bench and to give to the Board the power to make any order under S. 5 (*e*) of the Act requiring an employer to reinstate any employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, is not *ultra vires* of the Legislature of Saskatchewan. (*Lord Simonds.*) LABOUR RELATIONS BOARD OF SASKATCHEWAN *v.* JOHN EAST IRON WORKS. LTD. 53 C.W.N. 389=A.I.R. 1949 P.C. 129 (P.C.).

BROKER AND CONSTITUENT—*Rights and liabilities of—Broker closing transaction for non-payment of margin and entering into cross-contract under rules—Cross-contract in pursuance of instructions—Distinction.*

In principle there can be no difference between a case in which a broker closes an outstanding transaction because no margin has been paid to him and the rules permit him to perform the outstanding contract of entering into a cross contract and closing the outstanding contract, and a case where the broker enters into a cross-contract pursuant to instructions given to him by the constituent. (*Chagla, C.J.* and *Coyajee, J.*) GHELABHAI MAHASUKHRAM ROY *v.* KESHADVDEY MADANLAL. 51 Bom.L.R. 499=A.I.R. 1949 Bom. 343.

BURDEN OF PROOF—*Compromise decree—Defendant to pay money by instalments through Court—Suit to be decreed on default—Non-payment not due to defendant's fault—Proof required.*

A suit for cancellation of a sale deed and for possession of the property in question filed on the failure of the defendant to pay the balance of the sale price ended in a compromise decree under which the defendant was to pay the amount due in instalments and in case of default in payment of any one of them the plaintiff's suit was to be decreed. The defendant failed to pay one of the instalments and the decree-holder applied for execution of the decree on the ground of default.

Held, that the obligation was on the defendant to pay and as he did not pay, it was for him to prove that the fault was not his. Assuming that the obligation was to pay "through Court" and that that meant that he must pay into the Imperial Bank having first obtained a proper vocher from the Court, yet it was still for him to prove that he took all proper and reasonable steps to make such payment but nevertheless failed to do so. (*Lord Simonds.*) BISHAN SINGH *v.* MAHBUB ALI. 61 L.W. 127=A.I.R. 1948 P.C. 17=50 P.L.R. 30 (P.C.).

———*Ejectment suit—Onus.*

It is incumbent upon the plaintiff in a suit in ejectment to establish his title to the property in suit and also a subsisting right to possession. (*Venkataramana Rao, C.J. and Venkata Ramaiya, J.*) PALIA *v.* GOVERNMENT OF MYSORE. 52 Mys.H.C.R. 405=2 D.L.R. 237=28 Mys.L.J. 1.

———*Ejectment suit——Onus—of proof—What plaintiff has to prove—Limitation Act Art.* 142.

A plaintiff suing in ejectment on the strength of his title, must, in order to succeed, should not only make out his title to the property sought to be recovered but should also establish that he has a subsisting title, *i.e.*, that he or his predecessors had been in possession, whether actual or constructive within 12 years prior to the suit. 29 Coch. 257, foll.; 39 Coch. 567, ref. (*Govinda Menon and Simon, JJ.*) KOMU MENON *v.* SUPPUKUTTY MENON. 5 D.L.R. (T.C.) 27=A.I.R. 1950 T.C. 46.

———*Importance of—Parties adducing all their evidence—Question of onus—If material—Duty of Court.*

When both sides have let in evidence the question of onus loses its importance; the parties having produced all their evidence, the dispute as to the burden of proof is mainly of an academic nature and the Court has to decide the matter on the whole evidence before it. 56 Cal. 805; 112 I.C. 89, ref. (*Ananthakrishna Iyer, C.J. and Mampilli, J.*) CHIEF SECRETARY TO GOVERNMENT *v.* ANANTAKRISHNA IYER. 4 D.L.R. (Coch.) 164.

——*Kanom—Suit for arrears of michawaram—Proof of details of kanom—Onus—Kanom admitted by defendant—Title deeds with defendant—Plaintiff, if bound to prove details—Failure by defendant to prove kanom set up—Effect.*

When a kanom tenure is admitted or a presumption of a kanom arises on the facts of the case, the burden of proving the entire details of the kanom cannot be thrown on the jenmi suing for arrears of mischavaram, especially when the kanomdar himself is in possession of the title deeds of the kanom admitted by him. In such cases the kanomdar defendant must himself prove the kanom relied on him and if he fails to do so, the plaintiff is entitled to a decree in his suit. 18 T.L.J. 920; 29 T.L.J. 355, rel. (*Abraham and Habub Mahomed, JJ.*) ERANI VASUDEVARU *v.* KANAKOO VELAYUDHAN. 4 D.L.R. (Trav.) 63.

——*Lapse of time—Relief.*

Although lapse of time may prejudice the chances of the plaintiff in proving his case, it does not relieve him of any part of the burden of proof that rests on him, when the lapse of time is not due to any default on the part of the defendant or his predecessors. (*Sir John Beaumont.*) JAGDISH NARAIN *v.* NAWAB SAID AHMAD KHAN. I.L.R. (1946) Kar. (P.C.) 24 =223 I.C. 394=59 L.W. 268=50 C.W.N. 477 =1946 P.C. (Rul.) 137=1946 M.W.N. 389= 1946 A.L.W. 268=1946 A.L.J. 228=81 C.L. J. 107=48 Bom.L.R. 430=1946 O.W.N. 207= 1946 A.L.W. 258=1946 A.L.J. 228=81 C.L. A.W.R. (P.C.) 94=12 B.R. 459=A.I.R. 1946 P.C. 59=(1946) 2 M.L.J. 98 (P.C.).

BURMA INCOME-TAX ACT (XI OF 1922), S. 23 (3) and (4)—*Relative scope and distinction—Assessment to the "best of his judgment"—Statement of same in order of assessment.*

The only difference between S. 23 (3) and S. 23 (4) is that in cases falling under sub-S. (3), the Income-tax Officer is to arrive at an assessment to the best of his judgment on the evidence before him, whereas under sub-S. (4) he is to arrive at an assessment to the best of his judgment in the absence of such evidence.

An assessment under S. 23 (3) is not consequently had in law because it is made to the best of the Income-tax Officer's judgment and this fact is stated in the assessment order. (*Roberts, C.J., Blagden and Wright, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* MESSRS. EIN SHIN. (1947) I.T.R. 290.

CALCUTTA ACTS, ETC.

Calcutta Cotton Cloth and Yarn Emergency Search Order (1945).
Calcutta High Court Rules.

Calcutta House Rent Control Order (1943).
Calcutta House Rent Control Order (1946).
Calcutta Improvements Act (V of 1911).
Calcutta Improvement (Appeals) Act (XVIII of 1911).
Calcutta Municipal Act (III of 1923).
Calcutta Official Receivers Act (VII of 1938).
Calcutta Police Act (IV of 1866).
Calcutta Rent Ordinance (1946).
Calcutta Suburban Police Act (II of 1866).
Calcutta Survey Act (I of 1887).
Calcutta Thika Tenancy Ordinance (II of 1948).
Calcutta Thika Tenancy Act (1949).
Calcutta Tramway Act.

CALCUTTA COTTON CLOTH AND YARN (EMERGENCY) SEARCH ORDER (1945)—Validity—Defence of India Rules, R. 81. [*See* Q.D. 1941—1945, Vol. I, Col. 593.] KHETSIDAS GIRDHARILAL *v.* PROTAPMULL RAMESWAR. A.I.R. 1946 Cal. 197.

CALCUTTA HIGH COURT CIVIL RULES AND ORDERS (Part I), R. 264—*Notice of non-satisfaction under S. 41, C. P. Code—Absence of covering letter—Effect of.*

A notice of non-satisfaction under S. 41, C. P. Code, would be such a notice, whether or not it is accompanied by a covering letter as required by R. 264 of the Civil Rules and Orders (Part I) of the Calcutta High Court. (*Harries, C. J. and Sarkar, J.*) BENOY KRISHNA MUKERJEE *v.* MOHANLAL GOENKA. A.I.R. 1950 Cal. 287.

——R. 704—Levy of fee on affidavits—Legality. *See* GOVERNMENT OF INDIA ACT, S. 224. 222 I.C. 59.

CALCUTTA HIGH COURT RULES (APPELLATE SIDE), Ch. II, Sch., Para. 3—*Issuing of rule—Value of subject-matter exceeding Rs. 2,000—Jurisdiction of single Judge.*

A Judge sitting singly has no jurisdiction to issue a rule against an order of a Judge relating to a subject-matter of which the value exceeds Rs. 2,000. (*Chakravartti, J.*) GOLAM BARI MOLLA *v.* RAI HARENDRA NATH. 53 C.W.N. 648.

CALCUTTA HIGH COURT RULES AND ORDERS (O.S.) Ch. V, R. 3—Judge disposing of application without making report to Chief Justice—Appellate Court, if may set aside order. [*See* Q. D. 1941—1945, Vol. I, Col. 593.] HARIDAS MAJUMDAR *v.* BEJOY PRASAD SINGH. 223 I.C. 576=1946 Cal. (Rul.) 195=A.I.R. 1946 Cal. 121.

CALCUTTA HIGH COURT RULES, Chap. V, R. 15—*Petition for revision—Presentation to single Judge when only one Judge is functioning—Validity.*

Under R. 15 of Chap. V of the Calcutta High Court Rules, a petition for revision can, no doubt, be presented only to a Division Bench. But if at the time the petition is put in, there is only one Judge of the High Court functioning and no Division Bench could be constituted, the presentation of the petition to a single Judge and the issue of a Rule by him, cannot be fatal to the petition which is subsequently before a Division Bench for hearing and disposal. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) SAMPATLAL KESHAN *v.* BALIPRASAD SHAH. 54 C.W.N. 92=A.I.R. 1950 Assam 6.

CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), Ch. VI, R. 5—*Summons taken out on 14th and made returnable on 17th of the same month—If a proper one.*

Summons taken out on the 14th and made returnable on the 17th of the same month, allows 2 clear days as is required by R. 5 of Ch. VI of the Original Side Rules (Calcutta). (*Majumdar, J.*) GOVINDA CH. GHOSE *v.* BISHNU CH. MITTER. 52 C.W.N. 502.

———Ch. VII, R. 1—*Privy Council matters—Reference to Full Bench—If competent.*

Chap. VII, R. 1 is wide enough to cover a reference to a Full Bench in Privy Council matters. (*Das, Mookerjee and Lahiri, JJ.*) SANTOSH KUMAR DAS *v.* NRIPENDRA KUMAR ROY. A.I.R. 1949 Cal. 430=53 C.W.N. 533 (F.B.).

———Ch. VIII, R. 6 and Chapter IX, R. 2—*Defendant not entering appearance—If can defend suit.*

Rules of the Original Side do not say that a defendant who has not "entered appearance" cannot in any way defend the suit. Under Chap. VIII, R. 6 and Chap. IX, R. 2, there are two consequences of not entering appearance. One is that the suit is liable to be heard *ex parte* and the other is that no written statement can be filed. A party subject to these handicaps imposed by the Rules can still appear under the C. P. Code when the suit is called on for hearing from the undefended list, not only to cross-examine the witnesses of the plaintiff and demolish in such manner the plaintiff's case on evidence that the Court will not pass any decree in the plaintiff's favour but also to make such arguments and submissions on law and on such evidence as the plaintiff may have brought to the Court. These are valuable rights under the Code which are not taken away by any rules of the original side. (*P. B. Mukharji, J.*) DEBENDRA NATH DUTT *v.* SATYABALA DASSI. 54 C.W.N. 110=A.I.R. 1950 Cal. 217.

———Ch. VIII, R. 25—*Leaving summons on the table of attorney's office—If proper service.*

R. 25 of Ch. VIII of the Original Side Rules of the Calcutta High Court merely prescribes the mode of service of the Attorney when such service is provided by statute or rules. Even in such a case, leaving the summons on the table of the Attorney on the refusal of his clerk to receive it, would not amount to sufficient service of the summons under R. 25. (*Majumdar, J.*) GOVINDA CH. GHOSE *v.* BISHNU CH. MITTER. 52 C.W.N. 502.

———Ch. X, R. 35—*Applicability—Suit on special list after appearing in prospective list—Power of Court to dismiss for non-prosecution.*

R. 35 of Ch. X of the rules of the High Court, Original Side, applies only to cases which are not in the prospective list and which never were in that list. When a suit has once appeared in that list, this rule is no longer applicable to it. The Court has therefore no jurisdiction to dismiss a suit on the special list for non-prosecution after it has once appeared in the prospective list or the warning list. The inherent power of the Court cannot be invoked in such a case. 58 C. 736, 46 C.W.N. 653, Foll. 44 C. 929 (F.B.) and 63 I.A. 12, rel. on. (*Chatterjee, J.*) TARAK NATH BACCHI *v.* KALACHAND BACCHI. A.I.R. 1949 Cal. 377=53 C.W.N. 786.

———Ch. XII, R. 2-D and Ch. X, R. 7—*Commercial suit—Entry in prospective list—Requisition to Registrar by plaintiff's attorney—Necessity for.*

In the case of a commercial suit in which directions have been given under R. 2-D of Ch. XII of the Original Side Rules by a commercial Judge that the suit shall be placed under Prospective List on a particular date, it is no longer necessary or incumbent on the plaintiff's attorney to submit a requisition to the Registrar for entering the suit in the Prospective List as prescribed by R. 7 of Ch. X. (*Chatterjee, J.*) GOPESWAR MULLICK *v.* SOURENDRA KRISHNA ROY. 53 C.W.N. 788.

———Ch. XIII—*Originating summons—Jurisdiction of High Court—Extent of—Matters included in S. 302, Succession Act.*

Chap. XIII of the Calcutta High Court O.S. Rules is not, in terms, limited to matters which can only be dealt with by the High Court in exercise of its ordinary original civil jurisdiction prescribed by Cl. 12 of the Letters Patent. By its terms, it covers matters relating to or arising out of wills, trusts, etc. The language used in the Rules in this Chapter is wide enough to cover matters included in S. 302 of the Succession Act. The "jurisdiction" conferred by the section is a new and special jurisdiction which is an original jurisdiction as opposed to appellate jurisdiction and may be brought before the Court by way of an originating summons. (*Das, J.*) MAURICE MEYER *v.* ALBERT JOSEPH MEYER. I.L.R. (1947) 1 Cal. 184.

———Ch. XIII, R. 1—*Applicability*—Wakfnama.

Paragraph 1 of Ch. XIII of the Original Side Rules is wide enough to embrace a *wakfnama,* and a question whether it creats a Wakf-al-al-aulad or not is a question which falls within the scope of that paragraph and the High Court in its Original Side is competent to decide that question on an originating summons. (*Khundkar, J.*) HAFIZ SYED MAHOMED HASHMI *v.* COMMISSIONER OF WAKFS, BENGAL. 51 C.W.N. 267.

———Ch. XIII, Rr. 3, 5, 7 and 11—*Service of originating summons.*

There is a marked distinction between the language of R. 3 and Rr. 5, 7 and 11 of Chap. XIII of the High Court Original Side Rules. The three last-mentioned rules requires service of originating summons on all persons who would be proper defendants if proceedings were taken by way of an ordinary suit, whereas R. 3 requires service on any one of the persons whose rights are sought to be affected. (*Das, J.*) MAURICE MEYER *v.* ALBERT JOSEPH MEYER. I.L.R. (1947) 1 Cal. 184.

———Ch. XIII-A, Rr. 6, 7 and 9—Leave to defend—When may be given unconditionally. [*See* Q.D. 1941—1945, Vol. I, Col. 595.] KIRANMAYI DASI *v.* J. CHATTERJI. I.L.R. (1945) 2 Cal. 145=A.I.R. 1949 Cal. 479.

———Ch. XXIII, R. 12—*Filing of award by one of arbitrators—Validity.*

Under Ch. XXIII, R. 12 of the Original Side Rules of the Calcutta High Court in causing an award to be filed the arbitrators do not perform a judicial act but one of a ministerial nature, and the ministerial act of filing can properly be carried out by one of their number. [1914 Sind 90, appr.] (*Gentle, J.*) ANANDI LAL PODDAR *v.* KESHAVDEO PODDAR. I.L.R. (1945) 2 Cal. 526=A.I.R. 1949 Cal. 549.

———Ch. XXV, R. 34—*Applicability—Part-heard suit—Adjournment—Withdrawal of brief—Counsel's right to fees.*

R. 34 of Ch. 25 of the Original Side Rules does not apply when the case is not one of simple adjournment but where the suit was actually part-heard and adjourned for a fortnight.

If client has engaged a counsel and if the attorney of the client has in fact delivered the brief to the counsel, the counsel is entitled to his fees, if the attorney withdraws the brief from the counsel on the instruction of his client provided of course the counsel was agreeable to appear or work on the brief. Delivery of the brief to the counsel entitles the counsel to the fees marked on the brief so long as the counsel is prepared to discharge his obligations in respect of the brief. The fact that the brief was withdrawn by the attorney on the instruction of the client and the counsel had not to work out the brief cannot in such circumstances deprive the counsel of his right to the fees. (*Mukharji, J.*) GOUR CHAND MULLICK *v.* PRODYUMNA KUMAR MULLICK. 84 C.L.J. 9.

———Ch. XXVII, R. 37—*Sale by Registrar set aside on ground of want of good title—Purchaser's right to interest on purchase-money deposited in Court.*

Where a sale held by the Registrar under Ch. XXVII of the Original Side Rules is set aside on the ground that a good title could not be made out, the purchaser, in addition to the refund of the purchase money paid by him and kept in deposit in Court is entitled under R. 37 of that chapter only to "his costs, charges and expenses occasioned by his bidding" and not to any interest on such deposit.

A sale held by the Court through its officer, the Registrar cannot be treated on the same footing as a sale by private treaty. Further, the case is not of such a description where the purchaser for getting release from his bid has to allege or rely upon circumstances which would attract the equitable jurisdiction of Equity Courts of England, for that jurisdiction is exercised only in cases of fraud, accident or breach of confidence or where the remedy at law is inadequate.

The fact that there has grown up a practice in the Calcutta High Court to allow the purchaser interest in such cases is of no value. O. XL, R. 3 of the O.S. Rules has in contemplation the procedural or adjective law. Its meaning is that where there are no specific rules regulating procedure the procedure sanctioned by practice is to be followed. The question as to whether a purchaser would be entitled to get interest on the purchase-money deposited by him on the reversal of the sale is one which concerns substantive law, and his claim can only be sustained either on the basis of contract or on the basis of statutory law or rules having the force of law or on general principles of substantive law. (*Mitter, A. C.J. and Sharpe, J.*) BANK OF CALCUTTA, LTD. *v.* NATIONAL INSURANCE CO., LTD. 51 C.W.N. 788.

———Ch. XXXVI, Rr. 2 and 3—***Solicitor and client—Implied retainer—Permissibility.***

The act of authorising or employing a solicitor to act on behalf of clients constitutes the solicitor's retainer by that client. A retainer need not be in writing although it is always advisable to have a writing. Where there has been no written retainer the Court may imply the existence of a retainer from the acts of the parties in a particular case. None of the Rules of the original side of the Calcutta High Court makes it obligatory that a retainer must be in writing. There is nothing in R. 66 or R. 69 of Ch. 2 of the Rules to exclude an implied retainer. That being so English Rules and Practice which permit and recognise implied retainers must be followed as provided by Rr. 2 and 3 of Ch. 36. (*Mukharji, J.*) GOUR CHAND MULLICK *v.* PRODYUMNA KUMAR MULLICK. 84 C.L.J. 9.

———Ch. XXXVI, R. 32 (4)—***Fees in excess of prescribed maximum—Power of Court to allow—Consent of client not in writing.***

While R. 32 in Ch. 36 of the Original Side Rules of the Calcutta High Court defines the powers of the Taxing Officer, it is not intended to take away the power of the Court in a proper case to allow fees greater than the maximum authorised by the Rules. The Court has always jurisdiction to allow fees paid to counsel in excess of the maximum laid down in the Rules when the consent of the client to such payment is proved although such consent is not in writing. 35 C.W.N. 993; 51 C. 829 and 49 C. 618, rel. on. (*Mukharji, J.*) GOUR CHAND MULLICK *v.* PRODYUMNA KUMAR MULLICK. 84 C.L.J. 9.

———Ch. XXXVI, R. 77, Item 22—*Amount realised by decree-holder as result of compromise —Sheriff's right to poundage.*

A sheriff is not entitled to poundage on an amount realised by the decree-holder without the direct or indirect intervention of the sheriff. Where a notice of attachment in respect of a sum of money alleged to be due to the judgment-debtor from a third person was issued through the sheriff on an application by the decree-holder, and later a certain sum of money was realised by the decree-holder as a result of a compromise in full settlement of his claim against the judgment-debtor and the costs of the execution proceedings, the sheriff is entitled to recover from the decree-holder poundage on the sum realised by him in pursuance of the compromise. (*Edgley, J.*)

CAL. H. C. RULES (O.S.), Ch. XXXVIII, R. 43.

BASANTI COTTON MILLS, LTD. *v.* SAROJE KUMAR GHOSH. I.L.R. (1947) 1 Cal. 238.

——**Ch. XXXVIII, R. 43**—*Scope of.*

R. 43 of Ch. XXXVIII of the High Court Original Side Rules does not give the meaning of the word 'last day' as used in R. 44. It merely lays down the rule for reckoning the number of days when the last day is a Sunday or when the Court remains closed and the last day obviously means the day when the summons or notice is made returnable. (*Majumdar, J.*) GOVINDA CH. GHOSE *v.* BISHNU CH. MITTER. 52 C.W.N. 502.

——**Ch. XXXVIII, R. 60**—*Order directing security to be furnished to satisfaction of Registrar—Court's power of review.*

When a Court has directed security to be furnished by a party to the satisfaction of the Registrar, the decision of such authority on the sufficiency of the security cannot be questioned. But the Court has jurisdiction to review its orders when such authority designated in accepting such security has not acted in accordance with the order or has otherwise acted improperly. There is no reason why a Court should accept or allow a bond to be accepted by its officers pursuant to its order which may create any difficulty in its enforcement by reason of the absence of appropriate language or absence of strict compliance with the rules of the Court. (*Majumdar, J.*) EAST AND WEST TRANSPORT SERVICE *v.* NOAKHALI UNION BANK, LTD. 50 C.W.N. 876.

——**Appendix J**—*Sale by Registrar—Deposit of 25 per cent. of purchase money by purchaser—Default in paying balance—No re-sale—Purchaser's right to recover deposit.*

In a case of sale by Registrar on conditions set out in Appendix J to the Rules of the Calcutta High Court pursuant to a mortgage decree, the purchaser who had deposited 25 per cent. failed to pay the balance of the purchase money. There was no resale of the properties. On an application by the purchaser for the return of the deposit money to him,

Held, that the purchaser upon default lost his right to recover the deposit money in the absence of special circumstances. To be of any assistance to the purchaser any special circumstances which he relied upon must be such as amounted to an agreement binding on the mortgagee to forego his right with regard to the deposit; that is to say something which amounted to an agreement by the mortgagee to return the deposit which had already been made and which he had become entitled to either as a sum which he might forfeit or as an amount which though it would be taken into consideration in calculating any deficit upon a re-sale, would not otherwise be repayable to the person who made the deposit. The fact that the properties were not resold at an early date or within a reasonable time might disentitle the mortgagee to recover from the purchaser the deficiency that might arise, if and when the properties were eventually resold. But that fact could not operate so as to give the purchaser a title to the deposit which was lost by him when he defaulted. (*Clough, J.*) NARENDRA N. MITRA *v.* NRIPENDRA B. ROY. A.I.R. 1948 Cal. 208.

CAL. H. R. CONTR. ORD. (1943), Para. 9.

CALCUTTA HOUSE RENT CONTROL ORDER (1943)—*Scope of—If furnishes additional grounds of ejectment—T. P. Act, S.* 111.

The grounds for passing a decree for ejectment are detailed in S. 111 of the T. P. Act. The Calcutta House Rent Control Order does not furnish any additional grounds for ejectment. It rather places limitations on the right of the landlord seeking to eject a tenant: in other words, it furnishes additional grounds of defence. 50 C. W.N. 750, ref. (*Biswas and G. N. Das, JJ.*) MAHOMED EKRAMAL HAQUE *v.* REBATI BHUSAN MUKHERJEE. 53 C.W.N. 859.

——**Para. 9**—*Finding by Courts below that landlord* bona fide *required premises for his own occupation—If conclusive in second appeal.*

A finding of fact by the Courts below that the landlord *bona fide* required the premises for his own occupation, is conclusive in second appeal, and the appellant is not entitled to adduce evidence of subsequent events in order to have a fresh adjudication on that point. (*Lodge, J.*) RAM MOHAN RAO *v.* LALIT CHANDRA SEN. A.I. R. 1947 Cal. 351.

——**Para. 9**—*Lessee of land erecting buildings thereon and letting them—If protected against ejectment on expiry of lease.*

A lessee of land who has erected buildings thereon contracting with the lessor that he would convey them to him on the expiration of the lease, is not entitled to the protection of para. 9 of the Calcutta House Rent Control Order against ejectment after the expiration of the lease.

The language of para. 9 of the order read with the definition of "landlord" and "tenant" in para. 2, clearly indicates that there must be a direct relationship of landlord and tenant in respect of a house between the person who seeks to recover possession and the person who resists such claim. The definition of "landlord" shows that he must be entitled to receive rent in respect of the house or building.

The expression "the tenant" in para. 9 refers not to any tenant who may be in occupation of the house, but to the tenant to whom the house or building has been let by the landlord. This seems to follow from the definition of "house" in para. 2 (3) of the Order, from the reference to S. 108 of the T. P. Act in proviso (*a*) to para. 9, and from the reference to the contract with the landlord in Cl. (4) of para. 9. This being the case, the mere fact that the lessee has let the building to certain persons who hold under him as occupying tenants, is immaterial in a suit for recovery of possession of the demised land on the expiration of the lease from the lessee. (*Edgley, J.*). PRAFULLA CHANDRA GHOSH *v.* SHEIK SHAMSUDDIN. I.L.R. (1946) 2 Cal. 326.

——**Para. 9**—Protection of tenant—Facts subsequent to suit—If relevant. [*See* Q.D. 1941—1945, Vol. I, Col. 598.] SARAT CHANDRA DATTA *v.* USHANGINI DASI. I.L.R. (1945) 2 Cal. 585=A.I.R. 1949 Cal. 576.

——**Para 9 (1) (b)**—*Order of Commissioner of Police directing discontinuance of house as disorderly house—If deprives tenant of protection —Bengal Suppression of Immoral Traffic Act, S.* 6 (2).

A tenant of a house cannot be deprived of the protection afforded by para. 9 (1) of the Calcutta House Rent Control Order by reason of an order made by the Commissioner of Police under S. 6 (2) of the Bengal Suppression of Immoral Traffic Act directing the discontinuance of the use of that house as a disorderly house or brothel or a place of common assignation. If after the said order of the Commissioner of Police, the landlord determines the tenancy and institutes a suit for ejectment against the tenant, he cannot succeed unless he establishes that the tenant has been guilty of a conduct described in para. 9 (1) (*b*) of the Calcutta House Rent Control Order. The decision of the Commissioner of Police does not constitute a finding of or relate to any such conduct of the tenant. It only amounts to a finding that the house is used as a brothel or disorderly house and for the purposes of prostitution, etc. (*Majumdar, J.*) NIRMAL CHAND *v.* GOBORDHAN DAS. I.L.R. (1946) 2 Cal. 615=50 C. W. N. 756.

———**Para. 9 (1), proviso (c)**—*Tenant agreeing to decree for possession—If satisfactory cause.*

If the landlord can show that the tenant has agreed to a decree for possession being passed against him and is still agreeing, it would be a cause which the Court is bound to consider as satisfactory within the meaning of proviso (*c*) to para. 9 (1) of the Calcutta House Rent Control Order. (*Clough, J.*) KIRONSASHI DASSEE *v.* HIRENDRA NATH. I.L.R. (1946) 1 Cal. 462=50 C.W.N. 245.

———**Para. 9 (b)**—*Order setting aside decree for possession granting time to landlord to take proper steps—Effect of—Suit if kept pending—Permission to prosecute suit on ground that tenant is defaulter—If can be granted.*

A Small Cause Court setting aside under para. 9 (*b*) of the Calcutta House Rent Control Order its decree for delivery of possession, is not also bound at the same time to dismiss the suit entirely. It may do so, but for sufficient reasons it may also decide, while setting aside the decree to keep the matter alive. If by the order setting aside the decree the Court allows the landlord two months' time to take proper steps, it keeps the suit alive, and permission can, therefore, be validly granted in such a case to prosecute the suit on the ground that the tenant was a defaulter. (*Das Gupta, J.*) NIKUNJA LAL DUTTA *v.* RAJANI KANTA CHATTERJEE. 53 C.W.N. 462.

———**Para. 9 (b) (1)**—"Proceeding"—If includes appeal. *See* CALCUTTA HOUSE RENT CONTROL ORDER, PARA. 9 (B) (3). A.I.R. 1948 Cal. 226.

———**Paras. 9 (4) and 2**—Default by tenant in payment of rent in time—Landlord accepting rent subsequently—Tenants, if entitled to protection—Person becoming landlord subsequent to such default—If can avail himself of such default. [*See* Q.D. 1941—1945, Vol. I, Col. 599.] KANTO MOHAN MALLIK *v.* JYOTISH CHANDRA MUKHERJI. I.L.R. (1945) 2 Cal. 591=A.I.R. 1949 Cal. 571.

———**Para. 9 (4)**—Tenant paying up arrears of rent due before ejectment suit but not rent due during suit—If protected. [*See* Q.D. 1941—1945, Vol. I, Col. 599.] KESHAB MITTER *v.* MRS. P. GHOSH. I.L.R. (1946) 1 Cal. 176=224 I.C. 364=1946 Cal. (Rul.) 243=A.I.R. 1946 Cal. 81.

———**Para. 9-A**—*Pending suit—Dismissal for failure to obtain Rent Controller's permission—Power of Court—Para. 9-A superseded before disposal of suit in appeal—Suit, if can be tried on merits.*

A suit for ejectment filed by a landlord on the ground that he required the premises for his own use and occupation was pending when paragraph 9-A of the Calcutta House Rent Control Order, 1943, was added precluding the Court from passing a decree in such suit unless the permission of the Rent Controller was obtained for prosecuting the suit. The plaintiff-landlord failed to obtain the requisite permission and both the trial Court and the lower appellate Court dismissed the suit. The plaintiff filed an appeal to the High Court and before the disposal of that appeal, paragraph 9-A was superseded by other pieces of legislation.

Held, that there was no provision giving jurisdiction to the Court to dismiss the pending suit on the ground of want of permission of the Rent Controller and that the plaintiff should have an opportunity, because of the altered circumstances, to have the suit tried on the merits as there was then no bar as had originally been provided in paragraph 9-A. If during the pendency of a suit certain temporary legislation was enforced which did not directly authorise the Court to dismiss a suit for the non-fulfilment of certain conditions and if before that suit was finally disposed of by the Appellate Court that bar was removed, the plaintiff should not be denied the privilege of having the suit tried out which was said to have been in order on the date it had been filed. (*Mookerjee, J.*) ASHUTOSH BHATTACHARJEE *v.* MAHENDRA NATH ROY. 54 C.W.N. 813.

———**Para. 9-A**—*Requirements of—Permission to sue tenant given to two persons—Suit by three plaintiffs—Maintainability.*

On a reading of Para. 9-A of the Calcutta House Rent Control Order it is clear that there must be an identity between the person who wishes to institute a suit for ejectment, the person who applies to the Controller for permission, the person to whom the Controller gives permission and the person who ultimately brings the suit. Hence where only two of the landlords have been given the necessary permission by the Rent Controller under Para. 9-A of the Order, a suit by three plaintiffs as landlords to eject the tenant could not be entertained. (*Chakravartti, J.*) ABANI BHUSAN MUKHERJEE *v.* PRODYUT KUMAR. 52 C.W.N. 461.

———**Para. 9-A (1)**—*Suit for ejectment on several grounds—One of such grounds requiring Controller's permission—Suit, if may proceed on other grounds.*

If a suit for ejectment by a landlord against his tenant is brought on several grounds and one of them is "a ground" which requires the permission of the Controller and such permission has not been obtained, then the whole suit cannot be entertained under Para. 9-A (1) of the Calcutta House Rent Control Order. In such a case, the suit cannot proceed on the grounds for which no permission is necessary. 5 D.L.R. 57, not foll. (*Roxburgh, J.*) PRAFULLA KUMAR DUTTA *v.* GUIRAM. 54 C.W.N. 624=A.I.R. 1950 Cal. 544.

———**Paras. 9-A and 9-B**—*Validity—Defence of India Act, S.* 14—*Defence of India Rules, R.* 81 (2) (bb).

The provisions of Paras. 9-A and 9-B of the Calcutta House Rent Control Order relating to the necessity of the permission of the Rent Controller to institute a suit or to prosecute a pending suit, are not rendered invalid by reason of the provisions of S. 14 of the Defence of India Act. Nor are they *ultra vires* the powers conferred by Cl. (*bb*) of sub-R. (2) of R. 81 of the Defence of India Rules. (*Clough, J.*) BUTTO KRISTO SHAHA *v.* PANCHU GOPAL SHAHA. I.L.R. (1946) 2 Cal. 198.

———**(1945), Para. 9-B**—*Proceedings started before expiry of order—Continuation thereafter—Jurisdiction of Small Cause Court—Government of India Act, S.* 102.

On 12th July, 1946, a tenant filed an application for relief in a Small Cause Court under Para. 9-B of the Calcutta House Rent Control Order, 1945, as amended on 16th June, 1946, in respect of a consent decree for ejectment. Before this application was finally decided the control order expired on 30th September, 1946, and was replaced by the Calcutta Rent Ordinance, 1946. In spite of that, the Court proceeded to decide the application and set aside the consent decree on 6th December, 1946, in exercise of the powers conferred by Para. 9-B (3) of the control order.

Held, that in spite of the expiry of the control order on 30th September, 1946, the Small Cause Court had jurisdiction to decide the application filed on 12th July, 1946, and that Para. 9-B of the control order remained alive for the purposes of a proceeding commenced under it before the date of expiry although it was dead for all other purposes. The control order was passed by the Governor of Bengal under R. 81 (2) (*bb*) of the Defence of India Rules which again were framed under S. 2 of the Defence of India Act. The Defence of India Act itself was enacted under S. 102, Government of India Act under which the central legislature was given power to legislate on Provincial subject after a Proclamation of Emergency had been made. By sub-S. (2) of S. 102, as amended by S. 5, India (Central Government and Legislative) Act, 1946, it was provided that an emergency legislation on a provincial subject by the central legislature shall to the extent of the incompetency, cease to have effect on the expiration of six months after the proclamation of emergency has ceased to operate, "except as respects things done or omitted to be done before the expiration of the said period". If the control order is read, as it must be, as a part of the Defence of India Act, it must be held that on 30th September, 1946, the control order ceased to have effect except as respect things done or omitted to be done before the said date. 52 C.W.N. 25 (F.R.), rel. on; 51 C.W.N. 148, Diss. from. (*Das and Lahiri, JJ.*) DAWOO DOYAL *v.* GIRIDHARI LAHA. 84 C.L.J. 1=54 C.W.N. 12=A.I.R. 1950 Cal. 214.

———**Para. 9-B**—*Suit instituted before order—Absence of permission of rent controller—Maintainability.*

A suit for ejectment of a tenant for non-payment of rent is maintainable in the absence of permission of the Rent Controller under para. 9-B of the Calcutta House Rent Control Order, 1943, where such suit was instituted before that order came into operation and the Court does not make any order or decree for possession while it is in force. (*Mukherji, J.*) HARIMOHAN DUTT *v.* C. K. SEN & CO., LTD. 83 C.L.J. 278.

———**Para. 9-B (3)**—*Applicability—Consent decree.*

The provisions of paragraph 9-B (3) of the Calcutta House Rent Control Order introduced by notification dated 28th August, 1945, relate to a decree for recovery of possession passed by a Court after adjudication on the ground of non-compliance by tenant with regard to payment or deposit of rent, and not to a decree obtained by consent. (*Gentle, J.*) PARBATI DEBI *v.* S. N. SEN. 50 C.W.N. 242.

———**Para. 9-B (3)**—*Applicability—Consent decree.*

The provisions of para. 9-B (3) of the Calcutta House Rent Control Order, relate to a decree passed by the Court after adjudication upon the grounds specified in the order, and do not relate to a decree by consent. 50 C.W.N. 242, foll. (*Clough, J.*) KIRONSASHI DASSEE *v.* HIRENDRA NATH. 50 C.W.N. 245.

———**Para. 9-B (3)**—*Applicability — Consent decree.*

Assuming that a consent decree for ejectment comes within the purview of para. 9-B (3) of the Calcutta House Rent Control Order, a consent decree which does not itself show that there was default on the part of the tenant in regard to payment or deposit of rent which disentitled him to any protection under para. 9 and it was on account of that fact that he consented to a decree for eviction does not attract the operation of para. 9-B (3) of the order. (*Harries, C.J. and Mukherjea, J.*) MANICK CHANDRA PAL *v.* HARIPADA ROY. 52 C.W.N. 230=A.I.R. 1949 Cal. 151.

———**Para. 9-B (3)**—*Applicability—Consent decrees.*

Sub-para. (3) of para. 9-B of the Calcutta House Rent Control Order applies to and includes decrees passed on consent where either the decrees or the proceedings in the suits show that the real ground on which the landlord seeks eviction is non-payment of rent by the tenant. [50 C.W.N. 242 and 245, Diss.] (*Biswas and G. N. Das, JJ.*) MAHOMED EKRAMAL HAQUE *v.* REBATI BHUSAN MUKHERJEE. 53 C.W.N. 859.

———**Para. 9-B (3)**—*Application by tenant for vacating decree for ejectment—Forum—Trial or appellate Court—Appeal pending against decree*

CAL. H. R. CONTR. ORD. (1943), Para. 9-B.

—Jurisdiction of appellate Court to proceed with appeal.

An application by the tenant under Para. 9-B (3) of the Calcutta House Rent Control Order for vacating a decree for ejectment made before 29th August, 1945, must be made only to the Court which had passed the decree and not to the appellate Court, although an appeal filed by the tenant against the decree for ejectment is pending on the date of his application or on 29th September, 1945, that being last date for making such an application under that paragraph. The jurisdiction of the Court that had passed the decree to entertain the application does not cease even after the appellate Court passes its decree, as the principle of the merger of the decree of a lower Court in the decree of the appellate Court is not applicable to a proceeding coming under Para. 9-B (3), there being in the enactment itself an indication to the contrary.

Further in view of Para. 9-B (1) of the order the appellate Court itself has no jurisdiction to proceed with the appeal and any decree that it may pass is void. The word 'proceeding" occurring in the first part of Cl. (1) of Para. 9-B would include an appeal arising in a suit for ejectment of a tenant and would necessarily include an "appeal" also as far as the second part is concerned, for the word "proceeding" must have the same meaning in both the parts. (*R. C. Mitter and Sharpe, JJ.*) HARI PROSAD ROY *v.* BABULAL CHAUKHANI. I.L.R. (1948) 2 Cal. 334=A.I.R. 1948 Cal. 226.

———**Para. 9-B (3)**—*Order under—Costs—Power to disallow court-fees paid on amount decreed for mesne profits.*

The Court in making an order in favour of the tenant under Para. 9-B (3) of the Calcutta House Rent Control Order, can reduce the costs decreed in the suit itself but cannot in the exercise of its discretion disallow a portion of the court-fees which the plaintiff had paid under the orders of Court for getting a decree for the amount decreed for mesne profits. (*R. C. Mitter and Sharpe, JJ.*) HARI PROSAD ROY *v.* BABULAL CHAUKHANI. I.L.R. (1948) 2 Cal. 334=A.I.R. 1948 Cal. 226.

———**Para. 11**—*Scope and applicability.*

Para. 11 of the Calcutta House Rent Control Order proceeds on the well-known principle that an executing Court must execute the decree as it stands. That section gives the power, not to the executing Court, but to the Court which passed the decree to rescind or modify the decree if the decree could not have been passed in that form or could not have been passed at all at the date when it was passed if the control order had been in force on the date of the decree. (*Mitter, Ag. C.J. and Sharpe, J.*) JAWINIKANTO *v.* BONOMALI DEY. A.I.R. 1948 Cal. 172.

———**Para. 11-A**—Order under—Non-compliance—Penalty—Power to impose—Calcutta Rent Ordinance (1946), Ss. 21 and 26. *See* CALCUTTA RENT ORDINANCE, Ss. 21 AND 26. 4 D.L.R. (Cal.) 64.

———**(1946), S. 13**—*Scope—Permission obtained under House Rent Control Order, 1943—*

CAL. IMP. ACT (1911), S. 71.

Sufficiency for suit for eviction under Order of 1946.

On an application under S. 9-A of the Calcutta House Rent Control Order, 1943, permission was granted to the applicant, subject to the condition that the suit for eviction of the tenant should not be instituted prior to 1—2—1947. The Rent Control Order, 1943, having expired on 30—9—46, the new Order of 1946 was promulgated by the Governor, and it came into operation on 1—10—46. A suit for eviction was instituted on 5—2—47 on the permission granted under the old Order and the defendant pleaded that no permission having been obtained afresh under S. 13 (3) of the new Order, the suit filed on the strength of the permission granted under the old Control Order was not maintainable.

Held, that a fresh permission under S. 13 (3) of the House Rent Control Order, 1946, was necessary, as it is a condition precedent, and the suit instituted on the permission granted under the old Control Order was not maintainable, there being no provision to the effect that a permission for filing a suit obtained under the old Control Order would be deemed to be a valid permission under the new Control Order, 1946. (*Mukherjea and G. N. Das, JJ.*) SARJU TEWARI *v.* BANKIM CHANDRA. 52 C.W.N. 669=A.I.R. 1949 Cal. 67=3 D.L.R. (Cal.) 11.

CALCUTTA IMPROVEMENT ACT (V OF 1911), Ss. 70 and 72—Powers of Tribunal—Award modified on appeal—Inherent power to grant restitution. [*See* Q.D. 1941—1945, Vol. I, Col. 600.] BHUPATI NATH DEB *v.* PROVINCE OF BENGAL. I.L.R. (1945) 1 Cal. 40=A.I.R. 1949 Cal. 124.

———**S. 71**—*Hearing of valuation reference—Practice and procedure—Document in possession of acquiring authority filed during argument—Admissibility—C. P. Code, O. 13, R. 2.*

Provisions to be found in the Code of Civil Procedure relating to the examination of witnesses and the production of documents in Court are applicable during the hearing of a reference under the Calcutta Improvement Act. But a practice has grown in the Calcutta Improvement Tribunal, whereby the parties are not required to file in Court documents under their control or to file a list of witnesses as may be required necessary by the parties. Where a valuation reference is actually taken up for hearing at the opening stage the claimants indicate the detailed grounds for contesting the Collector's award and also the nature of evidence on which reliance will be placed. The Province from this stage takes steps for getting the evidence before Court in support of the Collector's award and to controvert the points as are to be urged by the claimants. The claimant adduces evidence as he is regarded as the plaintiff in the suit. The burden of proof is on the claimant to show that the award as made by the Collector is inadequate. The extent of this burden varies according to the nature of the enquiry made by the Collector under S. 11 of the Land Acquisition Act. Where the Collector gives no detailed reasons, the burden which is to be discharged by the claimant is very light. The claimant has to begin his evidence first and it is only after he has completed his evidence that the Government is to rebut it and support the award made by the Collector by positive evidence.

The Tribunal is not justified in allowing a document which is in the possession of the acquiring authority to be filed late during the argument for practically no reason whatsoever. Where the order as recorded does not indicate any sufficient consideration, the provisions contained in O. 13, R. 2, C. P. Code, are attracted in such a case and must be applied. (*Mookerjee and Mitra, JJ.*) MOHINI MOHAN SAHA *v.* PROVINCE OF BENGAL. 85 C.L.J. 379.

———**S. 71 (b) and Sch., Art. 9**—*Compulsory acquisition of land—Method of valuation.*

In cases of compulsory acquisition of land for the Board of Trustees for the improvement of Calcutta, the "development method" is not permissible. The land has to be valued according to its disposition at the date of the declaration. It cannot be imagined to be in a different state than what it actually was at that point of time, nor can it be valued with reference to its possible future user by proposing a physical change. 56 C. 989, 11 C.W.N. 875 and 41 C. 967, referred to. (*Mitter and P. N. Mitra, JJ.*) PROVINCE OF BENGAL *v.* AMULYA DHON ADDY. 54 C.W.N. 297=A.I.R. 1950 Cal. 356.

———**S. 81**—*Lands vested in Board for providing open space for ventilation and recreation—Power of Board to sell, lease or let for hire.*

The right conferred on the Board in general terms by S. 81 of the Calcutta Improvement Act to sell, lease or let for hire the lands vested in it, has been taken away by necessary implication in respect of lands acquired by the Government for the Board for the express purpose of providing an open space for ventilation and recreation for the exercise of the power of sale, lease, etc., would defeat the purpose for which the said lands had been acquired. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* BOARD OF TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA. I.L.R. (1946) 1 Cal. 583=221 I.C. 117=81 C.L.J. 185=50 C. W.N. 825=A.I.R. 1946 Cal. 416.

CALCUTTA IMPROVEMENT (APPEALS) ACT (XVIII OF 1911)—*Further appeal from the decision of the High Court—Competency.*

The question whether under the provisions of the Calcutta Improvement (Appeals) Act a further appeal against the decision of the High Court would lie or not left open. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) HARI SANKAR PAL *v.* ANATH NATH MITTER. 1949 F.C.R. 36=4 D.L.R. (F. C.) 70=1949 F.L.J. 125=A.I.R. 1949 F. C. 106=(1949) 2 M.L.J. 20 (F.C.).

———**S. 3**—*Appeal against decision of President of Tribunal—Power of High Court.*

Per *Das, J.*—The grounds which are open to the appellant on an appeal filed to the High Court against the decision of the President of the Calcutta Improvement Tribunal under S. 3 of the Calcutta Improvement (Appeals) Act, are akin to those to be found in S. 100, C. P. Code. Where the judgment of the Tribunal suffers from the defect that it does not consider an important piece of evidence on the question of valuation and it is also open to attack on the ground that it is difficult to discover from the judgment of the President as to the basis on which he arrived at his valuation, the judgment is not conclusive on the question of valuation and it is open to the High Court in appeal either to remit the case to the Tribunal for a fresh adjudication, or to decide the case for itself on the evidence which is on the record.

Per *Chatterjee, J.*—Where the judgment of the President of the Tribunal shows that the Tribunal failed to consider one very important piece of evidence, *viz.*, the valuation of a contiguous property, the decision of the Tribunal is contrary to law and can be interfered with by the High Court. A finding based on no evidence or in disregard of evidence or on inadmissible evidence, is an error of law. 11 C. 499, 11 C.W.N. 1028, A.I.R. 1926 Cal. 603, 41 C.W.N. 763, 54 A. 6, A.I.R. 1938 Mad. 568, A.I.R. 1928 Mad. 826, I.L.R. (1941) Bom. 107 and 18 P. 768, referred to. (*Das and Chatterjee, JJ.*) NARESH CHANDRA BASU *v.* PROVINCE OF BENGAL. I.L.R. (1949) 1 Cal. 444.

———**S. 3**—*Scope of appeal.*

If the Tribunal determines the basic rate per cottah on the private sales proved in the case and not on the accepted awards, it is a matter of appreciation of evidence and of the weight to be attached to it and not a matter of principle of law or procedure which can be urged in an appeal. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* JOY NARAYAN FATEHPURIA. 228 I.C. 523=1947 Cal. (Rul.) 105=82 C.L.J. 18=A.I.R. 1947 Cal. 25.

———**Ss. 6 and 3 (1) (b) (i)**—*Appeal against decision of Tribunal—Limitation—Exclusion of time during which application for President's certificate was pending—Permissibility—Limitation Act, Ss. 5 and 12.*

Appeals against the decision of the Calcutta Improvement Tribunal are governed by Art. 156 of the Limitation Act. The time during which the application for the certificate asked for under S. 3 (1) (*b*) (*i*) of the Calcutta Improvement (Appeals) Act was pending before the President cannot automatically be excluded in computing limitation under the provisions of S. 12 or any other section of the Limitation Act and there is no provision in the Calcutta Improvement (Appeals) Act for excluding this period of time in making the computation. This period of time can, however, be excluded under the provisions of S. 5 of the Limitation Act, and the appellant is entitled to the exclusion of the period of time during which his application for certificate was kept pending before the President through no fault of his. (*Mitter and P. N. Mitra, JJ.*) PROVINCE OF BENGAL *v.* AMULYA DHON ADDY. 54 C.W.N. 297=A.I.R. 1950 Cal. 356.

CALCUTTA MUNICIPAL ACT (III OF 1923), S. 3 (24)—*"Domestic purposes"—Test.*

In deciding whether water is used for "domestic purposes", the test is not whether the water is consumed or used in the course of a trade or business but whether its user is in its nature domestic. (*Bannerjee, J.*) Nanilal Ray *v.* Satyendra Nath. 54 C.W.N. 42.

———**S. 3**—*"Occupier"—Owner using land to limited extent—If occupier.*

There may be cases where land must be regarded as "vacant" for purposes of valuation but is none the less "used" by its owner to an extent which, though limited, will bring him with the definition of "occupier" in S. 3 of the Calcutta Municipal Act. (*Lord Du Parcq.*) Bengal Nagpur Railway Co., Ltd. *v.* Corporation of Calcutta. 74 I.A. 1=I.L.R. (1947) Nag. 172=228 I.C. 596=1947 P.C. (Rul.) 42=(1947) P.W.N. 46=1947 A.W.R. (P.C.) 14=1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B. R. 291=A.I.R. 1947 P.C. 50=I.L.R. (1947) Kar. 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P. C.).

———**S. 4**—*Assessment of area as bustee—Decision of Commissioners—If necessary.*

All that S. 4 of the Calcutta Municipal Act means is this. If there is any dispute or doubt as to whether an area is a *bustee* or not, the Corporation is empowered to decide that dispute or resolve that doubt and its decision on the question shall be final. It does not make the decision of the Commissioners at a meeting a *sine qua nom* for the assessment of an area as a *bustee*. (*A. N. Sen, J.*) Municipal Commissioners of Howrah *v.* Jagabandhu Banerjee. A.I.R. 1950 Cal. 201.

———**Ss. 25 and 20 (1) (b)**—Claim to be enrolled as voter, under S. 20 (1) (*b*)—Revising Authority, if can go behind register of occupiers. [*See* Q.D. 1941—1945, Vol. I, Col. 601.] S. K. Sawday *v.* N. Singha Roy. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

———**S. 25 (2)**—R. 17—Grounds of claim not specifically stated—Reference made to application in Form A for registration as voter and to S. 20 (1) (*b*)—If sufficient—Rejection of claim by Revising Authority on ground of form—Interference by High Court. [*See* Q.D. 1941—1945, Vol. I, Col. 601.] S. K. Sawday *v.* N. Singha Roy. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

———**S. 25 (3)**—Jurisdiction of High Court—Writs of *mandamus* and *certiorari*—Power of High Court to issue on Revising Authority—Specific Relief Act, S. 45. [*See* Q.D. 1941—1945, Vol. I, Col. 602.] S. K. Sawday *v.* Singh Roy. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

———**S. 29 (8)**—Applicability—Uncontested elections—Publication purporting to be made under R. 16 (2) of Rules framed under S. 30—Effect of. [*See* Q.D. 1941—1945, Vol. I, Col. 602.] Arun Bhusan Ray *v.* Hari Sankar Pal. I.L.R. (1945) 1 Cal. 240.

———**S. 46**—Election petition—Challenge on ground that candidate is not qualified—Publication of his name under S. 29 (8)—If prerequisite. [*See* Q.D. 1941—1945, Vol. I, Col. 604.] Arun Bhusan Ray *v.* Hari Sankar Pal. I.L.R. (1945) 1 Cal. 240.

———**S. 46**—Petition to set aside election of person elected uncontested—His name published in gazette—Subsequent publication in gazette of names of persons elected at contested elections—Petition filed more than eight days after first publication—If time barred. [*See* Q.D. 1941—1945, Vol. I, Col. 605] Arun Bhusan Ray *v.* Hari Sankar Pal. I.L.R. (1945) 1 Cal. 240.

———**S. 127**—*Construction—"At the time of the assessment"—Effect of—Owner of vacant land—Liability of.*

It is impossible to construe S. 127 of the Calcutta Municipal Act as meaning that when land is unoccupied, its annual letting value must be taken to be the rent at which it might be expected to be let to a tenant who was precluded from occupying it. Full effect must be given to the words "at the time of the assessment" in the section; but there is no justification for holding that an owner, by making or permitting some trifling use of what is essentially vacant land, will escape all but a nominal charge as a ratepayer. (*Lord Du Parcq.*) Bengal Nagpur Railway Co., Ltd. *v.* Corporation of Calcutta. 74 I.A. 1=I.L.R. (1947) Nag. 172=(1947) P. W.N. 46=228 I.C. 596=1947 A.W.R. (P.C.) 14=1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B.R. 291=1947 P.C. (Rul.) 42=A.I.R. 1947 P.C. 50=I.L.R. (1947) Kar. (P.C.) 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P.C.).

———**S. 127 (a) and (b)**—*Applicability—Premises owned by Bank and occupied by General Manager for the time being as a perquisite of his post—Non-payment of rent—Assessment—Procedure.*

Where certain premises owned by a bank are occupied by the General Manager of that Bank as a perquisite of his post, without payment of any rent or of any deduction by way of rent out of his salary, it must be held that the General Manager of the Bank is allowed to occupy the premises by the bank as a lien *i.e.*, as long as he happens to be the General Manager. He is not a tenant at all. Hence the assessment should be under S. 127 (*b*) and not under S. 127 (*a*) of the Calcutta Municipal Act. (*R. C. Mitter and K. C. Chunder, JJ.*) Corporation of Calcutta *v.* Allahabad Bank, Ltd. I.L.R. (1949) 1 Cal. 293=3 D.L.R. (Cal.) 43.

———**Ss. 127 (a) and (b)**—*Servant living in house owned by master—Occupation, whether as servant or tenant.*

If it is a requirement of the contract of service that a servant should live in a house owned by the master whether it is suitable to him or not or if the occupation is necessary and subservient to the service it should be deemed to be the occupation of a servant and not of a tenant. On the other hand, if residence is merely optional or is a matter of convenience to the employee and is not required for the better or more efficient performance of his service the occupation will be deemed to be that of a tenant and not of a servant.

Actual payment of rent is not essential for the purpose of creating a tenancy. The law is well settled that if a servant is allowed to reside in a house belonging to the master as a part of the remuneration for his service, his occupation would be that of a tenant and not of a servant. (*Mu-*

kherjea and Ahmed, JJ.) Governor-General of India *v.* Corporation of Calcutta. 1947 Cal. (Rul.) 162=51 C.W.N. 517=229 I.C. 495=A.I.R. 1948 Cal. 8.

———**S. 127 (a)**—*Valuation of premises by sub-dividing unit—Legality.*

Under S. 127 (*a*) of the Calcutta Municipal Act, the entire premises consisting of land and buildings should be assessed as one unit, when there is no application for sub-division of the unit and no proceedings are taken for that purpose. A valuation of the premises by sub-dividing the same into two parts, *viz.*, the buildings and land appurtenant thereto, and land not so appurtenant, is wrong. (*G. N. Das and Lahiri, JJ.*) Dominion of India *v.* Corporation of Calcutta. 53 C.W.N. 620=A.I.R. 1950 Cal. 121.

———**S. 127 (a) and (b)**—*Valuation of land and building—Procedure for ascertainment—Scheme of section.*

The scheme of S. 127 of the Calcutta Municipal Act is that if the land be bare land, it is to be valued under S. 127 (*a*); if there be a building upon it, the case would be governed by S. 127 (*a*) if the building was erected for letting purposes or was ordinarily let; or by S. 127 (*b*) *if the building was not* erected for letting purposes or was not ordinarily let. In either case the building must be taken along with the land and the two assessed together as one unit. The assessment of one unit of assessment partly under S. 127 (*a*) and partly under S. 127 (*b*) is not permissible. 66 I.A. 42 and 52 C.W.N. 173, rel. on. 44 C.W.N. 165, referred to.

As regards bare land, the actual user is not considered, a hypothetical letting value is taken. The annual value is determined by the hypothetical rent which a hypothetical tenant who is free to use the land would pay in respect of the land. 51 C.W.N. 336, referred to.

In regard to buildings, S. 127 makes the annual value dependant on user, actual or intended. It is more logical to hold that where a building with land has to be rated the user of the building ought to determine the basis on which the building and the land which forms with it one unit of assessment, should be valued. The fiction of English Law that buildings erected on land become, by the mere accident of their attachment to the soil, the property of the owner, is not in consonance with the usages and customs of this country. 6 W.R. 228 (F.B.) and 54 I.A. 218, referred to.

If the land is covered by buildings, erected by the owner of the land or a lessee of the land, the entire land and the building has to be assessed as one unit of assessment, the annual value being determined by the user of the building, *viz.*, the building if held for letting purposes under S. 127 (*a*) but if for personal use, under S. 127 (*b*). An assumption that because the land is used for letting purposes, the building though used by the lessee himself should be regarded as held for letting purposes, is unwarranted. S. 127 does not speak of hypothetical user but of actual or intended user. 44 C.W.N. 165, Expl. (*G. N. Das and Lahiri, JJ.*) Dominion of India *v.* Corporation of Calcutta. 53 C.W.N. 620=A.I.R. 1950 Cal. 121.

———**S. 131 (2) (d)**—*New structures erected after assessment of bare land—Revised assessment of both land and structures before expiry of six years—Legality.*

If after the assessment of bare land under S. 127 (*a*) of the Calcutta Municipal Act, new structures are erected on that land, it is not permissible for the corporation to re-value the entire premises (*i.e.*) the structures and the surrounding land anew under S. 131 (2) (*d*) during the currency of the period of six years prescribed by S. 131 (1) of the Act. The Corporation can only value the new structures. (*G. N. Das and Lahiri, JJ.*) Dominion of India *v.* Corporation of Calcutta. 53 C.W.N. 620=A.I.R. 1950 Cal. 121.

———**S. 138**—*Construction and scope—Valuation or increase of valuation—Notice to owner or occupier—If condition precedent—Absence of notice—Valuation if void and* ultra vires—*Jurisdiction of Civil Court to go into.*

Under S. 138 of the Calcutta Municipal Act, the giving of a notice is not a condition precedent to the making of a first valuation or to increasing the valuation. The valuation can be made, but a notice should of course be given to give the owner or occupier an opportunity to object. Failure to give notice before making the valuation is not an illegality which renders the valuation *ultra vires* or without jurisdiction. It merely gives the owner or occupier a right to complain and to appeal to the Small Cause Court, as provided in the Act. But the Civil Court has no jurisdiction to go into the matter in a suit by the Corporation for arrears of rates, on a plea of want of notice raised by the defendant, rate payer. 35 Cal. 683, rel. (*Harries, C.J. and Mukherjea, J.*) Mt. Fatima Khatoom Bibi *v.* Corporation of Calcutta. 4 D.L.R. (Cal.) 116.

———**Ss. 149, 205 and 213**—Liability for consolidated rates—Corporation mentioning by mistake smaller amount as due from owner of premises—Whether estopped from recovering actual amount due—Purchaser of premises—Position of. *See* Evidence Act, S. 115. 50 C.W.N. 263.

———**S. 149**—*Vacant land—Liability of owner to pay rates.*

Under the Calcutta Municipal Act, mere ownership carries with it a liability to pay one-half of the rate assessed on the annual value of the land, though he allows it to lie vacant and unoccupied. (*Lord Du Parcq.*) Bengal Nagpur Railway Co., Ltd. *v.* Corporation of Calcutta. 74 I.A. 1=I.L.R. (1947) Nag. 172=228 I.C. 596=1947 P.C. (Rul.) 42=(1947) P.W.N. 46=1947 A.W.R. (P.C.) 14=1947 O.A. (P.C.) 14=51 C.W.N. 336=13 B.R. 291=A.I.R. 1947 P. C. 50=I.L.R. (1947) Kar. (P.C.) 72=27 P.L.T. 491=(1947) 2 M.L.J. 106 (P.C.).

———**S. 204**—*Presentation of bill—If condition precedent to suit.*

Per *Chakravartti, J.*—The presentation of a bill under S. 189 is a condition precedent to the institution of a suit under S. 204 of the Calcutta Municipal Act. (*Blank and Chakravartti, JJ.*)

Subimal *v.* Corporation of Calcutta. 51 C.W.N. 326=A.I.R. 1947 Cal. 369=I.L.R. (1947) 2 Cal. 173.

———**Ss. 205 and 204**—*Occupier's share of consolidated rate—Whether a charge on property—Suit for arrears of occupier's share against owner alone if lies.*

S. 205 of the Calcutta Municipal Act creates a charge on the land or building for arrears of the occupier's share of the consolidated rate as well and itself authorises a suit for enforcement of the charge, which need only satisfy its own requirements and not also the requirements of S. 204. Such a suit may be against the owner alone who, though not liable to pay the occupier's share personally, is in the position of a surety whose immovable property stands charged for the debt of another, *viz.*, the occupier. S. 204 does not authorise a suit against the owner for the occupier's share of the rate, except in cases covered by S. 157 and questions arising under it have no relevance to a suit brought against the owner for enforcement of the charge under S. 205 in respect of the occupier's share. (*Blank and Chakravartti, JJ.*) Subimal *v.* Corporation of Calcutta. I.L.R. (1947) 2 Cal. 173=51 C.W.N. 326=A.I.R. 1947 Cal. 369.

———**S. 291 (2)**—Prosecution under—Burden of proof. *See* Evidence Act, S. 106. A.I.R. 1948 Cal. 58.

———**S. 363**—*Demolition of unauthorised building—Discretion of Magistrate—Power of High Court on revision.*

In a proceeding under S. 363 of the Calcutta Municipal Act, a magistrate is not bound to order a demolition even if he found that a building is unauthorised or that it infringed the building rules. The magistrate has a discretion in the matter and can refuse demolition if he thinks it would be against equity and justice. 33 C. 287 and 34 C. 341, referred to.

The High Court on revision has the power to exercise all the powers which the Magistrate has and it is open to it either to order demolition or to prohibit demolition if such demolition has been ordered by the Magistrate. 34 C. 341, referred to.

Where a party is allowed to be in possession of an unauthorised building for a period of over three years with full knowledge of the corporation, it is unfair and unjust to direct him to demolish the building especially when it has not infringed any of the building bye-laws of the corporation and has not affected adversely any rights of the neighbours. (*Sen, J.*) Badridas Goenka *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

———**S. 363**—*Proceeding under—Conversion to one under S. 493—Power of Magistrate.*

It is not open to a Magistrate to convert a proceeding instituted under S. 363 of the Calcutta Municipal Act to one under S. 493 of the Act. 41 C.W.N. 1373, cons. (*Sen, J.*) Badridas Goenka *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

———**S. 363**—*Proceeding under—Fine—If can be inflicted.*

In a proceeding under S. 363 of the Calcutta Municipal Act, no fine can be inflicted under the provisions of S. 493 of the Act. (*Sen, J.*) Badridas Goenka *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

———**S. 363, Proviso**—*Application for demolition—Notice to occupier—Necessity for.*

Under S. 363, proviso, Calcutta Municipal Act, both the owner and occupier are entitled to notice of an application for demolition and must be given an opportunity of adducing evidence and of being heard in their defence. A tenant and indeed even a sub-tenant is an "occupier" as defined in S. 3 of the Act. An order of demolition passed without notice to a tenant in possession and without his knowledge is, therefore, liable to be set aside. 48 C.W.N. 170, rel. on. (*Harries, C.J. and Das Gupta, J.*) Gobindra Charan Maji *v.* Corporation of Calcutta. 53 C.W.N. 813.

———**S. 386**—*Applicability—If limited to factories, trades and places of public resort—Storing of grains by Government Department for benefit of employees—If for purposes of trade—Need for licence—Crown, if bound by provisions of section.*

S. 386, Calcutta Municipal Act, will be attracted not with reference to storing in every premises, but only in those which are limited by the description given by the sub-heading, "Factories, trades and places of public resort".

S. 386 of the Act provides for a licence being taken out for storing grains for purposes of trade. The word "trade" is one of a very general application and must always be considered along with the context in which it is used. The intendment of the Legislature in enacting S. 386 was to regulate and restrict, for the sake of health and convenience of the public, storing of particular articles meant to be utilised for trade. So far as the provisions of this section are concerned, it is immaterial whether the persons storing intend to or actually derive profit or not. In this view it must be held that where grains are stored in a premises for the purpose of distribution among the employees of a particular Government department at concession rates they are stored for trade, and S. 386 is attracted unless its application is otherwise barred. 40 C.W.N. 766, referred to.

Where such storing and sale are by and on behalf of the Central Government, the provisions of S. 386 of the Act are inapplicable, the Crown not being bound by those provisions either expressly or by necessary implication, and no licence, therefore, need be taken out in such a case. 73 I.A. 271, foll. (*Mookerjee, Das and Gupta, JJ.*) Corporation of Calcutta *v.* Sub-Postmaster, Dharamtala Post Office. 54 C.W.N. 429=A.I.R. 1950 Cal. 417=51 Cr.L.J. 1532.

———**S. 386 (1) (a) and Sch. 19**—*Business of electroplating—Need for licence.*

The business of electroplating cannot fall within any of the items in Sch. 19 of the Calcutta Municipal Act. Electroplating is not the manufacture of chemical preparations and therefore does not fall within Item 8. It is merely covering copper or some such metal with a thin film of silver or nickel and this is done by electrolysis. It is therefore not an offence to carry on the business of electroplating without a licence. (*Harries, C.J.*) Badruddin & Sons *v.* Calcutta Corporation. A.I.R. 1950 Cal. 147=51 Cr.L.J. 663.

———**S. 421**—*Applicability—Crown.*

Although the Crown has not been expressly made bound by the provisions of S. 421 of the Calcutta Municipal Act, relating to public health, it is by necessary implication to be considered as bound by them. The Crown cannot evade its own responsibility to obey such laws of health which are fundamental if a municipality is to function properly and if the Crown violates the same, it has to be made to observe such laws by means of magisterial action. 73 I.A. 271, referred to. (*Chunder and Guha, JJ.*) Corporation of Calcutta *v.* Bhupal Chandra Sinha. 54 C.W.N. 438=A.I.R. 1950 Cal. 421.

———**S. 421**—*Order under—Revision—Cr. P. Code, S. 439.*

The High Court has power to revise an order passed by a Municipal Magistrate under S. 421 of the Calcutta Municipal Act. 54 C.W.N. 438 and 52 C. 952, referred to. 54 C. 532, expl. (*Roxburgh, J.*) Sarat Chandra Sadhu Khan *v.* Corporation of Calcutta. 54 C.W.N. 480=A.I.R. 1950 Cal. 423.

———**S. 421**—*Proceeding under—Nature of—Order of Municipal Magistrate—Revision—If lies—Cr. P. Code, Ss. 435 and 439.*

A proceeding under S. 421, Calcutta Municipal Act, is a proceeding before a Criminal Court within the meaning of S. 435, Cr. P. Code and the High Court has, therefore, jurisdiction under S. 439, Cr. P. Code, to revise an order under S. 421 or the cognate sections of the Calcutta Municipal Act by the Municipal Magistrate of Calcutta. (*Chunder and Guha, JJ.*) Corporation of Calcutta *v.* Bhupal Chandra Sinha. 54 C.W.N. 438=A.I.R. 1950 Cal. 421.

———**S. 421**—*Right to be heard—Purchaser in possession applying for order of destruction—Seller, if entitled to be heard.*

The provisions of S. 421 and of the preceding sections of the Calcutta Municipal Act are very vague on the question of what procedure is to be followed by the Magistrate and who is to be heard. Where a person in possession of adulterated food purchased by him applies for an order under S. 421 of the Act for its destruction, the only fair procedure for the Magistrate to follow is to hear the seller who is really interested in the matter and give him an opportunity to present such evidence as he may have on the quality of the article in question. (*Roxburgh, J.*) Sarat Chandra Sadhu Khan *v.* Corporation of Calcutta. 54 C.W.N. 480=A. I. R. 1950 Cal. 423.

———**S. 421 (2) and (3)**—*Notice to party affected—If necessary.*

Per *Mookerjee, J.*—Even though there is no direct provision that a formal notice is to be given to the party before any action is taken either under sub-S. (2) or sub-S. (3) of S. 421, Calcutta Municipal Act, the Magistrate is bound to give notice before he arrives at a decision. (*Mookerjee and Das Gupta, JJ.*) Abdoola Haroon and Co. *v.* Corporation of Calcutta. A.I.R.. 1950 Cal. 36=51 Cr.L.J. 346.

———**S. 421 (2)**—*Order of Magistrate under—Nature of—Revision—Cr. P. Code, S. 435.*

Per *Mookerjee, J.*—On a reading of the provisions contained in S. 421 of the Calcutta Municipal Act and interpreting the section as a whole and the context in which it appears, there is no escape from the conclusion that the order of a Municipal Magistrate under S. 421 (2) of the Act is a judicial order and not merely a ministerial or executive order. There is also no doubt that the Municipal Magistrate, if he is acting in a judicial capacity, is a Court subordinate to the High Court. Accordingly, the High Court has jurisdiction to exercise reversionary powers under S. 435, Cr. P. Code, in respect of an order passed by a Municipal Magistrate under S. 421 (2). of the Act.

Per *Das Gupta, J.*, contra.—The facts that the Magistrate acting under S. 421 (2) of the Calcutta Municipal Act is just an alternative to the several corporation officers or a Councillor or an Alderman acting under S. 420 of the Act and that the law does not require the Magistrate to issue any notice, take any evidence, or hear any party before passing any order under S. 421 (2) make inevitable the conclusion that the Magistrate acting under S. 421 (2) is an executive officer and not a Court, and his order for destruction is an administrative, and not a judicial order. The High Court has, therefore, no jurisdiction to revise an order passed by a Magistrate under S. 421 (2) of the Act. 42 C.W.N. 731 and 44 C.W.N. 173, Dist. (*Mookerjee and Das Gupta, JJ.*) Abdoola Haroon and Co. *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 36=51 Cr. L.J. 346.

———**S. 421 (2)**—*Tinned food stuff—Question if it is injurious to public health—Examination by Magistrate of every tin—If necessary.*

Per *Mookerjee, J.*—The question whether a particular tinned food stuff is or is not deleterious and injurious to public health is a question of fact which must be determined on the evidence adduced in the case. The Magistrate is not bound to examine each and every particle of the food stuffs or each and every one of the tins. How many tins have to be examined in any particular case must depend on the facts in each case. 44 C.W.N. 173, referred to. (*Mookerjee and Das Gupta, JJ.*) Abdoola Haroon and Co. *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 36=51 Cr.L.J. 346.

———**Ss. 424 and 488**—Refusal to sell rationed article for analysis to Food Inspector—If offence—Bengal Rationing Order, 1943, cls. 6, 7 and 9—Defence of India Rules, R. 4. [*See* Q. D. 1941-1945, Vol. I, Col. 614.] Corporation of Calcutta *v.* Pranabesh Bhowmick. I. L. R. (1946) 1 Cal. 112=223 I.C. 511=1946 Cal. (Rul.) 213=A.I.R. 1946 Cal. 71=47 Cr.L.J. 529.

———**S. 478 (17)**—Bye-laws not framed under—Bye-laws framed under old Act—If continue in force—Bengal General Clauses Act, S. 25. [*See* Q.D. 1941-1945, Vol. I, Col. 614.] Bhu-

Pendra Nath Ray *v.* Corporation of Calcutta. I.L.R. (1945) 1 Cal. 199.

———**S. 488 (2)**—*Applicability — Accused wrongly convicted—Whether can be convicted for continuing to do that act.*

S. 488 (2), Calcutta Municipal Act, provides "Whoever, after having been convicted of any offence continues to commit such offence". That obviously must mean being rightly convicted. A man who has been wrongly convicted cannot be convicted thereafter for merely continuing to do that for which he was wrongly convicted. (*Harries, C.J.*) Badruddin & Sons *v.* Calcutta Corporation. A.I.R. 1950 Cal. 147=51 Cr.L.J. 663.

———**S. 498 (3)**—*Order cancelling licence—Validity—Jurisdiction of Criminal Court to consider—Cancellation of licence—When justified.*

A Criminal Court has jurisdiction only to consider whether an order cancelling a licence made by the municipal authorities under S. 498 (3), Calcutta Municipal Act, was made entirely without jurisdiction but not whether the municipal authorities ought not to have cancelled the licence on the merits.

An order cancelling a licence is without jurisdiction if the cancellation is not one which could be justified under S. 498 (3) of the Act. Where the licence provides that undue nuisance should not be created, the municipal authorities can only cancel the licence if they consider that the use of the premises is creating an undue nuisance, that is to say, presumably a nuisance greater than was anticipated when the licence was given—greater than reasonably necessary for carrying on the purposes for which the premises are being used. I.L.R. (1950) Mad. 118 (F.B.), appl.; 37 C.W.N. 344, comm. on. (*Roxburgh, J.*) Lalit Kumar Bose *v.* State, Sanitary Inspector. 54 C.W.N. 909.

———**S. 531**—*Appointment of Municipal Magistrate—Purpose of.*

Under S. 531, Calcutta Municipal Act, a Municipal Magistrate can only be appointed for one purpose and one purpose alone, namely, trial of offences. There is no provision for appointment of a Municipal Magistrate as executive officer. (*Chunder and Guha, JJ.*) Corporation of Calcutta *v.* Bhupal Chandra Sinha. 54 C.W.N. 438=A.I.R. 1950 Cal. 421.

———**S. 533**—*Applicability—Accused failing to appear on adjourned hearing—Conviction in his absence—Legality.*

It is quite clear from S. 533, Calcutta Municipal Act, that if the accused fails to appear at the first hearing, that is, at the time and place mentioned in the summons the Magistrate may proceed in his absence. But if the accused fails to appear at some subsequent hearing then the case does not fall within the words of that section, because he does not fail to appear at the time and place mentioned in the summons. Where an accused person fails to appear at an adjourned hearing of a case and the Magistrate proceeds in his absence and convicts him, the conviction is liable to be set aside. 53 C.W.N. 847, foll. (*Harries, C.J.*) Badruddin & Sons *v.* Calcutta Corporation. A.I.R. 1950 Cal. 147=51 Cr.L.J. 663.

———**S. 533**—*Ex parte* trial after accused has appeared—Legality. [*See* Q.D. 1941—1945, Vol. I, Col. 614.] Bhupendra Nath Ray *v.* Corporation of Calcutta. I.L.R. (1945) 1 Cal. 199.

———**S. 533**—*Failure of accused to appear at adjourned hearing—Power of Magistrate to proceed* ex parte.

S. 533 of the Calcutta Municipal Act applies only if the accused fails to appear at the initial hearing, that is, at the hearing on the date and time and at the place fixed in the summons. It cannot apply where an accused person fails to appear at an adjourned hearing because if he fails to appear at such hearing it is not a failure to appear at the time and place fixed in the summons. The Magistrate cannot, therefore, under the section, hear and determine the case *ex parte* on some subsequent date to which the trial is adjourned. [1937 Cal. 218 and 48 C. W.N. 630, appr.] (*Harries, C.J. and J. P. Mitter, J.*) Ashutosh Roy *v.* Corporation of Calcutta. 53 C.W.N. 847=A.I.R. 1949 Cal. 589=51 Cr.L.J. 123.

———**S. 534**—*Applicability—Proceeding under S.* 363.

S. 534, Calcutta Municipal Act, does not relate to proceedings under S. 363 but to proceedings under S. 493 of the Act. (*Sen, J.*) Badridas Goenka *v.* Corporation of Calcutta. A.I.R. 1950 Cal. 140=51 Cr.L.J. 645.

———**S. 534**—*Prosecution under S.* 395 (2)—*Limitation.*

Under S. 534 of the Calcutta Municipal Act, a prosecution for an offence under S. 395 (2) of the Act must be launched within three months of the date upon which the Corporation first had notice of the offence. S. 395 (2) clearly contemplates that notice can be given to the Corporation other than by notice to the Executive Officer. A body corporate can only receive and read a notice through its agents and if an agent is authorised to receive a complaint and that officer has received it, the corporation has received it. (*Harries, C.J. and Mitter, J.*) Nagendra Nath Bhowmik *v.* The King. A. I. R. 1949 Cal. 664=51 Cr.L.J. 1=54 C.W.N. 160.

———**S. 535**—*Order for costs and compensation against corporation—Notice to corporation—Necessity for.*

An order awarding costs against the corporation and directing the corporation to pay compensation to the complainant passed behind its back without service of notice on it, in proceedings under S. 535, Calcutta Municipal Act, is bad and is liable to be set aside. It is true that the section does not provide for any notice being served, but it would be entirely unfair and unjust and against all principles of law to pass an order penalising a party without giving the party an opportunity of being heard. The principle *audi alteram partem* is applicable to a case of this description. (*Sen, J.*) Corporation of Calcutta *v.* Krishna Chandra Sil. 54 C.W.N. 220=A.I.R. 1950 Cal. 314=51 Cr.L.J. 1234.

———**Ss. 536 and 488**—*"Unlawful work"—Wall liable to be demolished under S.* 300—*If* *constitutes—Power of Magistrate to order its demolition.*

A wall which is liable to be demolished under S. 300 of the Calcutta Municipal Act is undoubtedly an unlawful wall and constitutes an "unlawful work" within the meaning of S. 536 of that Act, and the Magistrate has therefore power to order its demolition under that section. S. 488 of the Act does not circumscribe the powers of the Magistrate regarding the various orders which he may make in a case of this description. It merely states the maximum limit of the fine which he may inflict and it does not lay down that the Magistrate may not inflict any other punishment except the levying of a fine. (*Sen, J.*) Ramesh Chandra Patra *v.* Corporation of Calcutta. A.I.R. 1949 Cal. 88=50 Cr.L.J. 146.

——Sch. XVII, R. 32—*Scope and effect—Erection of building attached to adjacent premises—Approval of plan by Corporation.*

The words in sub-R. (1) of R. 32 of Sch. XVII of the Calcutta Municipal Act, "if either side of a domestic building is not attached" relate to the proposed new building and if, according to the plan, that new building will not be attached to the adjacent building, then the Corporation must see that the plan provides for an open space between the new building and the next adjacent building, the distance of the space being as provided in sub-R. (2). Sub-R. (3) is clearly an exception to the earlier provisions of the Rule. This sub-rule is to apply when the site, adjacent to the site upon which the proposed building will be erected, is not occupied by a masonry building situated within ten feet of the boundary line between the two sites and within twenty-four feet from the frontage of the street on which the two sites abut. That sub-rule does not apply when the adjacent site is occupied by a masonry building within ten feet of the boundary line and within twenty-four feet from the frontage of the street. The rule applies when there is a vacant space of the dimensions set out in the sub-section. There is nothing in R. 32 which prevents the Corporation from approving plans for the erection of buildings which will, on either one or both sides, be attached to adjacent premises. (*Gentle, J.*) Prasad Das Sen *v.* Corporation of Calcutta. I.L.R. (1946) 2 Cal. 484.

——Sch. XVII, R. 33—*Projection of beams and eaves on passage—If infringement of rule—Maxim* de minimis non curat lex.

Where a passage is about eighty feet in length, projection at intervals of seven beams in that length, does not, in substance, prevent the passage being open to the sky, and is therefore not an infringement of R. 33 of Sch. XVII of the Calcutta Municipal Act. The projection of eaves over the passage does not also amount to an infringement of that rule. The matter is covered by the maxim *de minimis non curat lex*. (*Gentle, J.*) Prasad Das Sen *v.* Corporation of Calcutta. I.L.R. (1946) 2 Cal. 484.

——Sch. XVII, R. 58—*Implied permission to execute work—Scope of.*

Under R. 58 of the Sch. XVII of the Calcutta Municipal Act the Corporation must be deemed to have granted permission to execute a work if within the time prescribed by R. 57 it has neither granted nor refused permission to execute it. The permission which the Corporation is deemed to give is a permission to execute the work in accordance with the plan in so far as the plan complies with the Act and by-laws made thereunder The fact that permission is deemed to be granted does not mean that the plan must be deemed to be in accordance with the Act and the by-laws. If it transpires that the plan is contrary to the Act or to the by-laws, the implied permission will not save the person building according to the plan. (*Harries, C.J.*) Commissioners of Municipality of Howrah *v.* Rajendra Nath Das. 52 C.W.N. 321=A.I.R. 1948 Cal. 109.

——Sch. XVIII, R. 4 (2) and S. 511—*Prosecution for disobedience of notice to vacate—Question if building is in dangerous condition—Magistrate, if can go into.*

A Municipal Magistrate trying a person for disobedience of a notice issued under R. 4 (2) of Sch. XVIII, Calcutta Municipal Act, directing him to vacate the premises on the ground that it was in a ruinous or dangerous condition, cannot investigate the question whether the building was in a ruinous or dangerous condition. It is clear from the words of the rule that the corporation alone is the authority to decide this question. Further, S. 511 of the Act makes it additionally clear that this question is one which is to be decided exclusively by the corporation. 11 C.W.N. 671, 3 C.W.N. 508 and I.L.R. (1941) 2 Cal. 308, rel. on. (*Sen, J.*) Buddhu Mohan Khatik *v.* The Corporation of Calcutta. 4 A.I.Cr.D. 109=5 D.L.R. (Cal.) 42=A.I.R. 1950 Cal. 188=51 Cr.L.J. 861.

CALCUTTA OFFICIAL RECEIVER'S ACT (VII OF 1938)—*Official Receiver's charges—Government commission in respect of purchase of Government bonds—Power of Court to exempt payment of.*

The Court can in a fit case direct the Official Receiver not to charge the commission in respect of the purchase of Government bonds which are to be retained by him on behalf of a minor. (*Edgley, J.*) Subhendu Kumar *v.* Subodh Kumar. 52 C.W.N. 459.

CALCUTTA POLICE ACT (IV OF 1860), S. 3—*"Common gaming house"—Proof that profit has been made by person running premises—If necessary—Profit accruing from gambling—If sufficient.*

The phrase "kept or used for the profit or gain of the person" in the definition of "common gaming house" in S. 3 of the Calcutta Police Act simply implies that the person running the premises hopes to make a profit or gain by keeping or using the instruments of gaming; it does not mean that there must be proof that such profit has been made or must inevitably be made.

The phrase "whether by way of charge for the use of such house, etc., or instruments or otherwise" in the section does not mean that the profit to the person concerned must accrue by way of charge for the use of the house, etc., or instruments. It is sufficient if he expects to make a profit or gain from the actual gambling. I.L.R. (1937) 1 Cal. 611, overruled. (*Lodge, Roxburgh and Chakravartti, JJ.*) Superintendent and Remembrancer of Legal Affairs, Bengal *v.* D. E. Wilson. 51 C.W.N. 804=A.I.R. 1947 Cal. 429=82 C.L.J. 248 (F.B.).

———S. 39—*Condition of license violating S. 40—Power of Government to sanction.*

S. 39 of the Police Act empowers the Government to sanction the conditions upon which a license is granted. Nevertheless, the Government cannot give effective sanction to a condition which conflicts with the provisions of the Act, contained in S. 40, requiring a conviction to be obtained before the question of forfeiture of a license can arise. A note in a license according to which the Commissioner can forfeit a license upon breach of a condition even in the absence of a conviction violates S. 40 and is beyond the powers of the Government to sanction. (*Gentle and Das, JJ.*) Commissioner of the Calcutta Police *v.* Rolla Ram Chopra. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

———S. 40—*Forfeiture of license—Power of Commissioner.*

S. 40 of the Calcutta Police Act negatives any power in the Commissioner of Police to cancel or forfeit a license granted by him under S. 39, in the absence of a conviction for breach of condition of the license. Further under S. 40, the Commissioner's power to forfeit is not an absolute power, but it is subject to the direction and control of the Government;; this negatives a power in the Commissioner to forfeit at his will and pleasure. (*Gentle and Das, JJ.*) Commissioner of the Calcutta Police *v.* Rolla Ram Chopra. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

———S. 40—*Forfeiture of license—Wrongful exercise of discretion by Commissioner—Remedy—Specific Relief Act, S. 45.*

Under S. 40 of the Calcutta Police Act, the Commissioner exercises an executive discretion in deciding whether to forfeit a license and not judicial discretion. He is not a Court nor a person or entity exercising judicial or *quasi*-judicial functions. That being the position, proceedings by way of prohibition and *certiorari* do not lie to correct any error committed by him with regard to forfeiture; but if a wrongful exercise of the discretion takes place, that wrong can be corrected only by the procedure under S. 45 of the Specific Relief Act. (*Gentle and Das, JJ.*) Commissioner of the Calcutta Police *v.* Rolla Ram Chopra. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

———(I OF 1898), S. 54-A—*Stolen goods found in shop—Manager, if in possession—Presumption.*

If stolen goods are found in a shop, *prima facie* the person in possession is the owner of the shop. It cannot be presumed that the manager of the shop is in possession merely because he is in the shop. Unless there is some evidence connecting the manager with the acquisition of these goods or with the fact of bringing them on to the premises, he cannot be said to be in possession of them so as to be convicted under S. 54-A of the Calcutta Police Act. (*Harries, C.J.*) Sova Chand Bothra *v.* The King. 52 C.W.N. 258=2 D.L.R. 583=A.I.R. 1948 Cal. 184=49 Cr. L.J. 240=83 C.L.J. 243.

CALCUTTA RENT ORDINANCE (V OF 1946)—*Jurisdiction of Controller—Permission to file ejectment suit—Grant of—If conditional only on service of notice to quit and termination of tenancy.*

The Rent Controller in granting permission to a landlord to file a suit for ejecting his tenant is not required to grant it only when the tenancy has been terminated by the landlord: He has ample jurisdiction to grant the permission without any notice to quit having been given by the landlord. (*Chunder, J.*) Bibhuti Bhusan Chakravarty *v.* Surendra Mohan Lahiri. 4 D.L.R. (Cal.) 245=A.I.R. 1950 Cal. 96.

———*Scope—Suit for ejectment filed with permission of Rent Controller—Ordinance expiring after suit—If causes abatement of suit.*

The fact that after a suit is filed for ejectment with the permission of the Rent Controller, the Ordinance under which the permission was granted has expired does not cause any abatement of the suit. (*Chunder, J.*) Bibhuti Bhusan Chakravarty *v.* Surendra Mohan Lahiri. 4 D.L.R. (Cal.) 245=A.I.R. 1950 Cal. 96.

———Ss. 3 and 26—*Suit for rent decided after Bengal House Rent Control Order* (1942), *ceased to exist—Rent accruing before ordinance—Law applicable—Rate of rent payable.*

The Bengal House Rent Control Order, 1942, has no application to a suit for rent decided after 30th September, 1946, when that order came to an end. The Court has therefore to decide in such a suit the rate of rent with reference to the provisions of the general law and to the Calcutta Rent Ordinance of 1946. As the proviso to S. 3 (1) of the Ordinance says that sub-S. (1) has no application to any rent which accrued due before the date of the commencement of the ordinance, sub-S. (1) has no application to a suit to recover such rent and the general law will apply. Under the general law, the rent payable would be the rent agreed upon between the parties. S. 26 of the Calcutta Rent Ordinance does not keep alive the provisions of the Bengal House Rent Control Order of 1942, as far as the rate of rent recoverable is concerned. (*Sen, J.*) Bhim Charan Guin *v.* Sasi Bhusan Kundu. I.L.R. (1948) 2 Cal. 166.

———Ss. 6 and 9—*Payment of salami—If renders contract of tenancy illegal.*

Ss. 6 and 9 of the Calcutta Rent Ordinance do not make the contract of tenancy illegal if salami is paid, but provide that the salami shall not be taken and if taken, would be refundable when claimed within six months. These provisions therefore indicate that while salami, if taken, will be refunded, the contract of tenancy will continue. (*Mukkarji, J.*) Surendra Chandra Majumdar *v.* Panchi Bibi. 83 C.L.J. 328.

———Ss. 9 and 3—*Order of refund—When may be passed.*

Under S. 9 read with S. 3 of the Calcutta Rent Ordinance, the Controller has power to pass an order of refund only when the payment in excess of the standard rent was due to an increase of rent. (*Sen, J.*) Sobha Rani Roy *v.* Guha Roy. A.I.R. 1949 Cal. 681=54 C. W.N. 205.

———**S. 9 (2)**—*Order of refund sent to Civil Court for execution—Power of latter Court to transfer it to another Court—C. P. Code, S. 39.*

Where an order of refund passed by the controller is sent to a Civil Court under S. 9 (2) of the Calcutta Rent Ordinance for execution, the matter comes to that Court not as a part of its ordinary jurisdiction but by reason of a special jurisdiction conferred upon that Court by the provisions of S. 9 (2) of the Ordinance. The Civil Court has no power to transfer it to another Court for execution. S. 39, Civil Procedure Code, cannot be availed of for the purpose. 49 C.W.N. 10, referred to. (*Sen, J.*) Sobha Rani Roy *v.* Guha Roy. A.I.R. 1949 Cal. 681=54 C.W.N. 205.

———**Ss. 12 and 13**—Bona fide *requirement of landlord—Finding of Rent Controller—If conclusive.*

Under S. 12 of the Calcutta Rent Ordinance all that the Rent Controller has to decide is whether the petitioner before him for permission to institute a suit for ejectment has shown sufficient cause which would entitle the Rent Controller to hold that the petitioner required the premises *bona fide* for his own use. The finding of the Rent Controller on this point is not conclusive so far as the Court deciding the suit for ejectment or application for ejectment is concerned. The Court must come to its own conclusion on this point. The Rent Controller's decision merely removes the bar to the entertainment of the suit. It does nothing further. (*Sen, J.*) Debi Sankar Bhattacharjee *v.* Jagendra Bhusan Sanyal. A.I.R. 1949 Cal. 65=52 C.W.N. 602.

———**S. 12**—*Tenant inducting licensees on portion of premises—If liable to ejectment.*

The Calcutta Rent Ordinance speaks of subletting only, not of inducting licensees, and a tenant who inducts licenses on a portion of premises does not, therefore, disentitle himself from the benefit of the ordinance. Persons who are allowed by the tenant to occupy portions of premises without payment of rent, are licensees and not sub-tenants. (*Chakravartti, J.*) Bissen Sarup *v.* Kishen Prasad Agarwalla. 84 C.L. J. 50.

———**S. 12 (1), Proviso (b)**—*Applicability—Sub-letting before ordinance.*

Under S. 12 (1) read with clause (*b*) of the proviso to S. 12 (1) of the Calcutta Rent Ordinance, the tenant will be entitled to claim the protection of the ordinance in a case of subletting only if he can show that he has sublet with the express consent in writing of the landlord. Where the subletting had taken place before the enactment of the ordinance and continued till after the ordinance was passed, that subletting would be quite effective to attract the operation of clause (*b*) unless it is shown by the tenant that he had obtained the consent in writing from the landlord to such subletting after the ordinance had come into operation. (*Biswas, J.*) Gurupada Haldar *v.* Arjun Das. 52 C.W.N. 604=A.I.R. 1949 Cal. 61.

———**S. 12 (1), Proviso (b)**—*Applicability—Subletting by tenant prior to the ordinance coming into force—If prevents tenants from obtaining benefit of S.* 12 (1).

Though a tenant might have sub-let the property in question before the coming into force of the Calcutta Rent Ordinance of 1946, he is prevented by proviso (*b*) to sub-section (1) of S. 12 of the ordinance from obtaining the benefit of subsection (1) of S. 12 namely protection against ejectment. (*Sen, J.*) Atul Krishna Basu *v.* Ganesh Chandra Dhar. 52 C.W.N. 379.

———**S. 12 (1), Proviso (b)**—*Applicability—Subletting prior to 1st October,* 1946.

The subletting referred to in S. 12 (1), proviso (*b*) of the Calcutta Rent Ordinance includes a subletting prior to the enactment of the ordinance. Therefore, a tenant who has sublet a portion of the premises before 1st October, 1946, in the absence of a contract without the landlord's consent in writing, is not entitled to the benefits of provision of S. 12 (1) of the ordinance. ((*Clough, J.*) Shaik Mahomed Omer *v.* T. B. Timmo. 52 C.W.N. 693.

———**S. 12, Proviso (b)**—*Application for ejectment filed under Calcutta Rent Control Order—Ordinance coming into force while application pending—Law applicable—Tenant, if can be ejected on ground that he had granted sub-leases.*

An application for ejectment was fied by the landlord under the Calcutta Rent Control Order, 1943, on the ground that the tenant was a defaulter within the meaning of the order. While this application was pending, the Calcutta Rent Control Order ceased to have effect, and the Calcutta Rent Ordinance, 1946, came into force. Thereafter the landlord applied to the Court to amend the application by including an averment that the tenant had granted a sub-lease. The Court allowed the amendment and held that in view of proviso (*b*) to S. 12 of the Calcutta Rent Ordinance, the tenant was not protected against eviction and accordingly passed an order directing him to give possession of the property to the landlord.

Held, that the Court was right in allowing the amendment and disposing of the application according to the law as laid down in S. 12 of the Calcutta Rent Ordinance. The tenant was liable to ejectment on the ground that he had granted a sub-lease, although it was granted at a time when the Calcutta Rent Control Order was in force and when the grant of such a sub-lease did not entail a liability to ejectment. The application on the amended ground could not be defeated on the ground that permanent rights had accrued under the Calcutta Rent Control Order. The Calcutta Rent Control Order merely prevented the Courts granting particular reliefs during the continuance of the order, which by its very nature was of temporary effect. It did not purport to confer permanent rights on a party. (*Lodge, J.*) Purusottam Lal *v.* Hawi Bai. A.I.R. 1947 Cal. 401=83 C.L.J. 173.

———**S. 13 (1)**—*Suit for ejectment of tenant—Prior permission of Rent Controller—If pre-*

requisite to institution of suit—Permission granted in prior suit—If valid in subsequent suit—Suit instituted without permission, pending when West Bengal Premises Rent Control Act came into operation—Suit, if maintainable—Latter Act, if retrospective.

Under S. 13 (1) of the Calcutta Rent Ordinance, 1946, permission of the Rent Controller is a pre-requisite to the institution of a suit by the landlord against the tenant for ejectment on the ground that he required the premises *bona fide* for his own use. Any suit which has been instituted without such permission is no suit at all in the eye of the law and is liable to be dismissed, and the defect of not obtaining permission cannot be cured by the subsequent obtaining of permission.

A permission granted by the Rent Controller for the institution of a prior suit for ejectment which has been dismissed, does not remain valid for the institution of a fresh suit. If the Rent Controller dismisses an application by the landlord for a fresh permission for the institution of the second suit on the ground that it is not necessary, the order cannot be construed as granting of permission to institute the second suit. The landlord should appeal against the order and insist in the Court of appeal that the Rent Controller should grant a second permission in respect of the second suit.

If a suit for ejectment instituted without the permission of the Rent Controller while the Calcutta Rent Ordinance, 1946, was in force, remains pending when the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, came into operation, the latter Act does not have the effect of making the suit maintainable although under that Act no permission of the Rent Controller is necessary, and the tenant has still the right to resist ejectment on the ground of want of permission. The suit, being a pending suit, must be governed by the provisions of the Calcutta Rent Ordinance, as there are no words in the West Bengal Premises Rent Control (Temporary Provisions) Act which make the Act retrospective. The question involved is not a question of mere procedure, it is a question relating to a substantive right. By S. 13 (1) of the Calcutta Rent Ordinance, a tenant is given a substantive right to insist on the dismissal of any suit in ejectment unless previous permission of the Rent Controller has been obtained. (*Sen, J.*) Tarini Gupta Chowdhuri *v.* Manmatha Nath Ghatak. 53 C.W.N. 855=A.I.R. 1949 Cal. 674.

———S. 14—*Applicability—Nature of suits.*

S. 14 of the Calcutta Rent Ordinance is a bar only to the institution of a suit of the nature referred to therein. The section requires that non-compliance with the provisions of the ordinance as to the payment or deposit of rent must have been taken as a ground for eviction in the suit. If that is not the ground on which the suit is brought, the section will not operate as a bar although the ultimate decree may be passed on that ground. (*Biswas, J.*) Abanindra Mohan Bose *v.* Khazana Mull Sardar. 52 C.W.N. 698.

———S. 14—*Applicability—Pending proceedings.*

S. 14 of the Calcutta Rent Ordinance is not intended to be applicable to pending proceedings. (*Biswas, J.*) Abanindra Mohan Bose *v.* Khazana Mull Sardar. 52 C.W.N. 698.

———Ss. 17 and 14—*Decree for ejectment under S. 9-B (3) of Calcutta House Rent Control Order—If can be rescinded on ground that permission of Controller was not obtained for suit by landlord.*

Under S. 17 of the Calcutta Rent Ordinance the Court cannot rescind its earlier decree for ejectment made under S. 9-B (3) of the Calcutta House Rent Control Order, 1943, on the ground that the landlord had not obtained the permission of the Controller to institute his suit as required by S. 14 of the Ordinance. (*Khundkar, J.*) Manindra Nath Banerjee *v.* A. K. Fazlul Huq. 51 C.W.N. 148.

———S. 17—*Discretion of Court.*

S. 17 of the Calcutta Rent Ordinance is not mandatory but enabling. It vests in the Court a discretion to rescind or vary its own earlier decree or not to do so. (*Khundkar, J.*) Manindra Nath Banerjee *v.* A. K. Fazlul Huq. 51 C.W.N. 148.

———S. 17—*Order rescinding decree—Appeal.*

An order rescinding a decree under the provisions of S. 17 of the Calcutta Rent Ordinance, 1946, is in itself a decree and appealable as such. (*Lodge, J.*) Gouri Dutt Agarwalla *v.* Kasiram Sonal. I.L.R. (1948) 2 Cal. 494.

———Ss. 21 and 26—*Applicability and scope—Order on landlord under S. 11-A, House Rent Control Order (1943)—Non-compliance—Liability to fine under S. 21 of Ordinance (1946)—Jurisdiction of Rent Controller.*

S. 21 of the Calcutta Rent Control Ordinance can come into operation only when there has been application under S. 18 of that Ordinance, and when there has been no such application no fine can be imposed under S. 21. The Calcutta House Rent Control Order which came to an end on 30th September, 1946, contained no provision corresponding to S. 21 of the Ordinance of 1946, for fining a landlord for non-compliance with an order passed under the House Rent Control Order, 1943, and when proceedings under that order had terminated in an order under S. 11-A of that order, before the Ordinance of 1946, came into force, the Controller has no jurisdiction to fine a landlord under S. 21 of the new Ordinance for failure of the latter to comply with the order under S. 11-A. S. 26 of the Ordinance of 1946 does not empower the Court to act under S. 21 in such a case. It would be against all the canons of construction of statutes to enforce the penal provision of S. 21 of the Calcutta Rent Ordinance, 1946, in respect of proceedings under S. 11-A, Calcutta House Rent Control Order, 1943. (*Sen, J.*) Tilokchand Punamchand *v.* Kanhyalal. 4 D.L.R. (Cal.) 64=A.I.R. 1949 Cal. 251=50 Cr.L.J. 482.

———S. 25—*District Judge—Jurisdiction—Appeal from order of Controller—If appeal under C. P. Code—C. P. Code, O. 41.*

S. 25 of the Calcutta Rent Control Ordinance gives the District Judge jurisdiction to hear and decide an appeal against an order of the Rent Controller. In such an appeal he can grant a landlord unconditional permission to file a suit in ejectment, where the Rent Controller had granted a conditional permission. The District Judge is not a Court of appeal in the sense of the C. P. Code and O. 41, C. P. Code, does not apply to the case. (*Chunder, J.*) BIBHUTI BHUSAN CHAKRAVARTY *v.* SURENDRA MOHAN LAHIRI. 4 D.L.R. (Cal.) 245=A.I.R. 1950 Cal. 96.

——**S. 25**—*District Judge—Status of—Order passed by him—Revision by High Court—Calcutta House Rent Control Order, S.* 14.

The District Judge, as contemplated in S. 14 (1) (*b*) of the Calcutta House Rent Control Order and in the corresponding provision in S. 25 (1) (*b*) of the Calcutta Rent Ordinance, is not the District Judge in his ordinary judicial capacity or the Presiding Officer of the Principal Court of Original Civil Jurisdiction in the District, but a *persona designata.* An order passed by him as an Appellate authority under this provision is, therefore, not an order passed by a Court and accordingly is not revisable by the High Court under S. 115, C. P. Code. (*Chakravartti and Ellis, JJ.*) SUHASHINI DAS *v.* MAHENDRA KUMAR BOSE. I.L.R. (1948) 1 Cal. 376=51 C.W.N. 818.

——**S. 26**—*Appeal under Calcutta House Rent Control Order pending when ordinance came into operation—Power of Appellate Court to grant permission under ordinance.*

An appeal under the Calcutta House Rent Control Order, 1943, is also a proceeding commenced under the provisions of that order, and if the appeal was pending on the date on which the Calcutta Rent Ordinance, 1946, came into operation, it must, on the strict interpretation of the words of S. 26, be deemed to have been commenced under S. 25 of the Calcutta Rent Ordinance, and the Appellate Court has full power to grant permission under that Ordinance. 52 C. W.N. 669, Dist. (*Das Gupta, J.*) NIKUNJA LAL DUTTA *v.* RAJANI KANTA CHATTERJEE. 53 C.W.N. 462.

CALCUTTA SUBURBAN POLICE ACT (II OF 1866), Ss. 4 (2) and 8-B—*Police officer under suspension—Duty to obey order of superior officer to report to Police Training School.*

S. 4 (2) of the Calcutta Suburban Police Act clearly shows that the responsibility of a Police officer under suspension to obey the orders of his superior officers in matters of internal discipline continue even after suspension. An order given by a superior officer to a police officer under suspension to report to the Police Training School comes clearly under the term of "discipline", and its disobedience is punishable under S. 8-B of the Act. The words in S. 4 (2) of the Act "during the term of such suspension the duties conferred upon him as a police officer shall be in abeyance" refer to his official duties as a police officer *vis a vis* the public, and have no effect on his duty to continue to obey for the purpose of

internal discipline the orders of his superior officers. (*Roxburgh and Ormond, JJ.*) LEGAL REMEMBRANCER, BENGAL *v.* SAYED ISHAQ ALI. I.L.R. (1945) 2 Cal. 9.

——**S. 33-A**—*Proof required.*

Under S. 33-A of the Calcutta Suburban Police Act there are two things to be proved. First of all, the prosecution must satisfy the magistrate that there is reason to believe that the property has been stolen. If the prosecution establishes this, the accused must account for his possession to the satisfaction of the Magistrate. (*Henderson, J.*) GAZI RAM BANIA *v.* EMPEROR. I.L.R. (1944) 2 Cal. 603=228 I.C. 323=48 Cr. L. J. 197=A.I.R. 1947 Cal. 40=1947 Cal. (Rul.) 133.

CALCUTTA SURVEY ACT (I OF 1887), S. 3—*Survey—Khasra—Entry in—Presumptive value.*

A survey khasra prepared under S. 3 of the Calcutta Survey Act which is not finally published is not in the nature of a record of rights and entries therein have no presumptive value, although the survey may be admissible in evidence. The section itself does not contemplate preparation of any record of rights in respect of the lands surveyed under the Act. An entry in such Khasra showing a plot of land as *gairmazrua am sarak kham* has no presumption of correctness attached to it and is not sufficient to destroy in any way the title of the owner thereof. 18 P.L.T. 466, diss. 18 P.L.T. 464, dist., 27 Pat. 701, ref. (*Sinha and Rai, JJ.*) MURLI PRASAD *v.* SHEO KISHORE NARAIN. 29 Pat. 448=A.I.R. 1950 Pat. 432.

——**S. 22**—*Scope—"Demarcation of boundaries"—Meaning of—Line in survey map representing boundary—If can be shown as erroneous after more than one year.*

The expression "demarcation of boundaries" in S. 22 of the Calcutta Survey Act, must be given its natural meaning, which is the marking out or laying down of a boundary. If there is a dispute about a boundary and the survey authorities decide that dispute and demarcate the boundary, a suit by the party aggrieved by that decision must be brought within one year under the section. But if there has been no dispute and no actual demarcation of the boundary, a person cannot be prevented even after the lapse of several years from showing that a line in the survey map representing the boundary between his premises and the premises of his neighbour is erroneous. In such a case a presumption of correctness would, no doubt, attach to the survey map, but it would be a rebuttable presumption. [1937 Pat. 516, overruled.] (*Shearer and Reuben, JJ.*) HARDEO MISSIR *v.* GAYA MUNICIPALITY. 27 Pat. 701=A.I.R. 1949 Pat. 132.

CALCUTTA THIKA TENANCY ACT (II OF 1949), S. 2 (5) and Calcutta Thika Tenancy Ordinance, S. 2—*"Thika tenant"—Meaning of—Tenant holding over after expiry o lease.*

A tenant can only be called a *thika* tenant under any particular system. It may be the system which has the well-known names mentioned in S. 2 (5) of the Calcutta Thika Tenancy Act or S. 2 of the Calcutta Thika Tenancy

Ordinance. It may also be a similar system. It is essential for the tenant to prove and establish the system or "any other like system" referred to in the above provisions of the Act or the Ordinance before he can be called a *thika* tenant under them. It is a matter of proof and evidence in every case. A tenant holding over after the expiry of a lease cannot be treated as holding the land within the meaning of the expression "under any other like system" in the Act or Ordinance. [1922 Cal. 123 and 23 C.W.N. 201, Dist.] (*P. B. Mukharji, J.*) MURARI MOHAN MUKHERJEE *v.* PROKASH CHANDRA CHATTERJEE. 53 C.W.N. 640=83 C.L.J. 285=A.I.R. 1950 Cal. 230.

——**S. 2 (5)**—*"Thika tenant"—Proof required.*

Before a Thika tenant can claim any of the benefits of the Calcutta Thika Tenancy Act, he is required to show that he belongs to the apparently rare (if at all existent) variety defined in S. 2 (5) of the Act. 53 C.W.N. 640 and 54 C.W.N. 287, foll. (*Roxburgh, J.*) PANCHANON SHAW *v.* SATYABANDHU MUKHERJEE. 54 C.W. N. 541=A.I.R. 1950 Cal. 319.

——**S. 2 (5)**—"Thika *tenant"—Tenant building structures on vacant land.*

When a tenant takes a vacant land and then builds structures thereon he does not *ipso facto* become a *thika* tenant under the Calcutta Thika Tenancy Act. If that were so, every lessee under an ordinary building lease whereby he takes a vacant land and agrees to build on it would become a *thika* tenant under the Act. Neither the express language nor the intention of the Act justifies such a conclusion. A *thika* tenant under the Act must prove (1) a system, which is either the "commonly known system" or a "similar" system and (2) that he "holds" under that system.

The Act is not a Charter of Rights for the *bustee* dwellers of Calcutta. 43 C.W.N. 640, foll. (*Mukherji, J.*) SHAIKH MAHOMED MATEEN *v.* BAIJNATH BAJORIA. 85 C.L.J. 66=54 C.W. N. 287.

——**S. 28**—*Application under—Relevant considerations—Decree for ejectment, arrears of rent and damages until delivery of possession—How may be varied—Date of varied decree—Opportunity to both sides to establish conformity or non-conformity with Act—If must be given.*

In dealing with an application under S. 28 of the Calcutta Thika Tenancy Act for variation of a decree passed before the commencement of the Act, the Court has in substance (1) to see if it amounts to the sort of order that would have been passed by the controller in a case under the Act, in other words, whether the conditions of S. 3 are fulfilled which lays down the grounds on which a thika tenant can be ejected and (2) whether in form the order is of the type that would be passed under S. 6 of the Act.

Under the Act the controller is only given power to pass an order for ejectment. He cannot pass any order which can be executed for recovery of arrears of rent. Where therefore the decree to be varied is both for ejectment and for payment of arrears of rent, it is clearly necessary to separate the two. It is only the decree for ejectment which is to be converted into an order such as the controller could pass and such as the controller can execute, under the powers given to him under S. 27 (6) of the Act.

Where the decree, as it stands, includes a decree for damages from the date of the suit till delivery of possession, the decree must be altered, as that is not an order which the controller could pass. Under S. 6, the limits of the controller's powers are to specify the actual arrears, the costs and the damages, if any, and the total is to be an amount which the tenant may pay within 30 days of the date of the order and so save himself from ejectment. The decree for ejectment must, therefore, be limited to one containing the actual order of ejectment plus the specification of arrears, costs and damages, limited to damages up to the date of the order.

The varied decree is to be executed as if it was an order made under and in accordance with the provisions of the Act. It follows that the varied decree to be treated as such order must be dated after the commencement of the Act. Therefore, in cases where under the Act the decree is amended to an order for ejectment under S. 3 (1) of the Act, and the provisions of S. 6 are to be carried out, the date of the order will be the date of the varied order, and thus the tenant will have the opportunity of paying the arrears.

Under S. 28 of the Act, the variation of the decree is not to be one of mere form, but the whole proceedings have to be gone over to see if the landlord can bring his case under S. 3. The whole law of ejectment has been changed by the Act and it is unfair to tie either the landlord or the tenant to pleadings and evidence led when the matter in issue was entirely different. Before the Act the "ground" for ejectment was termination of the tenancy on expiry of the lease, or on notice, and other grounds given in the T. P. Act. If the conformity is to be with the whole new Act, in particular S. 3, and not merely some change in the decree itself, both sides must be given opportunity to establish a case of conformity or non-conformity. (*Roxburgh, J.*) SAROJINI DEBI *v.* RABINDRA MOHAN SEN. A.I. R. 1950 Cal. 381.

——**S. 28**—*"Court which made the decree"—Meaning of.*

The phrase "Court which made the decree" in S. 28 of the Calcutta Thika Tenancy Act, cannot mean Court other than the trial Court. (*Roxburgh, J.*) SAROJINI DEBI *v.* RABINDRA MOHAN SEN. A.I.R. 1950 Cal. 381.

——**S. 28**—*Order rescinding decree—Appeal.*

No appeal lies from an order rescinding a decree under S. 28, Calcutta Thika Tenancy Act. The power given under the section is a special and extraordinary statutory power and an appeal would only lie if special provisions were given by the Act for an appeal creating a power. (*Roxburgh, J.*) PANCHANON SHAW *v.* SATYABANDHU MUKHERJEE. 54 C.W.N. 541=A.I.R. 1950 Cal. 319.

——**Ss. 28 and 31**—*Pre-Act consent decree—Power of Court to rescind.*

It cannot be said in view of the provisions of S. 31 of the Calcutta Thika Tenancy Act that a consent decree even if in some points it is not in conformity with the Act is not in a broader sense in conformity with the Act in the view that pre-Act contracts may exist having the effect of barring the provisions of the Act.

Where a pre-Act consent decree for ejectment was passed on the ground that proper notice giving at least 15 days' notice had been given to the tenant who was also in arrears of rent, and there was no agreement by the tenant to overlook the fact that full one month's notice had not been given to him as required by S. 4 of the Act, the decree should not be rescinded under S. 28 of the Act. (*Roxburgh, J.*) Panchanon Shaw *v.* Satyabandhu Mukherjee. 54 C.W.N. 541 =A.I.R. 1950 Cal. 319.

CALCUTTA THIKA TENANCY ORDINANCE (II OF 1948)—*"Thika tenant"—Meaning of.*

If the structure on the land has not been erected by the tenant, then even though the other conditions mentioned in the definition are fulfilled, the tenant is not a "thika tenant" within the meaning of the Ordinance (II of 1948). (*Banerjee, J.*) Haran Chandra Dey *v.* Charu Bala Dasi. 53 C.W.N. 553=84 C.L.J. 92.

——**S. 2**—*Thika tenant—Who is.*

A person seeking the protection of the Calcutta Thika Tenancy Ordinance must show that his tenancy is under one of the various systems mentioned in S. 2 of that Ordinance. It is a matter of proof and evidence in every case and it is essential for the tenant to establish it by evidence, the onus of proving this being upon him. Where any particulars of a tenancy or of any system under which the tenancy is held are not known and it is not proved that the structures or any of them standing on the land are erected by the tenant, it cannot be said that the tenant is a "thika tenant" within the meaning of the Ordinance. 53 C.W.N. 553 and 640, rel. on. (*Harries, C.J. and Chatterjee, J.*) Suraj Jan Bibee *v.* Banku Behary Saha. 54 C.W.N. 281=A.I.R. 1950 Cal. 428.

——**S. 3, Proviso**—*Deposit under—Limitation—Taxed costs, if to be paid.*

Before a tenant can take the benefit of Ordinance II of 1948, he must deposit the amounts referred to in the proviso to S. 3 within 30 days from the date of the decree. The proviso does not require that the taxed costs have to be paid. All that is necessary is to pay such costs, if any, as the Court may direct. (*Banerjee, J.*) Haran Chandra Dey *v.* Charu Bala Dassi. 53 C.W.N. 553=84 C.L.J. 92.

CALCUTTA TRAMWAY ACT (I OF 1880), S. 21—Offer of rupee for fare with demand for change—If avoidance of payment. [*See* Q.D. 1941-1945, Vol. I, Col. 617.] Bireswar Banerji *v.* Emperor. I.L.R. (1945) 1 Cal. 262.

CANADA TEMPERANCE ACT, R.S.C. (1927), Cap. 196—*If within the legislative competence of the Parliament of Canada—True test*

of the validity of a legislation—The Board, if and when bound by its previous decisions.

The Canada Temperance Act, 1878, the object of which was to authorise the adoption of a system of local option in regard to the sale of intoxicating liquor in counties and cities throughout the dominion, has been amended from time to time by the Dominion Parliament and has been re-enacted in a consolidated form on more than one occasion under the provisions of the Acts relating to the statutes of Canada. The last revision took place in 1924 under the provisions of the Dominion Act, 1924, and now appears on the Statute Roll as the Canada Temperance Act, R.S.C. of 1927, Cap. 196. The material provisions of the Act of 1927 are admittedly identical with those of the Act of 1878. The constitutional validity of the 1878 Act was challenged in 1882 in *Russell's case,* (1882) 7 A.C. 829, but it was held that the Act did not deal with any of the matters exclusively reserved to the provinces and its validity was upheld on the ground that it related to the peace, order and good Government of Canada. On a question as to the validity of the Canada Temperance Act, R.S.C., 1927, Cap. 196, it was sought to challenge the decision of the Board in *Russell's case,* (1882) 7 A.C. 829, which had declared the Canada Temperance Act of 1878 to be within the legislative competence of the Dominion Parliament or at any rate to deny its applicability to the Act in question.

Held: The true test of the validity of a legislation must be found in the real subject-matter of the legislation; if it is such that it goes beyond local or provincial concern or interests and must from the inherent nature be the concern of the Dominion as a whole, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good Government of Canada, though it may in another aspect touch upon matters specially reserved to the Provincial Legislatures. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a Provincial Legislature dealing with an aspect of the same subject in so far as it specially affects that Province. In tendering humble advice to His Majesty, their Lordships are no doubt not absolutely bound by previous decisions of the Board, as is the House of Lords by its own judgments. But on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted upon both by Government and subjects. In the present case the decision now sought to be overruled, *i.e., Russell's case,* has stood for over sixty years; the Act has been put into operation for varying periods in many places in the Dominion; under its provisions businesses must have been closed, fines and imprisonments for breaches of the Act have been imposed and suffered. Time and again the occasion had arisen when the Board could have overruled the decision had it thought it wrong. Accordingly, the decision must be regarded as firmly embedded in the constitutional law of Canada and it is impossible now to depart from it. If the Act of 1878 was constitutionally within the powers of the Dominion Parliament it could not be successfully contended that the Act of 1927 which replaced it was *ultra vires*. Moreover, if the subject-matter of the legislation is such that it comes within the province of the Dominion Parliament that legislature must have power to re-enact provisions with the object of preventing a recurrence of a state of affairs which was deemed to necessitate the earlier statute. To legislate for prevention appears to be on the same basis as legislation for cure. Once it has been decided that the Act of 1878 was constitutionally valid, it follows that an Act which replaces it and consolidates therewith the various amending Acts that have from time to time been enacted must be equally valid. (*Viscount Simon.*) THE ATTORNEY-GENERAL OF ONTARIO *v.* THE CANADA TEMPERANCE FEDERATION. 225 I.C. 63=1946 P.C. (Rul.) 210=(1946) F.L.J. 50=50 C.W.N. 535=12 B.R. 635=1946 M.W.N. 419=A.I.R. 1946 P.C. 88 (P.C.).

CANTONMENTS ACT (II OF 1924), S. 3—*Building site—Acquisition by Government—Proof.*

Where the land in dispute is in the centre of the cantonment area and no other land in the centre of the area is privately owned, and in 1849-50 this land was either already built upon or was about to be built upon and the site was included in the plan of the land which Government was proposing to acquire, the proper conclusion is that the land was acquired by Government. (*Sir John Beaumont.*) SOHAN SINGH *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1947 P.C. 178.

———**S. 3**—*Building site—Private ownership—Proof.*

The fact that the person who owns a building situated in a cantonment area executed in favour of Government a mortagage or lease on a monthly tenancy of the building together with the site thereof, does not establish his title to the land. Although the person who prepared the mortgage believed that the mortgagor was the absolute owner of the land mortgaged, it cannot carry the matter very far when there is no statement in the mortgage which can bind Government by estoppel to admit the absolute ownership of the mortgagor. (*Sir John Beaumont.*) SOHAN SINGH *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1947 P.C. 178.

———**S. 108**—*Land vested in Board—Board, if has ownership as well—Contonment Land Administration Rules, R. 9.*

By R. 9 of the Cantonment Land Administration Rules, the management of the land vested, in the Board under S. 108 of the Cantonments Act is also vested in the Board so that the Board has both the ownership as well as the management. (*Malik, J.*) CANTONMENT BOARD, MEERUT *v.* L. KAMTA PRASAD. A.I.R. 1947 All. 243=1946 A.L.W. 458=1946 A.W.R. (H.C.) 83.

———**S. 187**—*Applicability—Conditions.*

Under S. 187 of the Cantonments Act, only projections or structures overhanging, projecting into, or encroaching on, any street or drain, sewer or aqueduct therein can be demolished. (*Malik, J.*) THE CANTONMENT BOARD, MEERUT *v.* KAMTA PRASAD. 1946 A.L.W. 458=1946 A.W.R. H.C.) 83=A.I.R. 1947 A. 243.

———**S. 267 (2)**—*Applicability and scope—Offence compounded—Offender not in custody—Procedure—Dropping of further proceedings.*

Where an offence of failure to comply with a notice under S. 267, Cantonments Act, is compounded, the executive officer of the Cantonment Board will be acting within his statutory powers if he applies to the Court for dropping further proceedings in the matter. It is only if the offender is in custody, he has to be discharged. But when he is not in custody no order of discharge is called for; it is sufficient if further proceedings are dropped. The fact, however, that the offender is not in custody does not exclude the operation of S. 267 (2), in so far as it provides that if an application has been made and an offence properly compounded, no further proceedings shall be taken against the offender. (*Davis, C.J. and Thadani, J.*) EMPEROR *v.* RIJHUMAL VALIRAM. 229 I.C. 174=1947 Sind (Rul.) 58=48 Cr.L.J. 300=A.I.R. 1937 Sind 128.

———**S. 272**—*Applicability—Bar of suit where notice under S. 187 of the Act was itself bad.*

S. 272 of the Cantonment Act would apply only to such cases where from the facts proved it appears that the notice was given by the Board according to the terms of the Act; that is if it had been held that the encroachment was on a public street then the Board would be justified in issuing a notice under S. 187 and no suit could be maintained against such an order. But where it is found that the notice itself was bad for the reason that the encroachments were not on a public street but were on the land belonging to the plaintiff and hence a notice under S. 187 was not justified, then S. 272 would have no application. (*Malik, J.*) THE CANTONMENT BOARD, MEERUT *v.* KAMTA PRASAD. 1946 A.L.W. 458=1946 A.W.R. (H.C.) 83=A.I.R. 1947 A. 243.

———**S. 273**—*Scope of the protection afforded by.*

It is to acts which the Cantonment Board has not merely authority but also the duty to perform, that is, acts which are enjoined upon the Board that the protection afforded by S. 273 of the Cantonments Act extends. Hence, where the Board makes an appointment which it was not statutorily bound to make but gives the person appointed a salary less than that which it was bound by its own rules to pay and is sued for the balance of pay, the provisions of S. 273 (1) of the Act could not be invoked in aid by the Board. (*Mulla and Yorke, JJ.*) RAMCHANDER SAHAI *v.* THE CANTONMENT BOARD OF MEERUT. 1946 A.W.R. (H.C.) 466=1946 A.L.W. 235 =A.I.R. 1947 A. 42=231 I.C. 288.

CARRIERS—*Carrier of passengers by air—Contract exempting liability for negligence of servants—Validity.*

A carrier of passengers by air can reasonably, if he thinks fit, refuse to carry any one save at the passenger's own risk. It does not matter for this purpose whether the carrier is a common or general carrier or not. His duty to carry for all and sundry according to his profession is something different from the terms on which he so carries. His general duty to exercise care may, subject to statutory restrictions, be superseded by a specific contract which may either enlarge, diminish or exclude it. He can by a special contract exempt himself from liability even for negligence of his servants provided there are no statutory conditions limiting his right, and such a contract cannot be pronounced unreasonable, invalid or illegal by a Court of Justice. (*Lord Wright.*) ALFRED WILLIAM LUDDIT *v.* GINGER COOTE AIRWAYS, LTD. 51 C.W.N. 498=1947 O.A. (P.C.) 27=1947 A.W.R. (P.C.) 27=1947 M.W.N. 353=60 L.W. 602=1947 A.L.J. 387=A.I.R. 1947 P.C. 151=(1947) 2 M.L.J. 237 (P.C.).

———*Common carrier—Duties and liabilities of—Law as to—Contract Act—Applicability—Bill of Lading—Clauses exempting from liability for loss or damage—Validity and effect.*

A common carrier's liability is not within the Indian Contract Act; the law relating to Carriers in India is not affected by that Act. Notwithstanding some general expressions in the chapter on bailments contained in the Contract Act, a common carrier's responsibility is not within the Act. The duties and liabilities of a common carrier in India are governed by the principles of the English Common law on the subject except where they have been departed from by the Carriers Act, or the Railways Act or the Carriage of Goods by Sea Act. It is open to a carrier under the law to protect himself by appropriate clauses from all liability regarding any loss or damage caused to the goods by him.

Where a Bill of Lading provides, ***inter alia,*** that the carrier shall not be liable for loss, damage or delay directly or indirectly resulting from Act of God, King's enemies, piracy, robbery, theft or pilferage with or without violence on board or elsewhere; breakage, leakage, vermin, sweat, rust, temperature of holds, climate, rain, injurious effect of other goods, whether by contact or otherwise however, perils, dangers and accidents of sea, rivers, navigation; any act, neglect or default whatsoever of . . . . in the loading, unloading or delivery of the cargo; on deck, shipper's risk, Steamer not responsible for breakage and leakage; it must be held that the carrier is immune from all liability whatever for shortage, damage or loss to the goods. A.I.R. 1928 Bom. 5; 10 Cal. 166; 18 Cal. 620 (P.C.); 38 Cal. 28; 28 Mad. 400; 32 Mad. 95 (F.B.); 38 Mad. 941; A.I.R. 1931 Sind 124, ref. (*Koshi and Govinda Pillai, JJ.*) ORIENT SHIP SUPPLY CO. *v.* KALMARSUND CO. 5 D.L.R. (T.C.) 346.

CARRIERS ACT (III OF 1865)—*Property delivered to common carrier not by consignor but by another carrier—Liability for loss or damage—Onus of proof.*

A common carrier cannot escape liability for loss or damage to property delivered to him to be carried merely by showing that he had not received it directly from the consignor but only from another carrier.

In view of the provisions of S. 9 of the Carriers Act, the burden is on the carrier to prove the absence of negligence on his part and all that the plaintiff-consignor is required to prove is the factum of the loss or damage in respect of which the liability of the carrier is said to arise. As the carrier cannot obviously be made liable for any loss or damage which might have occurred before the goods were actually entrusted to him for carriage, the condition of the goods as delivered to him and not as delivered at the station of origin must be proved and the onus of proof is on the plaintiff-consignor. (*Biswas, J.*) RIVER STEAM NAVIGATION CO., LTD. *v.* MANINDRA NATH. **51 C.W.N. 551.**

———Ss. 6 and 8—*Consignment booked at station of defendant Railway Co. for despatch to station on different railway—Defendant contracting to act only as forwarding agents of that railway—Loss of consignment on that railway—Liability of defendant.*

A consignment was booked at a station of the defendant railway company to be despatched to a station on a different railway. It was lost after it was made over by the defendant company to the other railway administration. Under the contract evidenced by the Parcels Consignment Note of the defendant Company, the latter agreed to act as common carriers over their own transport system only, and beyond that they agreed to transport the consignment as agents of the other railway and the contract was to be treated not as one indivisible contract, but as a series of contracts.

Held, that as the defendant company did not act, nor purport to act, as common carriers of the consignment over the other railway but merely acted as the forwarding agents of that railway, they were not liable for the loss of the consignment on that railway. 23 C.W.N. 998 and 31 C.W.N. 358, dist.; 28 C.W.N. 302 (P.C.), referred to. (*Thadani, C.J. and Ram Labhaya, J.*) INDIAN GENERAL NAVIGATION AND RAILWAY CO., LTD. *v.* KRISHNA KANTA DAS. A.I.R. 1949 Assam 25.

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—*Applicability—Hindu lady converted to Mahomedanism and marrying Mahomedan—Inheritance of husband's estate—Death of widow issueless—Her Hindu relations whether her legal representatives.*

A Hindu lady became converted to Islam and married a Muslim who predeceased her. She inherited a share of her husband's estate on his death and died issueless leaving her uterine brother, her step-brother and the children of her sister. It was conceded that the Muslim relations of the deceased through her husband were not her legal representatives so as to be impleaded in her place in the testamentary proceeding to which she was a party. The question was raised that her Hindu relations were enabled to inherit to and represent her by virtue of the Caste Disabilities Removal Act.

Held, that the Caste Disabilities Removal Act accorded protection only to the person who had renounced or had been excluded from the communion of his former religion and that it did not enable the Hindu relations of the deceased to be brought on record as her legal representatives. (*Rajamannar, O.C.J. and Satyanarayana Rao, J.*) MOHAMED ISMAIL SAIT *v.* ABDUL HAMEED SAIT. 61 L.W. 489=3 D.L.R. (Mad.) 58=1948 M.W.N. 501=A.I.R. 1949 Mad. 141=(1948) 2 M.L.J. 87.

CASTE "SABBA"—*Nature and incidents—If a club or unregistered society.*

A caste "*Sabba*" or association which is nothing more than a loosely knit caste organisation exercising certain ill-defined powers of discipline over its members does not partake of the nature of a "club" which essentially signifies a centre of social intercourse, and hence such a sabba cannot claim the privileges or immunities claimable by a club or unregistered society. (*Das and Ayyar, JJ.*) BALAKRISHNA PATRU *v.* BALU SUBUDHI. 14 Cut.L.T. 25=A.I.R. 1949 Pat. 184.

CATTLE TRESPASS ACT (I OF 1871), S. 10—*Damages—Nature of—If can be presumed.*

Damages required under S. 10 of the Cattle Trespass Act is not necessarily substantial damage; it may be nominal damages. When cattle enter a sugarcane field it can be presumed that in fact they would have committed damages. (*Agarwala, J.*) FAIYAZ KHAN *v.* REX. I.L.R. (1949) A. 211=1948 A.W.R. (H.C.) 296=A. I. R. 1949 A. 180=50 Cr.L.J. 232.

———S. 10—*Occupier—Person taking settlement of land for pasture—Right to seize cattle eating grass.*

A person with whom land is settled for the purpose of pasture may be regarded as the occupier of the land within the meaning of S. 10 of the Cattle Trespass Act; the grass standing on the land is the produce of the land, and the person with whom the land is settled for pasture is entitled to seize cattle eating the grass. (*Reuben and Dalziel, JJ.*) BIKRAM MAHTON *v.* EMPEROR. 226 I.C. 536=12 B.R. 785=A.I.R. 1947 Pat. 172=1946 P.W.N. 354=1946 Pat. (Rul.) 419=47 Cr.L.J. 986.

———S. 10—*Right of seizure—Cattle coming back within their owner's possession.*

In order to cover the act of the owner or occupier of a field who pursues a trespassing animal and captures it outside the field which has been damaged, the words "cattle trespassing on such land" in S. 10 of the Cattle Trespass Act have to be given an extended meaning and such an extension must be confined within reasonable limits. These words cannot be stretched to cover a case where the cattle had traversed a great distance from the field damaged and had come not merely constructively but actually within their owner's possession. It follows from this that in seizing or attempting to remove the animals in those circumstances, the act of the owner or occupier of the damaged field is not only not covered by S. 10 of the Cattle Trespass Act but it also amounts technically to an offence of theft. Consequently, the owners of the animals are entitled under S. 104, I. P. Code, to use force to any extent short of causing death in order to prevent the owner or occupier of the field from carrying out his purpose. (*Cornelius and Falshaw, JJ.*) JIWANA *v.* EMPEROR. A.I.R. 1947 Lah. 380.

———S. 20—*Award of costs to complainant.*

A complainant under S. 20, Cattle Trespass Act, may be allowed the costs of the proceeding, though not the pleader's fee, if any, incurred by him. 7 Mad. 345, ref. (*Ray, C.J.*) PADAMA CHARAN *v.* RANGADHAR DAS. 5 D.L.R. (Cut.) 6=4 A.I.Cr.D. 256=16 C.L.T. 51.

———S. 20—*Complaint—Contents of—Different heads of losses not specified—Effect—If fatal.*

The different heads of losses suffered by a complainant under S. 20, Cattle Trespass Act, must be specifically indicated in the petition of com- the complainant. But the fact that the petition plaint or at any rate in the evidence adduced for of complaint is silent on this point is no reason for throwing out the complainant's claim for compensation, provided he alleges and proves the same during the hearing and the opposite party gets an opportunity to plead and prove in reply. A.I.R. 1935 All. 925; 1928 Mad. 369; 1939 Oudh 37; 1930 Nag. 149; 1923 Pat. 292, ref. (*Ray, C.J.*) PADAMA CHARAN *v.* RANGADHAR DAS. 16 C.L.T. 51=4 A.I.Cr.D. 256=5 D.L.R. (Cut.) 6.

———S. 20—*Complaint under—Order of dismissal—If amounts to acquittal—Revision, if lies—Cr. P. Code, S. 4 (o).*

The effect of inclusion of any act in respect of which a complaint may be made under S. 20 of the Cattle Trespass Act in the definition of offence in S. 4 (*o*), Cr. P. Code, is to confer jurisdiction on a Magistrate to hear such complaints and to hold an enquiry into the wrongful seizure and detention of the cattle. The result of the enquiry, however, is not acquittal or conviction. A person against whom a complaint is made under S. 20 is not an accused; if the seizure is found to be wrongful he is not convicted of any offence and the amount of compensation which he is required to pay is not a fine. If, therefore, a District Magistrate sets aside an order of a subordinate magistrate imposing a fine and ordering compensation under Ss. 20 and 22 of the Cattle Trespass Act, his order does not amount to an acquittal of the accused and a revision is maintainable against his order. (*Sen, J.*) MATRU *v.* DHUNNILAL. I.L.R. (1950) Nag. 393=5 D.L.R. (Nag.) 77=4 A.I.Cr.D. 254=1950 N.L.J. 36.

———S. 20—*Jurisdiction—Order of compensation by Magistrate not competent to entertain complaint—Legality.*

An order of compensation awarded by a Magistrate other than the one before whom a complaint of illegal seizure is made and who is not competent to entertain the same is illegal and void under S. 20 of the Cattle Trespass Act. 23 Cal. 442, ref. (*Ray, C.J.*) PADAMA CHARAN *v.* RANGADHAR DAS. 5 D.L.R. (Cut.) 6=4 A.I.Cr.D. 256=16 Cut.L.T. 51.

———S. 20—Limitation—Computation of period of 10 days—Limitation Act, S. 14—Application of. *See* Limitation Act, S. 14. 5 D. L. R. (Cut.) 6.

———**S. 20**—*Revision—Interference by High Court.*

Where the compensation awarded under S. 20, Cattle Trespass Act, is excessive, the High Court's power to interfere in revision cannot be challenged. 126 I.C. 497, ref. (*Roy, C.J.*) Padama Charan *v.* Rangadhar Das. 5 D.L.R. (Cut.) 6=4 A.I.Cr.D. 256=16 C.L.T. 51.

———**S. 22**—*Award of compensation under S. 545 (1) (a), Cr. P. Code—Legality.*

What is awarded to the complainant under S. 22 of the Cattle Trespass Act is compensation which is not a fine as contemplated by S. 545 (1), Cr. P. Code. An award of compensation under S. 545 (1) (*a*), Cr. P. Code, in such a case is, therefore, illegal and without jurisdiction. (*Padhye, J.*) William Roger Fernandez *v.* Emperor. 1948 N.L.J. 394=3 D.L.R. (Nag.) 61=A.I.R. 1949 Nag. 136=50 Cr.L.J. 335.

———**Ss. 22 and 23**—*Imprisonment in default of payment of compensation—If may be ordered—Cr. P. Code, S. 545 (1) (b)—If applicable.*

The person who is held liable under S. 22 of the Cattle Trespass Act is not "an accused" nor is he "convicted" of the "offence". Under S. 22 of the Act compensation together with fines and expenses, can only be ordered against the person who is adjudged liable. This money is recoverable under S. 23 of the Act as if it were a fine. No imprisonment can be ordered in default of payment of this money. Similarly, S. 545 (1) (*b*), Cr. P. Code, is not applicable. All the necessary powers are given by S. 22 of the Act. (*Hidayatullah, J.*) Ghulba Lahanu *v.* Emperor. 1948 N.L.J. 389=3 D.L.R. (Nag.) 63=A.I.R. 1949 Nag. 117=50 Cr.L.J. 289=I.L.R. (1948) Nag. 620.

———**S. 24**—*Forest in a zamindari treated as reserve forest for some purposes by the application of Ss. 26 and 32 of the Madras Forest Act—Zamindar's Range Officer seizing trespassing cattle—Rescue of such cattle—Offence.*

When a forest in a zamindary is for some purposes treated as a reserve forest by the application of Ss. 26 and 32 of the Madras Forest Act, the Zamindar is still the owner and occupier of the same. The forest has not been taken over by the Government as a reserve forest to which all the provisions of the Madras Forest Act are extended. A Range Officer appointed by the zamindar for the forest is in charge of the forest under the occupier who is the zamindar, and is entitled to seize cattle trespassing on land under his charge. People rescuing such cattle which have been thus lawfully seized commit an offence punishable under S. 24 of the Cattle Trespass Act. (*Govinda Menon, J.*) Sathirnalan, *In re.* 1948 M.W.N. 407=61 L.W. 483=A.I.R. 1948 Mad. 467=49 Cr.L.J. 689=4 D.L.R. (Mad.) 19=3 A.I.Cr.D. 92=(1948) 1 M.L.J. 428.

CAUSE OF ACTION. *See* C. P. Code, S. 20.

———*Meaning of.*

Cause of action has no relation whatsoever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as to cause of action, or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. Cause of action means the whole bundle of material facts which it is necessary for the plaintiff to prove in order to entitle him to succeed in the suit. In a restricted sense, the words "cause of action" mean the circumstances forming the infringement of the right or the immediate occasion for the action, and, in a wider sense, those words mean the necessary conditions for the maintenance of the suit including not only the infraction of the right but the infraction coupled with the right itself. This expression means every fact which might be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. 16 C. 98 (P.C.) and I.L.R. (1941) 2 Cal. 477, ref. to. (*Kartar Singh, J.*) Ganda Singh *v.* Zora Singh. A.I.R. 1950 Pepsu 21=5 D.L.R. Pepsu 3.

———*Crown servant—Wrongful dismissal—Suit to declare* ultra vires *and for arrears of salary—Re-instatement pending suit and order of suspension—Dismissal of suit—Legality—Decree for arrears of salary—Right to.*

Where a servant of the Crown is dismissed from service, and files a suit challenging the dismissal as *ultra vires* and wrongful and for arrears of salary, but pending suit the plaintiff is reinstated in service, but again suspended, and the plaintiff in his evidence also says that he is still in service, the suit cannot be dismissed in its entirety on the ground that he has no cause of action because he is still in service though under suspension.

The plaintiff has a cause of action for the salary due to him up to the date of the suit and the suit for arrears of salary is maintainable and the plaintiff is entitled to a decree for the arrears of salary so due to him. 10 F.L.J. 56, foll. 75 I.A. 225; 75 I.A. 343, expl. (*Manohar Lall and Mahabir Prasad, JJ.*) Abdul Majid *v.* Province of Bihar. 28 Pat. 562=30 P. L. T. 332=A.I.R. 1950 Pat. 17=4 D.L.R. (Pat.) 196.

CENTRAL PROVINCES ACTS, ETC.

(And Berar) Board of Revenue Act.

(And Berar) Board of Revenue Ordinance (1948).

(And Berar) Collection of Information and Letting of Houses Order (1946).

Consolidation of Holdings Act.

Co-operative Societies Act.

Court of Wards Act (XXI of 1899).

Courts Act.

(And Berar) Criminal Procedure Amendment Ordinance (II of 1948).

(And Berar) Debt Conciliation Act (II of 1933).

Debt Relief Act. *See* C. P. Relief of Indebtedness Act.

Entertainment Duty Act (XXX of 1936).

(And Berar) Excise Act (I of 1915).

(And Berar) Food Grains Control Order (1945).

(And Berar) House Rent Control Order (1947). *See also* C. P. & BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (1946).
Land Revenue Act (XVIII of 1881).
Land Revenue Act (II of 1917).
Local Funds Audit Act (1933).
Local Self-Government Act (IV of 1920).
(And Berar) Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act.
(And Berar) Maintenance of Public Order Act (1946).
Money Lenders Act (XIII of 1934).
Municipalities Act (II of 1922).
(And Berar) Oil Cake (Control) Order.
(And Berar) Provincial Co-operative Bank Bye-laws.
(And Berar) Public Safety Act (XXXVIII of 1947).
(And Berar) Public Safety Act (LXII of 1948).
Reduction of Interest Act (XXXII of 1936).
(And Berar) Reduction of Interest (Amendment) Act (X of 1938).
(And Berar) Regulation of Letting of Accommodation Act (1946).
(And Berar) Relief of Indebtedness Act (XIV of 1939).
(And Berar) Sales Tax Act (1947).
(And Berar) States Land Tenure Order.
Revenue Book Circular.
(And Berar) Temple Entry Authorization Act, S. 8 (2) (c).
Tenancy Act (XI of 1898).
Tenancy Act (I of 1920).
(And Berar) Tobacco Act (VIII of 1939).
(And Berar) Village Panchayat Act.

C. P. & BERAR BOARD OF REVENUE ACT, S. 6—*Order under Panchayats—Power of Board of Revenue.*

The Board of Revenue has no jurisdiction to take up cases under the C. P. and Berar Panchayats Act, 1946, either in appeal or in revision. (*Bambawale.*) VINAYAK *v.* GRAM PANCHAYAT SOIT. 1949 N.L.J. 585.

———**Ss. 7 (1) and 11**—*Rules framed under, R. 23—"Date of order"—Meaning of.*

The words "the date of the order" in R. 23 of rules made by the Board of Revenue under Ss. 7 (1) and 11 of the C. P. and Berar Board of Revenue Act, must be interpreted to mean the date on which the order was known to the party. An aggrieved party cannot be expected to proceed to take any action with regard to filing an application for revision against an order unless and until he comes to know of it. (*Bambawale.*) GOPAL VITHOBA *v.* PURUSHOTTAM. 1949 N.L.J. 325.

C. P. AND BERAR BOARD OF REVENUE ORDINANCE (1948), S. 6 and Schedule—*Powers of Board of Revenue—Cases invoking leases granted under S.* 55 (1) (d), *Berar Land Revenue Code.*

The power to dispose of cases involving leases granted by the Provincial Government under S. 55 (1) (*d*), Berar Land Revenue Code, not being specially delegated to the Board, it is not the Board's function to deal with them or with any matter connected with them. (*Bambawale and Sanyal.*) GANGABAI MOHTA, *In re.* 1949 N.L.J. 465.

C. P. AND BERAR COLLECTION OF INFORMATION AND LETTING OF HOUSES ORDER (1946)—*If* ultra vires.

The C. P. and Berar Collection of Information and Letting of Houses Order made under S. 2 of the C. P. and Berar Regulation of Letting of Accommodation Act, 1946, is *intra vires* of the Act. (*Hemeon, J.*) SHIVDAS SINGH *v.* CROWN. I.L.R. (1949) Nag. 396=1949 N.L.J. 38=4 D.L.R. (Nag.) 68=A.I.R. 1949 Nag. 140=3 A.I.Cr.D. 294=50 Cr.L.J. 343.

———**Cl. 3 (1)**—*Applicability—New buildings.*

The words "Every landlord of a house" in Cl. 3 (1) of the C. P. and Berar Collection of Inormation and Letting of Houses Order, mean every landlord of a building or part of a building, having regard to the definition of the word "house" in Cl. 2 (*a*) of the order. Clearly enough, these words do not merely refer to an old building or part of an old building alone, but to a building or part of a building, whether new or old. (*Hemeon, J.*) SHIVDAS SINGH *v.* CROWN. I.L.R. (1949) Nag. 396=1949 N.L.J. 38=4 D.L.R. (Nag.) 68=A.I.R. 1949 Nag. 140=3 A.I.Cr.D. 294=50 Cr.L.J. 343.

CENTRAL PROVINCES CONSOLIDATION OF HOLDINGS ACT, S. 26—*Powers of Tribunal—Nature of.*

S. 26 of the Consolidation of Holdings Act confers supervisory powers and not appellate or revisional powers. It is not intended that under those powers the Revenue Tribunal should adjudicate on disputes relating to a consolidation. It is only intended to secure that the provisions of the Act are complied with. (*Jayaratnam, F. C.*) TENANTS OF MOUZA OKHAR, *In re.* 1948 N.L.J. 192.

CENTRAL PROVINCES CO-OPERATIVE SOCIETIES ACT, R. 26—*Scope "Touching the business of a co-operative society"—Ex-member—Trading contrary to rules of society—Imposition of fine by society—Validity—Suit in Civil Court to challenge—If barred.*

Where a member of a Co-operative Society tenders his resignation, he ceases to be a member of the society and the rules of the society no longer bind him. If he thereafter trades in a manner contrary to the rules of the society, the society has no power to impose a fine upon him, and the imposition of such a fine is not a matter touching the business of the society, within the meaning of R. 26 of the rules under the C. P. Co-operative Societies Act. The imposition of a fine in such a case being *ultra vires*, Civil Courts have jurisdiction to entertain a suit challenging the imposition of the fines. (*Pollock and Padhye, JJ.*) VINKAR MANDAL *v.* NARAYANRAO. I.L.R.

(1948) Nag. 449=A.I.R. 1948 Nag. 327=2 D.L.R. 921=1948 N.L.J. 285.

CENTRAL PROVINCES COURT OF WARDS ACT (XXI OF 1899), S. 12—*Court of Wards taking over management of defendant's estate while suit pending—Defendant abandoning contention under S. 12 (2)—Compromise decree—Validity—Whether can be challenged in execution proceedings.*

The Court of Wards assumed superintendence of the defendant's estate while the suit was pending against him. The plaint was amended accordingly and the Court of Wards was shown as the guardian *ad litem* of the defendant. The defendant contended that the claim of the plaintiff should be deemed to have been discharged under S. 12 (2) on the ground that the claim had not been submitted within six months as required by S. 12 (1). Later on the parties compromised the claim and a decree was passed in terms of that compromise directing the defendant to pay a certain sum by a certain date with interest in case of default from the date of suit till satisfaction.

Held, that as the defendant had abandoned the contention under S. 12 (2), the Court had jurisdiction to pass the decree that it passed on the consent of the parties, and whether the Court had jurisdiction to pass that decree or not, the validity of the decree could not be challenged in execution proceedings. *(Pollock, J.)* LAL NAGENDRA SHAH *v.* SETH BACHHARAJ. I.L.R. (1947) Nag. 576=230 I.C. 66=1947 Nag. (Rul.) 140=A. I. R. 1948 Nag. 70=1947 N.L.J. 232.

CENTRAL PROVINCES COURTS ACT, S. 17 (1) (a)—*"Original proceeding"—If includes execution proceeding.*

The term "original proceeding" in S. 17 (1) (*a*), C. P. Courts Act, is used in contradistinction to the term "appeal" used in S. 20 of that Act, and includes an execution proceeding. *(Mudholkar, J.)* JAGANATH *v.* GULABSINGH. I.L.R. (1949) Nag. 981=5 D.L.R. (Nag.) 57=A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

——**Ss. 17 (1) (a) and 22**—*Inherent jurisdiction of Civil Judge (class II)—If affected by Distribution Memorandum of District Judge.*

It is clear from the provisions of S. 17 (1) (a) of the Central Provinces Courts Act that the Court of a Civil Judge, Class II, has jurisdiction "to hear and determine any suits or original proceeding of a value not exceeding Rs. 5,000". It is true that for reasons of convenience a District Judge has power under S. 22 of that Act to direct that any civil business cognisable by the Courts under his control shall be distributed among these Courts in such manner as he thinks fit. But this provision does not take away the inherent jurisdiction of a Court under the control of a District Judge "to hear and determine any suit or original proceeding which the C. P. Courts Act empowers it to entertain. *(Mudholkar, J.)* JAGANATH *v.* GULABSINGH. I.L.R. (1949) Nag. 981=5 D.L.R. (Nag.) 57=A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

CENTRAL PROVINCES AND BERAR CRIMINAL PROCEDURE (AMENDMENT) ORDINANCE (II OF 1948), S. 2—*Scope—If* ultra vires—*Government of India Act* (1935), *S.* 100 (1) *and Schedule* 7, *List* 1, *Items* 29 *and* 42 *and List* 3, *Item* 2.

S. 2 of the C. P. and Berar Crl. Procedure (Amendment) Ordinance, 1947, is not *ultra vires* the Provincial Legislature. The pith and substance of the section lies entirely within item 2 of the Concurrent List, relating to Crl. Procedure. The fact that it incidentally touches upon a field reserved for the centre does not render it *ipso facto ultra vires*. When the power to enact the legislation is to be found in either the Prvincial or the Concurrent List, then the incidental overlapping does not necessarily render that law ineffective. *(Hemeon and Hidayatullah, JJ.)* SYED RAONAKALI *v.* CROWN. I.L.R. (1948) Nag. 785=A.I.R. 1949 Nag. 16=50 Cr.L.J. 84=3 D.L.R. (Nag.) 69.

CENTRAL PROVINCES AND BERAR DEBT COUNCILIATION ACT (II OF 1933), S. 2 (e)—*"Debt"—Decree for land revenue payable by defendant but paid by plaintiff—Amount due under—If "debt".*

The definition of "debt" in S. 2 (*e*) of the C. P. Debt Conciliation Act is wide enough to include the amount due under a decree for arrears of land revenue payable by the defendant but paid by the plaintiff. The land revenue having been paid to Government ceases to be land revenue, and the liability of the judgment-debtor to the decree-holder is one arising under S. 69, Contract Act. The decree is not a decree in a suit for land revenue so as to exempt the same from the definition of "debt". *(Hidayatullah, J.)* SUJANSING AJIT SINGH *v.* RAMCHANDRARAO. I.L.R. (1948) Nag. 559=1948 N.L.J. 140=A.I.R. 1949 Nag. 104=2 D.L.R. 244.

——**S. 2 (e)**—*"Debt"—Liability of guardian to pay sum taken from minor while he was his guardian.*

"Debt" as defined in S. 2 (*e*) of the C. P. and Berar Debt Conciliation Act is wide and comprehensive and includes the liability of a guardian of minor's property to pay to the minor the sum which he had taken from him while he was his guardian and which he had not repaid. (1936) N.L.J. 17, dist. *(Bose and Sen, JJ.)* MIRABAI *v.* KAUSHALYABAI. I.L.R. (1948) Nag. 794=A.I.R. 1949 Nag. 235=4 D.L.R. (Nag.) 20=1949 N.L.R. 154.

——**S. 2 (e)**—*'Debt'—Mortgage-debt merging into preliminary decree.*

A mortgage-debt does not cease to be a "debt" within the meaning of S. 2 (*e*) of the Debt Conciliation Act merely because it has merged into a preliminary decree for foreclosure. *(Shevde, J.)* LUNGYA BALYA DHANGAR *v.* BANSILAL PUSARAM. I.L.R. (1948) Nag. 555=A.I.R. 1948 Nag. 312=1949 N.L.J. 320.

——**S. 7 (2)**—*Failure to issue notice—Proceedings before Board—If void.*

The notice under S. 7 (2) of the C. P. Debt Conciliation Act is not the *sine qua non* of the admission of the application, and the failure to issue such notice cannot, therefore, render the proceedings of the Board null and void. 1941 N.L. J. 220, overruled. (*Hemeon, Sen and Hidayatullah, JJ.*) SEWAKRAM CHANDRIDUTT *v.* NAKCHAND MADHORAM. I.L.R. (1948) Nag. 1= A.I.R. 1948 Nag. 211=2 D.L.R. 463=1948 N. L.J. 181 (F.B.).

———**S. 7-A**—*Jurisdiction of Board—If and when can be challenged in Civil Court.*

If the application is on the face of it an application under S. 4 of the Debt Conciliation Act and no objection is taken to the Board's jurisdiction, or if an objection is taken on the ground that the applicant is not a "debtor" within the meaning of the Act or that he has no holding, land or village in the area for which the Board has been appointed or that his debts exceed Rs. 50,000 and the Board holds otherwise, then clearly the Board's decision on such a point is final and, whether that decision is right or wrong, the Board's jurisdiction cannot be challenged in the Civil Courts. If, however, the Board were to hold that the applicant was not an agriculturist or that his debts exceeded Rs. 50,000 but that it was a deserving case and that they considered they ought to entertain the application, then the jurisdiction thus assumed by the Board could be challenged in a Civil Court; and the position would be the same if the Board assumed jurisdiction, when on the admitted facts it clearly had no jurisdiction. S. 7-A of the Act applies where the application is on the face of it an application under S. 4; but where on the face of it is an application which could not be made under S. 4, then the Board cannot confer on themselves a jurisdiction that they do not possess. (*Pollock and Sen, JJ.*) BALDEO SAHAI *v.* ABDUL HUSSAIN ABDUL ALI. I.L.R. (1946) Nag. 557= 225 I.C. 252=1946 N.L.J. 267=A.I.R. 1946 Nag. 249.

———**S. 8 (1) and (2)**—*Furnishing of statement under S. 8 (1)—Particulars not furnished—Debts if automatically discharged.*

S. 8 (1) of the C. P. Debt Conciliation Act requires no more than the furnishing of a statement of the debts and when that is done, the failure to furnish particulars of the debt cannot have the effect of automatically discharging the debt under S. 8 (2). The latter sub-section makes no mention whatever of the furnishing of full particulars of the debt. (*Grille, C.J.*) SUNDERBAI MOTILAL *v.* POORANSAO KISAN SAO. I.L.R. (1948) Nag. 441=A.I.R. 1949 Nag. 111=3 D.L.R. (Nag.) 55=1948 N.L.J. 248.

———**S. 12**—*Agreement registered under—When may be avoided.*

The only ground on which an agreement having the force of a decree registered under S. 12 of the C. P. Debt Conciliation Act by a Board with initial jurisdiction can be set aside is the ground of fraud. (*Padhye, J.*) JAGORAMA *v.* NARAYAN SADORA. I.L.R. (1947) Nag. 985= A.I.R. 1948 Nag. 150=1948 N.L.J. 65.

———**Ss. 12 and 13 (3)**—*Agreement with several creditors—One of them obtaining certificate—Effect of—Agreement, if ceases to subsist in respect of all.*

S. 13 of the C. P. Debt Conciliation Act concerns itself with an application by a single creditor who has been disappointed of his instalment which was agreed to by the agreement mentioned in S. 12. It does not concern itself with the whole of the creditors as a body. Therefore the certificate is granted under S. 13 (3) in respect of what the individual creditor claims and the agreement which ceases to subsist must be interpreted as being only the particular agreement between the particular creditor who applied and the debtor. So far as S. 12 is concerned the agreement is certainly one and indivisible, but so far as S. 13 is concerned "the agreement" is to be interpreted as the agreement between the individual creditor and the debtor. (*Grille, C.J.*) ASGAR ALI *v.* SULAIMANJI. I.L.R. (1947) Nag. 150=1947 Nag. (Rul.) 44=228 I.C. 361=1947 N.L.J. 49=A.I.R. 1947 Nag. 177.

———**Ss. 12 (2) and 13 (4)**—"Decree"—Legal fiction. [*See* Q.D. 1941—1945, Vol. I, Col. 626.] RATAN SINGH *v.* RAGHURAJ SINGH. I. L.R. (1945) Nag. 975=A.I.R. 1946 Nag. 30.

———**S. 13 (3)**—*Second certificate—Issue of—Permissibility.*

Under S. 13 (3) of the C. P. Debt Conciliation Act, there is no legal objection to the issue of a second certificate. (*Ramsden, F.C.*) ASGHAR ALI *v.* MST. MUNNI BAI. 1947 N.L.J. 169.

———**Ss. 15 and 21**—*Certificate granted to judgment-debtor—If enures for benefit of surety.*

A certificate granted to the judgment-debtor under S. 15 of the Debt Conciliation Act does not enure for the benefit of the surety, and the surety is not entitled to a postponement of execution against him. The liability of a surety and the liability of a principal debtor are separate liabilities. (*Grille, C.J. and Puranik, J.*) BIRDICHAND *v.* MT. KACHRI BAI. I.L.R. (1946) Nag. 353= 225 I.C. 355=1946 N.L.J. 74=A.I.R. 1946 Nag. 135.

———**S. 15 (1) and (2)**—*Applicability—Condition—Actual issue and production of certificate—If condition precedent to imposition of penalty.*

In order to entitle a debtor to claim the imposition of penalty on his creditor under S. 15 (1) and (2) of the C. P. Debt Conciliation Act, *viz.*, disallowance of costs and interest, the debtor must produce the certificate. The actual issue of the certificate is a *sine qua non* for penalising the creditor. It is not sufficient that an order for the issue of a certificate was made under S. 15. It is the duty of the debtor to apply for the grant of the certificate in the prescribed form and to produce it. If he fails to do so, for whatever reason, he has himself to thank, and cannot have the privilege of an order imposing a penalty on the creditor. (*Niyogi and Sen, JJ.*) PYARELALSA *v.* CHAMPALAL. I.L.R. (1947) Nag. 131=228 I. C. 457=1947 Nag. (Rul.) 46=1947 N.L.J. 385= A.I.R. 1947 Nag. 201.

———**S. 15 (3)**—*Debtor transferring property to creditor under agreement under S. 12—Arrears of municipal taxes subsequently recovered from* *creditor—Decree obtained by creditor against debtor for amount so recovered—Whether can be executed.*

Where in pursuance of an agreement registered under S. 12 (2) of the Central Provinces Debt Conciliation Act a debtor transferred his property to his creditor in satisfaction of his debt and agreed that he would be liable to the creditor if any arrears of municipal taxes due from the property transferred were realised from the creditor, a decree subsequently obtained by the creditor against the debtor for the amount recovered from him as arrears of taxes is hit by S. 15 (3) of the Act, and could not, therefore, be executed until all amounts payable under the agreement had been paid or such agreement had ceased to subsist. Although the liability to pay the arrears of taxes was incurred by the debtor as soon as they became payable before the date of the agreement, the arrears of taxes did not become a debt owing to the creditor until they were recovered from the latter after the registration of the agreement under the Act. (*Pollock and Padhye, JJ.*) MAHENDRA KUMAR *v.* MOJILALSA. I.L.R. (1948) Nag. 606=A.I.R. 1949 Nag. 8=4 D.L.R. (Nag.) 60.

———**S. 21**—*Board failing to issue certificate for stay of proceedings in civil suit—Decree passed by civil Court—Subsequent discharge of debt by Board under S. 8 (2)—Debtor, if estopped from questioning decree—Evidence Act, S.* 115.

It is quite clear from the provisions of S. 21 of the Debt Conciliation Act that the statutory duty is cast upon the Board to issue a certificate of suspension of civil suit proceedings, pending the determination of the application filed before it. It is the business of the Board to issue such a certificate *suo motu*. The only responsibility that lies upon the debtor is to bring it to the notice of the Board that some suit or proceeding is pending in a civil Court. If the debtor mentions in his application to the Board for conciliation of a mortgage-debt that it is the subject-matter of a suit, and if in spite of this definite notice the Board does not issue a certificate for stay of proceedings in the civil suit with the result that a preliminary decree for foreclosure is passed by the civil Court, the debtor is not estopped from questioning the preliminary decree although he was a party thereto, if the Board subsequently discharges the debt of the plaintiff under S. 8 (2) of the Act.

If the order of discharge under S. 8 (2) of the Act is *intra vires*, the decretal amount is wiped out by operation of law. The preliminary decree for foreclosure is dead as against the debtor and it cannot certainly be revived on the ground of estoppel. Estoppel is always personal and the failure to obtain a certificate is not the fault of the debtor but the mistake of the Board. It is certainly not the result of any personal acts or representations on his part and it cannot possibly serve as the basis for the plea of estoppel. Further as the preliminary decree is wiped out by operation of law, there can be no estoppel against a statute. (*Shevde, J.*) LUNGYA BALYA DHANGAR *v.* BANSILAL PUSARAM. I.L.R. (1948) Nag. 555=A.I.R. 1948 Nag. 312=1949 N.L.J. 320.

———**Ss. 21 and 15**—*Stay of proceedings by executing court—Production of copy of order sheet directing issue of certificate—If sufficient.*

Under the scheme of the C. P. Debt Conciliation Act the executing court can only stay its hands if the certificate granted by the Board under S. 15 (1) is filed by the judgment-debtor as required by the proviso to S. 21. No other form of proof is possible except the production of the certificate. A certified copy of the order-sheet of the Board directing that a certificate be issued cannot be accepted as an equivalent of the certificate. (*Hidayatullah, J.*) GOVINDRAM HARDATRAI *v.* JAGO LAXMAN. I.L.R. (1948) Nag. 384=A.I.R. 1949 Nag. 42=1948 N.L.J. 125.

———**S. 23**—*Applicability—Board having no jurisdiction to entertain application.*

S. 23 of the Debt Conciliation Act applies even in cases in which the Board is later found to have no jurisdiction to entertain the application. I.L.R. (1944) Nag. 244 and I. L. R. (1947) Nag. 572, foll. (*Bose, Ag. C. J. and Sen, J.*) RAMGOPAL *v.* RAMCHANDRA. I.L.R. (1949) Nag. 284=A.I.R. 1949 Nag. 354=1949 N.L.J. 344.

———**S. 23**—*Exclusion of time under—Execution of decree—C. P. Code, S.* 48.

In computing the period of 12 years prescribed by S. 48, C. P. Code, for execution of a decree, the time spent on proceedings before a Debt Conciliation Board is to be deducted under S. 23 of the C. P. Debt Conciliation Act in addition to any period that may be excluded under S. 15 (1) of the Limitation Act. (*Grille, C.J. and Sen, J.*) BISMILLAH *v.* JAGANNATH. I. L. R. (1947) Nag. 25=228 I.C. 576=1947 Nag. (Rul.) 61=1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

———**S. 23**—*Prior mortgagee applying to Board impleading subsequent mortgagee—Debt of latter, if becomes subject of proceedings before Board.*

The moment an application is made to a Board and the existence of certain debts is brought to its notice, those debts form the subject-matter of the proceeding before the Board irrespective of who makes the application and institutes the proceedings. If, therefore, a prior mortgagee applies to the Board impleading a subsequent mortgagee, the debt of the latter becomes the subject of proceedings before the Board within the meaning of S. 23 of the Central Provinces Debt Conciliation Act. Consequently the subsequent mortgagee is entitled under that section to exclude the period of the debt conciliation proceedings in calculating the period of limitation for a suit on his mortgage. (*Bose, J.*) TUKARAM *v.* TUKARAM. I.L.R. (1946) Nag. 783=224 I.C. 49=1946 Nag. (Rul.) 137=1946 N.L.J. 203=A.I.R. 1946 Nag. 271.

———**S. 23**—*"Proceedings under the Act"—If include proceedings wrongly begun before Board.*

A proceeding wrongly begun before the Board is no less a proceeding under the Central Provinces Debt Conciliation Act and the time spent before the Board can be deducted under S. 23 of that Act. (*Hidayatullah, J.*) SHEOLAL RAMLAL *v.* RAMRAO BALA. I.L.R. (1947) Nag. 572=A.I.R. 1948 Nag. 197=1947 N.L.J. 399.

———**S. 23**—*"Time during which such proceedings had continued"—Interpretation of—Date of registration—If date of termination—Receipt of registered agreement in office of Board and Order to file—If part of proceedings—Exclusion of time*

The proceedings before a Debt Conciliation Board, initiated on an application made by a debtor must be deemed to be effective proceedings until the agreement is actually registered. The expression "the time during which such proceedings had continued" in S. 23 of the C. P. and Berar Debt Conciliation Act necessarily postulates effective proceedings which call for the exercise of some judicial act as distinguished from a ministerial or a clerical act. When the agreement embodying the scheme of conciliation of debts is registered, the whole proceedings before the Debt Conciliation Board come to an end altogether. Mere receipt of the registered agreement in the office of the Board from the office of the Registering Officer, and a mere order to file papers cannot be regarded as proceedings before the Board so as to exclude also the period from the date of registration to the date of the order to file the papers. (*Shevde, J.*) MUNGALAL *v.* SYED MAKSUDDIN. I. L. R. (1948) Nag. 445=1948 N.L.J. 539=A. I. R. 1948 Nag. 411=3 D.L.R. (Nag.) 66.

C. P. DEBT RELIEF ACT. *See* C. P. (AND BERAR) RELIEF OF INDEBTEDNESS ACT (XIV OF 1939).

CENTRAL PROVINCES ENTERTAINMENTS DUTY ACT (XXX OF 1936), S. 8—*Rules framed under, R.* 18—*If* ultra vires.

Rule 18 of the Rules framed under S. 8 of the Entertainments Duty Act does not restrict the issue of complimentary tickets and is clearly within the rule-making powers conferred on Government by S. 8 (2) (*d*) of the Act. (*Mudholkar, J.*) GAJANAN TALKIES, BULDANA *v.* THE STATE. I.L.R. (1950) Nag. 895=5 D.L.R. (Nag.) 150=4 A.I.Cr.D. 488=A.I.R. 1950 Nag. 193=51 Cr.L.J. 1362=1950 N.L.J. 367.

———**S. 8**—*Rules framed under, R.* 18—*Maximum percentage of complimentary admissions—Mode of determination.*

There is no warrant for taking the aggregate of the total accommodation of all the shows held in a particular day for arriving at the maximum percentage of complimentary admissions on that day. Rule 18 speaks of "admission to an entertainment" which means nothing more than "a show". It does not mean *all the shows* held on a particular day. (*Mudholkar, J.*) GAJANAN TALKIES, BULDANA *v.* THE STATE. I.L.R. (1950) Nag. 895=5 D.L.R. (Nag.) 150=4 A.I.Cr.D. 488=A.I.R. 1950 Nag. 193=51 Cr.L.J. 1362=1950 N.L.J. 367.

C. P. (AND BERAR) EXCISE ACT (I OF 1915), S. 34 and S. 162, Cr. P. Code—Excise Sub-Inspector obtaining signatures of witnesses on their statements during investigation—Evidence of such witnesses—If admissible. [*See* Q. D. 1941—1945, Vol. I, Col. 632.] BHIKARILAL *v.* EMPEROR. 46 Cr.L.J. 710=18 R.N. 64.

CENTRAL PROVINCES AND BERAR FOOD GRAINS CONTROL ORDER (1945), Cl. 3 (1)—Partnership—Contravention by one partner—Liability of other partner or partners—*Mens rea*—Proof of. *See* ESSENTIAL SUPPLIES (TEMPORARY POWERS) ACT, S. 3. I.L.R. (1949) Nag. 488.

CENTRAL PROVINCES AND BERAR HOUSE RENT CONTROL ORDER (1947), Para. 13—Applicability—Pending proceedings. *See* C. P. & BERAR REGULATION OF LETTING OF ACCOMMODATION ACT, 1946. 1948 N.L.J. 323.

———**Cl. 14**—*Applicability—If limited to direct interference—Water supply cut off on application by landlord—Liability of landlord.*

Cl. 14 of the C. P. and Berar House Rent Control Order is not restricted to direct interference by the landlord with water connections. Interference of any kind which materially affects the tenant's enjoyment of the premises is prohibited by Cl. 14. The prohibition applies also to indirect interference by the landlord, *e.g.*, through the Municipality. Where therefore the landlord sends an application to the Municipality as a result of which the water supply to the house is cut off, the landlord renders himself liable under Cl. 14. (*Hemeon, J.*) GULABCHAND BHAGIRACHA *v.* EMPEROR. I.L.R. (1948) Nag. 365=2 D.L.R. 913=A.I.R. 1948 Nag. 414=49 Cr.L.J. 623=1948 N.L.J. 439.

———**Cl. 14**—*Scope—If* ultra vires.

Cl. 14 of the C. P. and Berar and House Rent Control Order (1947), is clearly designed to place restrictions on a landlord's powers of intermeddling with a tenant's conveniences in such a manner that the latter's enjoyment of the premises let to him is materially affected thereby; and the provisions of Cl. 14 are covered by S. 2 of the C. P. and Berar Regulation of Letting of Accommodation Act of 1946. It cannot therefore be contended that Cl. 14 of the C. P. and Berar House Rent Control Order is *ultra vires.* (*Hemeon, J.*) GULABCHAND BHAGIRACHA *v.* EMPEROR. I.L.R. (1948) Nag. 365=2 D.L.R. 913=A.I.R. 1948 Nag. 414=49 Cr.L.J. 623=1948 N.L.J. 439.

CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881)—*Protected status—Whether can be conferred on* garhtias.

Protected status cannot be conferred on *garhtias* for the reason that they are not proprietors. (*Rau, F.C.*) RAMNARAYAN *v.* THAKER LAL. 1947 N.L.J. 215.

———**S. 24**—*Tenant ejected in execution of rent decree—Ejectment order set aside on appeal—Application by tenant for mesne profits—Jurisdiction of executing Court—C. P. Code, Ss.* 47 *and* 144.

A tenant, was ejected in execution of a rent decree but the ejectment order was set aside on appeal, and the tenant was placed in possession. Subsequently the tenant applied for mesne profits for the period during which the landlord remained in possession, while the case was being fought in the Revenue Courts. The landlord contended that since S. 24 of the Tenancy Act was deleted before the tenant applied for mesne profits, the executing Court was no longer in existence and could not deal with the application.

Held, that as the possession by the landlord as a result of an erroneous order related to the execution of the decree, any profits that he might make in that way must be adjusted by the executing Court, and the application for mesne profits could therefore be dealt with by the Revenue Officer who executed the decree. (*Braye, F.C.*) ANANDRAO *v.* KISAN ATMARAM. 1947 N.L.J. 496.

———**S. 26**—*Dismissal of appeal for default—Appellant's counsel not appearing on date of hearing—Notice of date served only on him and not on appellant—Propriety.*

Under S. 26, Land Revenue Act, an appeal may be dismissed in default, if the appellant's counsel on whom a written notice of the date of hearing has been served fails to appear without any intimation to the Court. In such circumstances, an application for restoration by the appellant will be refused, although he was not informed of the date of hearing. (*Jayaratnam.*) ANNILAL *v.* SHAW WALLACE CO. 1950 N.L.J. 62.

———**S. 33**—*Finding regarding tenancy based on interpretation of entries in revenue records—Third appeal.*

Where no evidence is recorded and finding regarding tenancy is based on inferences and interpretations of entries in the revenue records, a question of law arises and therefore a third appeal is maintainable. (*Ramsden, F.C.*) SADASHIV RAO *v.* GULABIA. 1947 N.L.J. 110.

———**S. 37 (2) and (3)**—*If mandatory.*

The provisions of S. 37 (2) and (3) of the Land Revenue Act are mandatory and the appellate Revenue Officer is bound to follow them. His failure to do so renders his order illegal and invalid, and the illegality cannot be condoned for any reason whatsoever. (*Jayaratnam.*) JAINABBI *v.* SADASHIVRAO. 1950 N.L.J. 40.

———**S. 40 (1), Provisos (1) and (2)**—*Sanction for review—Notice to parties—If necessary.*

Under S. 40 (1), Proviso (1) of the C. P. Land Revenue Act, the Deputy Commissioner is not required to give notices to all parties before giving sanction for review. The only mandatory part of the section in this respect is from Proviso (2) under which the subordinate officer after obtaining sanction must hear all the parties before passing his review order. (*Ramsden, F.C.*) GOPAL DASARATH *v.* GANPATI. 1947 N.L.J. 28.

———**S. 46 (1) (a)**—*Modification of entries in* wajib-ul-arz—*Objection by some tenants.*

Every tenant who can show that he "is interested' in the modification of the entries in the *wajib-ul-arz* has a right to object; and if he so objects, the modification cannot legally be made. Where there is any room for doubt whether all agree, it would be safer to issue a proclamation or proclaim the intention by beat of drum. (*Ramsden, F.C.*) BAJIRAO RANOJI RAO, *In re.* 1947 N.L.J. 23.

———**Ss. 74 and 159**—Malik makbuza *rights held rent free as result of family arrangement at partition—Whether enure for benefit of transferee outside family.*

Where persons hold *malik makbuza* rights revenue free as against the lambardar as a result

of family arrangement at partition the right to hold in perpetuity extends only to the descendants of the original grantee and does not run with the land or enure for the benefit of transferees outside the family. It is the duty of such transferees, who are alien to the family, on obtaining possession to make an application to the revenue authorities claiming exemption rom payment of the land revenue under S. 75 of the C.P. Land Revenue Act. If this is not done the *lambardar-malguzar's* right to recover the revenue operates by virtue of S. 159 of the Act. (*Grille, C.J.*) GOVINDRAO *v.* MANOHAR. I.L.R. (1948) Nag. 316=A.I.R. 1949 Nag. 88=1949 N.L.J. 61.

———**Ss. 106 and 67**—*Person selling* malguzari *share in village reserving proprietary interest in Sir land—Position of—Occupancy tenant or* Malik-makbuza *of that land—Subsequent sale of Sir land—If gives rise to pre-emption right—C. P. Tenancy Act, Ss. 12-A and 49.*

A person selling his *malguzari* share in village can retain his proprietary interest in his *Sir* land. He becomes then not a *Sir* holder but a "plot proprietor" and is entitled to be declared a *mtlik makbuza* under S. 106 (b) (1) read with S. 67 of the Land Revenue Act. His rights over the *Sir* land are that of an undeclared *malik-makbuza* and not of an occupancy tenant and as such the pre-emption provisions in the Tenancy Act do not apply to a subsequent sale of those rights. (*Jayaratnam, F.C.*) VITHAL TULSIRAM *v.* PANDURANG. 1949 N.L.J. 172.

———**S. 109 (1) (a)**—*Suit by protected thekadar for possession of lands included in theka—Defendant not substantiating plea of family arrangement—Thekadar, if entitled to possession—Defendant's right to claim his share of profits.*

A protected thekadar is entitled to possession of all the lands included in the theka, in the absence of any family arrangement under S. 109 (1) (*a*) of the C. P. Land Revenue Act. In a suit by him for possession based on his title the defendant who fails to substantiate his plea of family arrangement is not entitled to resist the plaintiff's claim for possession. But this fact does not affect the right of the defendant to claim his share of profits, or maintenance. 24 N.L.R. 179 (P.C.), foll.; 1945 N.L.J. 291, referred to. (*Sen, J.*) CHANDEL *v.* HIRALAL. I.L.R. (1949) Nag. 883.

———**S. 138**—*Applicability — Tenant rights under C. P. Tenancy Act.*

S. 138 (1), C. P. Land Revenue Act does not apply to tenant rights recognised by or arising out of the C. P. Tenancy Act. (*Pollock, J.*) JAIRAM *v.* MAIFUTALI. I.L.R. (1948) Nag. 324 =1948 N.L.J. 275=A.I.R. 1948 Nag. 283=2 D.L.R. 773.

———**S. 145**—*Relation of defaulter—If entitled to deposit.*

Under S. 145 of the C. P. Land Revenue Act, a defaulter should either make the deposit himself or through his Counsel or else clearly state in writing that the deposit is being made by so-and-so on his behalf. A relation of the depositor who is not authorised to make the deposit on behalf of the defaulter is not entitled to make the deposit on his own behalf. (*Ramsden, F.C.*) MT. BUNDA *v.* SHIKARCHAND. 1947 N.L.J. 272.

———**S. 151**—*Claim for pre-emption—Power of Collector to decide—Application dismissed by him—Fresh application before Civil Court—Maintainability.*

The power to investigate and decide a claim for pre-emption under S. 151 of the C. P. Land Revenue Act remains in the Civil Court which transferred the decree to the Collector for execution, and is not delegated to the Collector under the rules framed by the Provincial Government. The fact that the Collector rejected an application for pre-emption when filed before him is not therefore a bar to the maintainability of a fresh application before a competent Court, *viz.*, the Civil Court, which alone has jurisdiction to receive and decide the application. (*Puranik, J.*) BRIJRAJ PRASAD *v.* CHABIRAM. I.L.R. (1947) Nag. 445=229 I.C. 132=A.I.R. 1947 Nag. 246=1947 Nag. (Rul.) 78=1947 N.L.J. 115.

———**S. 151**—*Pre-emptor, if can come in in course of sale.*

It is clear from the language of S. 151 of the C. P. Land Revenue Act that the pre-emptor can come in as early as he likes after the bid has been accepted. He can come in in the course of the sale and not merely at the conclusion of the sale. (*Grille, C.J. and Hidayatullah, J.*) NIMBA GANBA *v.* NARAIN PAIKAJI. I.L.R. (1948) Nag. 584=A.I.R. 1948 Nag. 369=1950 N.L.J. 218.

———**S. 162**—Forest Rules under—Breach of—If "offence" under "Cr. P. Code"—Order of fine by Deputy Commissioner—If conviction for offence or order by Court subordinate to High Court—Power of revision in civil or criminal jurisdiction. *See* C. P. CODE, S. 115. 13 Cut. L.T. 14.

———**S. 169 (1)**—*Order not stating clause of sub-section under which it is passed—Validity.*

A Revenue Court should always and without exception cite the section of the substantive law or statutory rule under which it passes an order. If it passes an order under S. 169 (1) of the Land Revenue Act, it should specify the clause of that sub-section under which the order is passed, as important and divergent consequences follow according as to whether the order is under Cl. (*a*) or Cl. (*c*) of S. 169 (1) of thes Act. A failure to do so invalidates the order completely. (*Jayaratnam, F.C.*) GOURABAI RAJARAM. 1949 N.L.J. 105.

———**S. 175**—*Exclusive property—Mode of partition.*

The partition must be so made that whole of the exclusive property falls to its owner as part of his share in the whole mahal. The rental valuation of the exclusive property is included in the assets of the mahal and the property cannot be excluded from the mahal. What is reserved to the owner of the exclusive property is the right to the cultivating profits. (*Braye, F.C.*) NARAYAN PRASAD *v.* HARDEO DATTA. 1947 N.L.J. 401.

———**S. 188**—*Powers of Lambardar—Lease of* banjar *land.*

The act of a lambardar in granting a lease of *banjar* land over which the cosharers exercised certain rights does not amount to their ouster. It is true that in such a case the cosharers would lose their actual possession over the land, but so long as their proprietary title to the land is not questioned, mere dispossession does not result in an ouster. As the lambardar has power to grant leases of unoccupied land in the village, it must be presumed that a lease of such land granted by him was granted in pursuance of that power. The action of the lambardar, falling within the scope of his powers, must be deemed to be one on behalf of the whole proprietary body. (*Mudholkar, J.*) BALDEOPRASAD *v.* REWARAM. I.L.R. (1950) Nag. 218=A.I.R. 1950 Nag. 107=1950 N.L.J. 51.

———**Ss. 197 and 77 (1) (c)**—*Applicability—Suit to recover dues from proprietor of one mahal by proprietor of another mahal—Such dues representing share of latter's loss in respect of assessment of Kotwar's service holding situated in his mahal—Jurisdiction of Civil Court.*

Where under the terms of a Wajib-ul-arz, the proprietor of Mahal No. 1 had to pay to the proprietor of Mahal No. 2 the share of the latter's loss in respect of the assessment of the Kotwar's service holding which was situated in Mahal No. 2.

Held, that the amount, payable could not be recovered under S. 197 of the Central Provinces Land Revenue Act but only by a suit in a Civil Court. The amount payable was *not* on account of Kotwar's dues; it was merely an adjustment of rent between the proprietors of the two mahals which happened to arise from the fact that the Kotwar held his land free and that land was all situated in one mahal. S. 197 was not therefore applicable to the present case. (*Ramsden, F.C.*) NILKANTH *v.* NARAYAN. 1946 N.L.J. 689.

———**S. 203**—*Occupant of* abadi *site since before First Settlement—Whether mere licensee—Presumption—Absence of entry in* wajib-ul-arz *relating to his right—Effect of.*

There is a presumption that an occupant of an *abadi* site since before the 30 years' settlement possesses proprietary right and is not a mere licensee whose right is subordinate to the proprietary right of the *malguzar* which was conferred upon him by the said settlement. The onus, therefore, lies upon the *malguzar* to prove that the occupant was a mere licensee. The terms of *wajib-ul-arz* are not fully exhaustive and any absence of entry relating to the rights of the old occupants at the time of the first settlement does not negative their proprietary rights; nor does it indicate that they were regarded as licensees. (*Pollock and Shevde, JJ.*) KRISHNA RAO *v.* NARAYAN. I.L.R. (1948) Nag. 237=A.I.R. 1949 Nag. 120=1948 N.L.J. 127.

———**S. 203 (3) and (4)**—*Purchase of house site in* abadi *by person entitled to site—Lambardar not recognising purchase and suing purchaser for ejectment—Power of Tahsildar to allot that site to purchaser.*

A person holding land in a village and entitled to a house site in the *abadi* under the provisions of S. 203 (1) of the Land Revenue Act, is fully entitled under S. 203 (3) to acquire by purchase a site independently of any consent of the Lambardar. It is within the powers of the Tahsildar to allot that site to the purchaser under the provisions of S. 203 (4) of the Act if the Lambardar is not prepared to recognise the purchase as a valid one, although a suit by the latter for ejectment of the purchaser from the house site is pending. 1940 N.L.J. 480, dist.; 1929 Nag. 59, relied on. (*Jayaratnam, F.C.*) NILKANTHRAO *v.* SITARAM SADASHIO. 1949 N.L.J. 111.

——S. 220—*Imperfect partition by Revenue Officer—Civil suit for possession of share allotted at such partition—Maintainability.*

Under Chapter XI of the C. P. Land Revenue Act, a Revenue Officer has jurisdiction to effect imperfect partition of land-revenue-paying estate. A Civil Court has no jurisdiction or power to effect a perfect or an imperfect partition of such estate or to reopen a partition already made by a Revenue Officer. The duty of a civil Court is to give effect to the partition made by the Revenue Officer. The Revenue Officer effecting partition has no doubt power to deliver possession to a person of the share allotted to him. If that is not done, that does not preclude such person from filing a suit in the Civil Court to recover possession in accordance with the partition made by the Revenue Officer. (*Sen, J.*) DHARAM SINGH *v.* DEOSINGH. I.L.R. (1949) Nag. 836= A.I.R. 1950 Nag. 102=1950 N.L.J. 20.

——Ch. IV—*Appeal and Revision—Entries in Nazul Maintenance Register.*

The Nazul Maintenance Register is, in all respects, a parallel document to a village *khasra.* The entries in it have only evidential value as regards possession and are not "orders". They are made by a Patwari or Nazul Surveyor who are not "Revenue Officers". As only orders passed by "Revenue Officers" are appealable or revisable under the provision in Ch. IV of the Land Revenue Act, there can be appeal or revision in respect of an entry in the Nazul Maintenance Register, even though a Nazul Officer may have mistakenly passed a formal order as to the entry to be made. (*Jayaratnam, F.C.*) CHANDRAKANT SHANKAR RAO *v.* HEMLATA CHANDRAKANT. 1948 N.L.J. 387.

——(XVI OF 1889), S. 65-A—*Scope and effect of*—Thikadari *tenure in Sambalpur District—Incidents of—If capable of being owned and enjoyed by Hindu joint family—Partition—Right to—Forfeiture—Effect on* Sir *and* Bhogra *lands.*

The *Thikadars' gountlias* or farmers in Sambalpur district hold an interest very similar to that of a permanent tenure. *Thikadari* leases, either permanent or temporary, but renewed or renewable from time to time, are, like any other property, capable of being possessed by a coparcenary and the joint family estate in such leases can grow, either if they are acquired with joint family funds, or with joint family labour, or are allowed to be treated as joint family property by the acquirer.

The declaration of protected status under S. 65-A of the C. P. Land Revenue Act does not effect any change in its character, so as to debar acquisition of joint family rights in it or to divest any pre-existing or subsisting right in them enuring to the benefit of the members of the family. S. 65-A, in saving pre-existing arrangements with regard to Thikadary tenures, saves not only partition of the tenure, but also joint or separate enjoyment of the *Sir* and *Bhogra* lands appertaining to the tenure or any other emoluments arising therefrom.

The prohibition of partition attaches to the tenure as such, namely, the right to collect rents and the privilege of representing the tenure before the landlord and the liability to pay the thikadari rent to him. In case the tenure, as such, is forfeited for non-payment of rent, the tenure as such lapses but not to the detriment of the rights already acquired prior to the enactment of S. 65-A, C. P. Land Revenue Act, as applied to Sambalpur. It is not the case that *Sir* and *Bhogra* lands also revert to the Zamindar on forfeiture of the *Thikadari* tenure; simultaneously with the forfeiture of the tenure the right of occupancy grows in such lands in the tenure-holder who is bound by any arrangement as to right to or possession of the *Sir* lands of the joint family members and the Thikadar, *inter se,* even though the landlord was not a party to any such arrangement or was unconcerned with it all the time when it was in force. 18 Pat. 509 (F. B.), ref. (*Ray, C. J. and Panigrahi, J.*) TIRTHA NAIK *v.* LAL SADANAND SINGH. I.L.R. (1949) Cut. 139.

——S. 82—Wajib-ul-arzs—*Entries of village customs—Presumption of correctness.*

Entries of village customs embodied in the *wajib-ul-arz* prepared by the settlement officer should, by virtue of S. 82 of the C. P. Land Revenue Act, be presumed to be correct. (*Das and Narasimham, JJ.*) PROVINCE OF ORISSA *v.* DURJODHAN DAS. I.L.R. (1949) Cut. 540.

——Ss. 106 (d), 46 and 71—*New* abadi *site declared by Deputy Commissioner—Residents of old* abadi—*If can be compulsorily evacuated and re-settled on new* abadi—*Powers of lambardar.*

An area entered as *"abadi"* in the Record of Rights continues as *"abadi"* until the entry is corrected. When an *abadi* is abandoned, it is the Settlement Officer who corrects the Record of Rights when it is re-written at Settlement. Where a new *abadi* site is declared by the Deputy Commissioner under the provisions of S. 106 (*d*) read with S. 71, Land Revenue Act, because of the old *abadi* site being subject to floods, it would be quite legitimate for the lambardar to ask that such compact areas of the old *abadi* as have been abandoned to be excised from the old *abadi* and included in the wasteland of the village which would then become available for cultivation. He can also refuse to allot new sites in the old *abadi.* But residents who are unwilling to give up their sites cannot be forced to do so and resettle on the new *abadi.* (*Jayaratnam.*) PRAKASHCHANDRA *v.* GANPAT RAMA. 1950 N.L.J. 382.

——S. 128 (g)—*Sale of occupancy holding—Permissibility—C. P. Tenancy Act, S. 12.*

S. 128 (*g*) of the C. P. Land Revenue Act cannot override the provisions of S. 12 of the C. P. Tenancy Act, and occupancy holdings cannot be sold under S. 128 (*g*) of the C. P. Land Revenue Act for recovery of arrears of land revenue. (*Rajan.*) Bholanathbhau *v.* Tahsildar, Gondia. 1950 N.L.J. 375.

———**S. 187 (5)**—*Appointment of* sadar-lambardar—*Procedure—Considerations.*

According to S. 187 (5) of the C. P. Land Revenue Act, if in any *mahal* more *lambardars* than one have been appointed one of them is selected and appointed its *sadar-lambardar.* The section presupposes the existence of a *lambardar* for each *patti* and suggests that before a *sadar-lambardar* can be appointed the *mahal* must have its full complement of *lambardars.* The selection has to be done in accordance with the instructions in R. 11 (2) of the *Lambardari* Rules. In selecting the *sadar-lambardar,* the interest possessed in the *mahal* by the candidates, the wishes of the *lambardars* and the interest represented by them have to be considered. In a case in which the *sadar-lambardar* was also a *lambardar* of a *patti,* the vacancy in the office of the *lambardar* must be filled before the appointment to the office of *sadar-lambardar* can be taken up as otherwise the elimination of one *lambardar* will narrow down the scope for selection and the considerations referred to in the rule will not be available to the fullest extent to the officer making the selection. If a *sadar-lambardar* is appointed without the *mahal* having its full complement of *lambardars,* the excluded proprietors will be debarred from claiming the office, thus giving the residuary body the unfair advantage of a restricted contest. The appointment of a *sadar-lambardar* is, for administrative reasons, as much the concern of the Revenue Officers as of the proprietors as even for the limited purpose of collecting the revenue payable through him, the *sadar-lambardar* represents all *lambardars.* That is why in selecting a *lambardar* the wishes of all the *lambardars* have to be considered. (*Sanyab.*) Brijlal Bhaiyalal *v.* G. N. S. Naidu. 1950 N.L.J. 394.

———**S. 218 (7)**—*Applicability—Excavation made for digging well.*

The removal of minerals without lawful authority from mines and quarries is made punishable under S. 218 (7), Land Revenue Act. The words "mines and quarry" are applied usually only to those excavations which are made with the object of extracting minerals. An excavation made not for the purpose of extracting minerals but for the purpose of digging a well does not therefore come under S. 218 (7) of the Act. Of course, as the right to all minerals vests with Government, Government is entitled to get the necessary royalty on all minerals extracted from land. (*Rajan.*) Dhanwate, *In re.* 1950 N.L.J. 362.

———**S. 218, Explanation** — *"Minerals"—Boulders extracted from ground while digging well.*

The explanation given at the end of S. 218, Land Revenue Act, is not an exhaustive definition of the word "minerals." There is no doubt that the boulders extracted from the ground during the course of digging a well are "minerals". (*Rajan.*) Dhanwate, *In re.* 1950 N.L.J. 362.

———**(II OF 1917)**—*Appeal—Entry by Deputy Commissioner in character roll of Official—Jurisdiction of Board of Revenue.*

According to Item 3 under "Land Revenue Department" in the list enclosed with Survey and Settlement Department Memorandum No. 1081-994|VII-1, dated 22nd October, 1948, the Board of Revenue has been empowered "to hear appeals preferred by Patwaris, Revenue Inspectors, Nazul Surveyors and Assistant Nazul Surveyors on the orders passed by Deputy Commissioners in respect of their appointments, promotion, punishments, etc., under the provisions of the C. P. Land Revenue Act, 1917, and Berar Land Revenue Code, 1928". Ordinarily, an appeal would not be entertained by the Board of Revenue against a routine entry recorded by the Deputy Commissioner in the charactor roll of an official. But where in a particular case the entry is of an unusual nature and of a very damaging character and is such as bound to affect the future promotion and prospects of an official adversely, the Board of Revenue would entertain an appeal. (*Bambawale.*) V. M. Gajerawar, *In re.* 1950 N.L.J. 135.

———**S. 26**—*Absence of applicant—Dismissal of case—If justified.*

A revenue officer is not ordinarily justified in dismissing a case in the absence of the applicant on a date on which there is nothing for the applicant to do. He must hear and determine the case or proceedings in his absence. (*P. S. Rau, F.C.*) Ganpat Rao *v.* Mt. Venoobai. 1945 N.L.J. 580.

———**S. 26**—*Dismissal of pre-emption application in default—Fresh application—Maintainability.*

After a pre-emption application has been dismissed in default under S. 26 of the Land Revenue Act, a fresh application on the same facts can be entertained by a revenue Court if it is within limitation. 6 R.R. 9 and 2 N.L.J. 75, foll. (*Jayaratnam.*) Vakil Singh *v.* Mt. Ludhiya Bai. 1949 N.L.J. 260.

———**Ss. 28, 33 and 39**—*Order under S. 28 (2)—Appeal—Revision.*

No appeal lies against *any* order passed under S. 28 (2) of the Land Revenue Act. Superior Courts can, however, exercise control in revision under S. 39 of the Act. In revision, however, the superior Court will not attempt to come to an independent judgment on the merits of the case, but will confine itself to the broader question of the legality, propriety or regularity of the order challenged. (*Jayaratnam.*) Laxmanrao Bhiwaji *v.* Pandurang Sheoramji. 1949 N.L.J. 177.

———**Ss. 28 (2) and 37**—*Restoration of appeal dismissed in default before admission—Notice to opposite party—Necessity for.*

An appeal which has been dismissed in default before it has been admitted under S. 37, can be restored to file under S. 28 (2) of the Land Revenue Act without notice to the opposite party. (*Braye, F.C.*) Mahavir Singh *v.* Lala Ram. 1947 N.L.J. 492.

——S. 39—*Application for revision when appeal not filed—Practice.*

An application for revision may be entertained by the Revenue Tribunal even if no appeal was filed within time. In a matter relating to a dispute between a landlord and tenant the Revenue Courts do not, in practice, take too rigid a view of the accessibility of the parties to the Revenue Courts. (*Jayaratnam, F.C.*) MIHILAL KISHORI *v.* SETH NOKHELAL. 1948 N.L.J. 303.

——S. 39—*Jurisdiction of Revenue Tribunal—Order of Revenue Officer leasing Government land.*

The Revenue Tribunal is only concerned with orders passed under the Land Revenue Act or the Rules made thereunder or under other statutory enactments where the Revenue Officer acts in a judicial or semi-judicial capacity. It is not concerned with action taken by Revenue Officers under the instructions of the Executive Government in regard to the management of Government land. The mere fact that Revenue Officers lease out Milkiyat Sarkar land does not confer supervisory powers over them in that respect on the Tribunal. (*Jayaratnam, F.C.*) JIYALAL HIRALAL *v.* LIBAL. 1948 N.L.J. 42.

——S. 39—*Nazul cases—Whether revenue cases—Revision—Government of India Act, S.* 296 (1).

The appeal and revision procedure prescribed in Ch. IV of the Land Revenue Act applies only to orders passed under that Act or rules made thereunder or to orders passed under other enactments to which the provisions of Ch. IV of the Act are applicable. Such orders are orders which are passed by Revenue Officers acting in a judicial or semi-judicial capacity in virtue of powers conferred on them by a statutory enactment. It is well-known that the control, management and disposal of *nazul* land in the Central Provinces is regulated by executive instructions of Government, which are not statutory rules under any Act. The orders passed by Revenue Officers under powers vested in them by the Provincial Government under these instructions are not judicial orders. They are subject to control by higher Revenue Officers, and ultimately by the Provincial Government. The fact that *nazul* cases are registered as revenue cases in the register maintained by the Revenue Courts does not make them proceedings under the Land Revenue Act or other allied Acts in which Revenue Officers Act in a judicial capacity. They are merely proceedings relating to the general administration, which for convenience of record and disposal are classified and registered as *"revenue cases"*; orders passed in such proceedings are not therefore subject to the appellate and revision procedure prescribed in Ch. IV of the Act. (*Jayaratnam, F.C.*) BHAIYALAL *v.* YESHWANT. 1948 N.L.J. 402.

——S. 40 (1)—*Sanction to review—Duty of sanctioning authority.*

Under S. 40 (1), Land Revenue Act, sanction to review should be given without prejudice to any order that may later be passed in appeal against the review order. The sanctioning authority should not, therefore, go into the merits and commit himself to any views in advance of what may follow in due course of law. (*Jayaratnam.*) ZAMAJI *v.* DAMAJI. 1950 N.L.J. 152.

——Ss. 47 and 49—*Applicability—Correction of revenue papers—Tenancy land becoming* khudkasht.

A change of the status of a land, which was originally a tenancy land and subsequently becomes *khudkasht*, will only be a correction of the annual papers referred to in S. 47 (1), C. P. Land Revenue Act, and the provisions of S. 49 of the Act do not apply to the case. (*Rajan.*) VITHOBA *v.* MANNULAL. 1950 N.L.J. 403.

——S. 47—Milkiyat Sarkar *land—Mutation—Appeal to Revenue Board—If lies.*

There can obviously be no "mutation" of *Milkiyat Sarkar* land under the provisions of S. 47 of the Land Revenue Act. The "Registrar of *Milkiyat Sarkar*" maintained under the instructions in para. 12, Revenue Book Circular 11—10, is a register maintained for administrative purposes and changes made in it are not "mutations". *Milkiyat Sarkar* land is managed by the Deputy Commissioner as the agent of Government by powers delegated to him by the instructions in Revenue Book Circular IV-2. Hence, no appeals can lie to the Revenue Board against a Deputy Commissioner's orders in such cases.

Whoever is in actual possession of the fields will presumably be shown against the khasra numbers in the *khasra* and *jamabandi*. As to who is *entitled* to be in possession the matter depends on the terms and conditions on which cultivating rights were leased by the Deputy Commissioner or Settlement Officer and the person to whom they were leased. These are not matters which are regulated by any of the provisions in the Land Revenue or Tenancy Act. (*Jayaratnam.*) THAKUR KISAN SINGH *v.* TANYABAI. 1949 N.L. J. 339.

——S. 49—*"Lawful possession"—Meaning of—Possession obtained by party under O. 39, R. 9, C. P. Code—If entitles him to mutation.*

The phrase "lawful possession" used in S. 49, C. P. Land Revenue Act, means "a legal possession" which is also rightful or at least excusable and which may be consistent with a superior right in some other person. Accordingly, possession given to a party in pursuance of an order of a Civil Court under O. 39, R. 9, C. P. Code, entitles him to mutation under S. 49, C. P. Land Revenue Act, as such possession is undoubtedly lawful possession. (*Bambawale.*) UMABAI *v.* LAXMIBAI. 1950 N.L.J. 248.

——Ss. 106 (d), 46 and 71—*New* abadi *site declared by Deputy Commissioner—Residents of old* abadi*—If can be compulsorily evacuated and re-settled on new* abadi*—Powers of lambardar.*

An area entered as *"abadi"* in the Record of Rights continues as *"abadi"* until the entry is corrected. When an *abadi* is abandoned, it is the Settlement Officer who corrects the Record of Rights when it is re-written at Settlement. Where a new *abadi* site is declared by the Deputy Commissioner under the provisions of S. 106 (*d*) read with S. 71, Land Revenue Act, because of the old *abadi* site being subject to floods, it would be quite legitimate for the lambardar to ask that such compact areas of the old *abadi*, as have been abandoned to be exercised from the old *abadi* and included in the wasteland of the village which would then become available for cultivation. He can also refuse to allot new sites in the old *abadi.* But residents who are unwilling to give up their sites cannot be forced to do so and resettle on the new *abadi.* (*Jayaratnam.*) Prakashchandra *v.* Ganpat Rama. 1950 N.L.J. 382.

———S. 109—*Protected thekadari succession case—Procedure—Order deleting name of protected thekadar without substituting another name—Effect of.*

Succession to the protected thekadari rights in a village is regulated by the provisions in S. 109 (1) (*b*) of the C. P. Land Revenue Act. But the law does not provide for special proceedings in protected thekadari succession cases. They are dealt with as ordinary mutation cases under Ss. 47-49 of the Act. When in a protected thekadari village no one claims to have his name mutated in place of a deceased thekadar the only order the Court can pass is that the name of the deceased thekadar should be deleted and no other entry made. Blank spaces cannot be retained in the register until the lease is determined by order of a Court. But this does not prevent any one from establishing his right to succeed to a protected theka under the provisions of the Land Revenue Act. An order of the Revenue Court deleting the name of a protected thekadar from the mutation register without substituting another name in its place is not evidence that the theka has been terminated or that any right in the theka has been lost. (*Jayaratnam, F.C.*) Jagannath *v.* Dhannalal. 1948 N.L.J. 188.

———Ss. 111 and 112—*Order forfeiting protected* thekadari—*Subsequent application by son of last protected thekadar to be declared protected* thekadar—*If lies.*

After the Deputy Commissioner passes an order forfeiting a protected *thekadari* under S. 111 of the Land Revenue Act, there is no *theka* left to be transferred to any one or to be dealt with under any of the provisions of Ch. IX of the Act. Therefore, a subsequent application by a son of the last protected *thekadar* under S. 112 of the Act asking that he may be declared protected *thekadar* of the village, does not lie. (*Jayaratnam, F. C.*) Sarat Chandra Rao *v.* Govind Rao. 1948 N.L.J. 336.

———S. 128 (g)—*Sale of occupancy holding—Permissibility—C. P. Tenancy Act, S.* 12.

S. 128 (*g*) of the C. P. Land Revenue Act cannot override the provisions of S. 12 of the C. P. Tenancy Act, and occupancy holdings cannot be sold under S. 128 (*g*) of the C. P. Land Revenue Act for recovery of arrears of land revenue. (*Rajan.*) Bholanathbhau *v.* Tahsildar, Gondia. 1950 N.L.J. 375.

———S. 131—*Sale without notice to parties—Validity—Death of judgment-debtor after attachment—Sale without notice to his legal representatives—Validity.*

As S. 131 of the C. P. Land Revenue Act directs that all sales under Chap. 10 of the Act other than S. 128 shall be as nearly as may be in accordance with the law relating to the attachment and sale of such property under the decree of the Civil Court, it follows that the law which prevails there must obtain here as well. Under that law a sale which is held without notice to the parties concerned is a nullity. Again, when a judgment-debtor dies even after attachment, any sale of his property held atfer his death is a nullity against his legal representatives unless they are noticed. (*Bose, J.*) Marotrao *v.* Narayan. I.L.R. (1948) Nag. 264=A.I.R. 1948 Nag. 300=1949 N.L.J. 70.

———S. 141 (2)—*Sale held before expiry of thirty days from date of proclamation—Validity.*

A sale held before the expiry of thirty days from the date of publication of the proclamation, is not *ipso facto* void, but is merely voidable. The holding of the sale within thirty days is a material irregularity and the person affected thereby must object and satisfy the Court that he has sustained substantial injury by reason of such irregularity. (*P. S. Rau, F.C.*) Ganpat Rao *v.* Mt. Venoobai. 1945 N.L.J. 580.

———S. 145—*Deposit made on behalf of defaulting tenant without knowledge or consent of Court—Section, if complied with.*

A mere deposit by a stranger on behalf of the defaulting tenant independently of the Court seized of the matter and without its knowledge or consent is not a sufficient compliance with S. 145 of the Land Revenue Act. The Court would be acting within the law in confirming the sale and refusing to take cognisance of such an irregular deposit. (*Jayaratnam.*) Nandgir *v.* Ganpat. 1949 N.L.J. 300.

———S. 145—*Powers of Tahsildar.*

A Tahsildar is vested with powers under S. 145, Land Revenue Act—*Vide* the schedule below S. 14 of the Act. He is therefore competent to accept a deposit under the section. (*Jayaratnam, F.C.*) Jamnaprasad *v.* Shree Deo Pandharinathji. 1948 N.L.J. 288.

———S. 145 and Relief of Indebtedness Act, S. 6 (3)—*Sale of defaulter's share for arrears of land revenue—Application to set aside sale by Collector before whom decree against defaulter are pending execution—Prior application by defaulter before Debt Relief Court—Debt exceeding Rs. 25,000—Collector's application, if valid.*

A share of the defaulters was sold for arrears of land revenue. The Collector before whom certain decrees against the defaulters were pending execution applied to set aside sale under S. 145 of the Land Revenue Act, depositing the required amount. It was contended by the defaulters that proceedings in the Collector's Court were automatically stayed under S. 6 (3) of the Relief of Indebtedness Act when their applications thereunder were admitted and therefore the application under S. 145 of the Land Revenue Act was void. The debts of the defaulters were admitted to exceed Rs. 25,000.

Held, that the Debt Relief Court had clearly no jurisdiction to stay proceedings in the Collector's Court and that the Collector's application under S. 145 of the Land Revenue Act was valid. (*Ramsden, F.C.*) Bhujangrao *v.* Nathu. 1946 N.L.J. 102.

———**S. 146**—*Sanction by Sub-Divisional Officer for sale of "so much" village as is necessary—Absence of demand for fraction of village—Sale of whole village—Legality.*

Where the Sub-Divisional Officer sanctions the sale of "so much" of a village as is necessary to clear the arrears of land revenue due on it, the words "so much" in the sanction includes the whole if a part alone is unsaleable. The Tahsildar will be acting within the authority given to him if he sells the whole village in the absence of any demand for a fraction of the village. 1944 N.L.J. 524, dist. (*Jayaratnam.*) Gomtibai *v.* Jiwandas. 1950 N.L.J. 512.

———**S. 148**—*Sale of holding without proper sanction—Illegality—Remedy of defaulter after confirmation.*

A sale of a whole holding of three fields under a sanction of the Deputy Commissioner for the sale of one field, is not a mere irregularity but is an illegality. The fact that all the three fields were, in fact, proclaimed for sale makes no difference. It is an act without jurisdiction and is therefore void and liable to be set aside even after confirmation. A sale which is void cannot create any rights, and although an auction-purchaser is an innocent third party his rights cannot supersede the rights of the defaulter who has been grievously wronged. In the circumstances an appeal lies under S. 33 of the Act against the order confirming the sale. (*Jayaratnam, F.C.*) Jamnaprasad *v.* Shree Deo Pandharinathji. 1948 N.L.J. 288.

———**Ss. 149 (2) and 39**—*Setting aside sale on ground of fraud—Proper remedy—Civil suit or revision.*

A sale can be set aside on the ground of fraud only by a Civil Court, and the aggrieved party has to file a suit under S. 149 (2) of the C. P. Land Revenue Act. When a particular procedure is laid down in the Act revisional jurisdiction cannot be invoked seeking the same remedy on the same grounds. If there is an illegality patent on the face of the record, *e.g.*, absence of sanction to the sale, there may be some justification for looking into the matter in revision. Where the record shows that the sale was proclaimed and properly published, a Revenue Court cannot go behind this and investigate whether the *kotwar's* signature to the proclamation was obtained by the fraudulent acts of some party or other. (*Jayaratnam.*) Mahomed Hussain *v.* Jagmohanlal. 1949 N.L.J. 176.

———**S. 157**—*Scope—Whether governed by S. 149.*

S. 157 (4) of the C. P. Land Revenue Act is not governed by S. 149 of that Act. The section provides the lambardar with a speedy and summary remedy when he pays the land revenue on behalf of a Malik-Makbuza, but it does not take away any of his ordinary rights of suit. In the same way, though immediate effect is given to the Deputy Commissioner's order of sale the rights of those affected to agitate the matter in the regular Courts is not taken away. (*Bose, J.*) Marotrao *v.* Narayan. I.L.R. (1948) Nag. 264=A.I.R. 1948 Nag. 300=1949 N.L.J. 70.

———**S. 162**—*Application for imperfect partition—Maintainability—Patti sought to be partitioned already privately partitioned—Consolidation of holdings—If destroys partition already made.*

An application for imperfect partition under the provisions of Ch. XI of the Land Revenue Act is not tenable when the *patti* which is sought to be partitioned has already been privately partitioned. The revenue Courts have no authority to upset a private partition unless all the parties agree to a fresh partition. An imperfect partition under the provisions of Ch. XI is a partition by metes and bounds, whereas a private partition is practically never so. So that what can be done under Ch. XI of the Act is a fresh partition which would be illegal if one party objects to it. Consolidation of holdings makes no difference to this position. It does not destroy the partition which has already been made. It is for the parties themselves to re-adjust their private partition, if there is any need to do so. The Revenue Courts are not concerned with that. (*Jayaratnam.*) Narayan Prasad *v.* Seoratriprasad. 1949 N.L.J. 269.

———**S. 187**—*Appointment of lambardar—Principles to be followed.*

Lambardari appointments should be decided on the basis of the principles enunciated in R. 11 of the Lambardari Rules. The Rule empowers the appointing authority to "select" a lambardar from amongst the candidates before appointing him. Discretion is thus vested in the "Revenue Officer exercising the power of appointment." This is as it should be, since that officer has the opportunity of seeing and questioning the candidates and their supporters. The appellate authorities should only intervene if the principles referred to have not been given full consideration or if discretion has been so used as to amount to an arbitrary or ignorant disregard of the instructions in the rule. Established hereditary claims descending from father to son cannot be lightly disregarded in selecting a lambardar. A fresh series of appointments must be based on something more than a mere quantum of shares held by the supporters of a candidate weighed against hereditary claim reinforced by substantial support. (*Jayaratnam, F.C.*) Puriram Uderam *v.* Nandal Sagun. 1948 N.L.J. 48.

———**S. 187**—*Appointment of protected thekadar as lambardar prior to Act—Validity—Right of such lambardar to lambardari haq.*

Even under the C. P. Land Revenue Act of 1881, there was no prohibition against the appointment of lambardars from among the thekadars. Therefore, a protected thekadar who was appointed a lambardar before the present Act of 1917 came into force is entitled to all the benefits of his appointment under the latter Act. He is entitled to the *lambardari haq.* (*Grille, C.J.*) Tukaram *v.* Laxman. I.L.R. (1948) Nag. 628=A.I.R. 1949 Nag. 144=1949 N.L.J. 67.

———**Ss. 187 and 189**—*Imperfect partition of mahal—Previous lambardar, if continues to function as lambardar of* Shamlati patti *and as* sadar-lambardar.

A person appointed lambardar of a village under S. 187 (1), C. P. Land Revenue Act before its imperfect partition, continues after partition to function as lambardar of his own *patti*, as lambardar of the *Shamlati patti* and as *sadar-lambardar* of the village. As he has no interest in the pattas allotted to the other proprietors, he should be formally removed from the office under S. 189 (1) (*a*) of the Act, and the other proprietors should be appointed as lambardar of their respective *pattis*. Having an interest in the *Shamlati patti,* he cannot be removed from the office of lambardar of that patti under S. 189 (1) (*a*). He is entitled to be appointed the *Sadar-lambardar* of the village for the reason that he was its lambardar before it was partitioned. 31 N.L.R. (Suppl.) 132, foll. (*Jayaratnam and Sanyal.*) GAJANAN v. NATHU. 1950 N.L.J. 321.

———**S. 187**—*Protected* thekadari *village—Appointment of lambardar—Interference by Revenue Tribunal—Rules framed under S.* 50, *R.* 11.

The instructions contained in the note below R. 11 of the rules framed under S. 50 of the Land Revenue Act summarise the law and practice which should be applied to protected thekadari mutations and consequently to lambardari cases.

In a protected thekadari village, the recognised protected thekadar becomes by virtue of that status the lambardar of the village. Where the conflicting claims in a case are incapable of final adjudication in the lambardari proceedings, the Revenue Tribunal will not be justified in interfering with an order of the lower Courts appointing one of the claimants as lambardar, but such appointment cannot be regarded as final and irrevocable. It is still open to the parties or others interested in the protected *thekadari* status to establish their sole right of succession to that status in the village. When that is done the lambardari proceedings can be re-opened. (*Jayaratnam, F.C.*) SONABAI *v.* PRATAPLAL. 1948 N.L.J. 422.

———**S. 187 (5)**—*Appointment of* sadar-lambardar—*Procedure—Considerations.*

According to S. 187 (5) of the C. P. Land Revenue Act, if in any *mahal* more *lambardars* than one have been appointed one of them is selected and appointed its *sadar-lambardar.* The section presupposes the existence of a *lambardar* for each *patti* and suggests that before a *sadar-lambardar* can be appointed the *mahal* must have its full complement of *lambardars.* The selection has to be done in accordance with the instructions in R. 11 (2) of the *Lambardari* Rules. In selecting the *sadar-lambardar,* the interest possessed in the *mahal* by the candidates, the wishes of the *lambardars* and the interest represented by them have to be considered. In a case in which the *sadar-lambardar* was also a *lambardar* of a patti, the vacancy in the office of the *lambardar* must be filled before the appointment to the office of *sadar-lambardar* can be taken up as otherwise the elimination of one *lambardar* will narrow down the scope for selection and the considerations referred to in the rule will not be available to the fullest extent to the officer making the selection. If a *sadar-lambardar* is appointed without the *mahal* having its full complement of *lambardars,* the excluded proprietors will be debarred from claiming the office, thus giving the residuary body the unfair advantage of a restricted contest. The appointment of a *sadar-lambardar* is, for administrative reasons, as much the concern of the Revenue Officers as of the proprietors as even for the limited purpose of collecting the revenue payable through him, the *sadar-lambardar* represents all *lambardars.* That is why in selecting a *lambardar* the wishes of all the *lambardars* have to be considered. (*Sanyal.*) BRIJLAL BHAIYALAL *v.* G. N. S. NAIDU. 1950 N.L.J. 394.

———**S. 188**—*Profits made by Lambardar—Co-sharer's right to share.*

The Lambardar is an agent of the proprietary body and has a fiduciary character as regards them despite the fact that he is also one of the co-sharers. No agent can make a profit of the property of his principal even if he is a co-sharer himself. Where a Lambardar acquires certain absolute occupancy land, a house and a *bari* and sells them for profit, the co-sharers are entitled to claim their share of the profit made by the Lambardar in this transaction, and not merely their share of *nazrana.* (*Bose, J.*) KAPILNATH BALDEO *v.* RAMNIHAL SAO. I.L.R. (1948) Nag. 780=A.I.R. 1949 Nag. 193=1948 N.L.J. 360.

———**S. 188 (2) (c)**—*Village profits—If include profits of cultivation—Liability of lambardar to render accounts of cultivating profits of Sir and* Khudkasht *land in his possession.*

A lambardar is not liable to render accounts of the cultivating profits of the *Sir* and *Khudkasht* land in his possession even though he is not in exclusive possession thereof. Under S. 188 (2) (*c*), C. P. Land Revenue Act, the lambardar has to collect the village profits and render an account of the same to the proprietors. Profits of cultivation is not an item of village profits. (***Deo, J.***) DARBARILAL SETH *v.* RAMLAL. 1950 N.L.J. 526.

———**S. 188**—*Village profits—Right to interest on.*

A co-sharer suing his lambardar for accounts can claim interest at 4 per cent. per annum provided he has given a notice in writing. If the Lambardar had given the plaintiff a certain set of accounts and offered to pay him a certain sum in satisfaction of the claim, the plaintiff should have accepted that sum under protest and sued for the balance. If he did not do so, he will not be allowed interest on the sum offered. KAPILNATH BALDEO *v.* RAMNIHAL SAO. I.L.R. (1948) Nag. 780=A.I.R. 1949 Nag. 193=1948 N.L.J. 360.

———**S. 188**—*Village profits—Suit for accounts against Lambardar—Basis of accounting.*

Where the Lambardar is not being sued for negligence, nor is the accounting on the footing of wilful default but the suit is for accounts pure and simple, the co-sharer is only entitled to receive his share in what the Lambardar actually received and not in what he might or ought to have received. (*Bose, J.*) KAPILNATH

BALDEO *v.* RAMNIHAL SAO. I.L.R. (1948) Nag. 780=A.I.R. 1949 Nag. 193=1948 N.L.J. 360.

——**Ss. 189 (2) and 137**—*Temporary* lambardar—*Appointment in death vacancy—Permissibility—Powers of* larbardar *so appointed.*

As the only provision for the appointment of a temporary *lambardar* is made in S. 189 (2) of the Land Revenue Act in a vacancy caused by the suspension of the permanent *lambardar,* a temporary *lambardar* cannot, under the law, be appointed in a death vacancy. The appointment of a temporary *lambardar* in a death vacancy is, therefore, an *ad hoc* appointment made for administrative convenience and has no statutory effect or validity. The temporary *lambardar* so appointed has none of the powers of a *lambardar* appointed under the provisions of S. 187 of the Act. (*Jayaratnam, P. and Sanyal, M.*) R. S. P. S. SIAL *v.* MAHADEORAO. 1949 N.L.J. 377.

——**S. 193 (c)**—*Encroachment on public path within* abadi *site by* mukaddam—*Power of Tahsildar to direct its removal.*

There is no internal survey of a village *abadi* and therefore neither the current village papers nor the wajib-ul-arz can possibly contain a record of lanes and public paths within the *abadi* site. The Revenue Courts can intervene when the question of encroachment on a public path or lane within the *abadi* site is raised before it. Such questions can be raised by executive action taken by the *mukaddam* under S. 193 (*c*) of the Land Revenue Act. If the *mukaddam* himself commits an encroachment, the Tahsildar who is a superior Revenue Officer can exercise powers under that section and direct removal of the encroachment. In order to "prevent" an encroachment a Tahsildar must necessarily have power also to direct removal of an existing encroachment. (*Jayaratnam.*) GAJRAJ SINGH *v.* HUKUM SINGH. 1949 N.L.J. 182.

——**S. 196**—*Kotwar's remuneration—Mode of assessment and collection—Liability of co-sharers.*

Co-sharers in a *malguzari* village are not assessed separately to Kotwar's remuneration. The whole of the home-farm land is assessed as a single unit. The person responsible for the payment of the Kotwar's remuneration on this account is the Lambardar of the village. He is responsible for collecting it from the proprietors of the Mahal or Patti of which he is lambardar. It is not for the Kotwar to collect his remuneration individually from each co-sharer proprietor of a village or take action against the proprietors severally for their failure to pay him his dues. The remuneration payable by the proprietary body as fixed at settlement is not an unalterable sum. It should be re-calculated according to the prescription in the Wajib-ul-arz whenever there is an accretion to or diminution in the total home-farm area. Any proprietor who holds land in his individual capacity, other than *Sir* or *Khudkasht* land, is liable to be assessed for Kotwar remuneration on that land as if it were tenancy land. This is an individual liability which he must discharge not as proprietor of a share in the village but as an independent holder of land. (*Jayaratnam, F.C.*) HABIB MIYAN *v.* BIHARI KOTWAR. 1948 N.L.J. 475.

——**S. 201**—*Breach by Malguzar of* wajib-ul-arz *entry regarding grazing—Tenant's right to graze cattle over* banjar *land.*

Where the *wajib-ul-arz* entry is to the effect that the cultivators graze their cattle free on the *banjar* land, the tenants are entitled to graze their cattle over the whole of the existing *banjar* land except that area which was specifically recognised as reserved for grass for the Malguzar. Where there is a breach by the Malguzars of the *wajib-ul-arz* entry regarding grazing by reserving more of the *banjar* land for the grazing of their own cattle than was recognised at settlement, action can be taken under S. 201 of the Land Revenue Act against them. (*Jayaratnam.*) RAJARAM *v.* PUNJABRAO. 1950 N.L.J. 207.

——**S. 201 and Central Provinces Tenancy Act, S. 88-A**—*Cases under—Procedure—Cr. P. Code or I. P. Code—If applicable.*

Cases under S. 201 of the Central Provinces Land Revenue Act and under S. 88-A of the Central Provinces Tenancy Act are not governed by S. 5 (2) or any other provisions of the Cr. P. Code or of the I. P. Code. The definition of 'offence' contained in S. 4 (*o*), Cr. P. Code, does not apply to cases under these Acts. (*Ramsden, F.C.*) RANASHAH BAPU *v.* SHALIGRAM. 1945 N.L.J. 542.

——**S. 201 and Central Provinces Tenancy Act, S. 88-A**—*Cases under—Revenue officer, if can start* suo motu.

Cases under S. 201 of the Land Revenue Act and S. 88-A of the Tenancy Act, can be started by the revenue officer *suo motu.* In S. 201 there is nothing to bar this and in S. 88-A, the words "or otherwise" would authorise it. (*Ramsden, F.C.*) RANASHAH BAPU *v.* SHALIGRAM. 1945 N.L.J. 542.

——**S. 201 and Central Provinces Tenancy Act, S. 88**—*Contravention of rule or custom by landlord—Separate fine in respect of each tenant injured thereby—If can be imposed.*

Under S. 201 of the Central Provinces Land Revenue Act separate fines cannot be inflicted in the case of each tenant injured by a contravention of the rule or custom by the landlord. For each occasion (*e.g.*) each season that the landlord contravenes each separate rule or custom, the maximum fine which can be imposed under the section is Rs. 200. This does not, however, apply to cases under S. 88 of the Tenancy Act. (*Ramsden, F.C.*) RANASHAH BAPU *v.* SHALIGRAM. 1945 N.L.J. 542.

——**S. 201**—*Lease of "banjar" land for cultivation—Liability of Malguzar and lessee—Construction of wajib-ul-arz*

If an entry in the wajib-ul-arz of a village states that the agricultural cattle of the cultivators "graze free in the 'banjar' land of the village", its legal effect is that the tenants are only entitled to graze their agricultural cattle free on whatever waste land there may be in the village from time to time. The malguzar is not bound to preserve an adequate area of waste land for the grazing of the village cattle. He may, if he chooses, lease out the whole of it for *cultiva-*

tion but not for grazing. If, therefore, a malguzar leases out a portion of "banjar" land for cultivation, neither he nor the lessee is liable under S. 201 of the C. P. Land Revenue Act. 30 N.L.R. 246, diss. from. (*Jayaratnam, P. and Sanyal, M.*) BRIJLAL KASHIRAM *v.* SAKHARAM. 1949 N.L.J. 329.

———**S. 201**—*Right of free grazing—Construction of wajib-ul-arz*—"Banjar" *land—Meaning of.*

The word "*banjar*" has not been defined anywhere. It includes all unoccupied village waste land which is regarded by custom as communal land and on which the grazing of cattle is possible. "*Banjar*" is the generic term for grazing land. In popular parlance it means waste land in the village over which cattle wander about and find their grazing. Where the wajib-ul-arz of a village recites that "there is no banjar land in the village", it cannot be contended from a stereotyped entry in the wajib-ul-arz that agricultural cattle graze free of charge on all the *banjar* land of the village that a certain khasra number which is recorded as "*jhudpi jungle ghas*" is "*banjar*" land and should, therefore, be open to free grazing. (*Jayaratnam.*) DURYODHAN *v.* DALLU. 1950 N.L.J. 73.

———**S. 202**—*Forest Rules—Applicability—Forest growth on 'chota ghas' land.*

"Chota ghas" land comes under the classification "scrub jungle and grass". By the definition in R. 1 of the Malguzari Forest Rules any forest growth on "chota ghas" land must therefore be subject to control under those rules. If there is no forest growth on the land then obviously the rules cannot apply. 18 N.L.J. 253, ref. (*Jayaratnam, F.C.*) PARTAP CHAND, *In re.* 1948 N. N.J. 552.

———**S. 202**—*Forest Rules—Applicability*——"Jarkharedi" *villages.*

The Rules framed under S. 202, Land Revenue Act, are applicable to "*Jarkharedi*" villages, and the lambardar-proprietor is liable to be penalised, as provided in the Rules, for any contravention of them. (*Jayaratnam.*) SHRI MADAN MOHAN DEOSTHAN, *In re.* 1950 N.L.J. 131.

———**S. 202**—*Forest Rules—Interpretation—Whether to be guided by practical considerations.*

The Rules under S. 202 of the C. P. Land Revenue Act will fail in their purpose if they are interpreted with too strict a regard to legal technicalities. Practical considerations must be the guide in the interpretation of the words occurring in the Rules. (*Jayaratnam, F.C.*) WASUDEO NARAIN SARAF, *In re.* 1848 N.L.J. 376.

———**S. 202**—*Forest Rules, Rr.* 2 *and* 5(*c*)—*License given by Malguzar for cutting timber with condition that Forest Rules should be observed—Breach of Rules by licensee—Liability of Malguzar.*

Written licenses were given by a Malguzar for cutting timber in his forest with a condition embodied in them that the Malguzari Forest Rules should be observed. The licensees however disregarded the condition. They did not cut trees flush with the ground R. 5 (*c*), and offended further by cutting a large number of prohibited trees (R. 2).

Held, that the Malguzar could not be held liable for the breach of R. 5 (*c*) because it could not be held that he in any way abetted such breach, but that he was liable for a breach of R. 2 because he was the immediate source of the authority which led to a breach of the rule. (*Jayaratnam, F.C.*) WASUDEO NARAIN SARAF, *In re.* 1948 N.L.J. 376.

———**S. 202**—*Forest Rules, Rr.* 3 (2) *and* 4—*Application by lambardar for permission to clear forest land for cultivation—Need for proper enquiry—Duty of Deputy Commissioner.*

If a lambardar applies under R. 3 (2) of the Malguzari Forest Rules for permission to clear forest land in the village for cultivation, sufficient care must be taken to safeguard all interests concerned including the public interest, before permission is given. Any objection raised to the granting of permission must be enquired into and there must be an inspection of the village forest so that a responsible officer can decide which is the most suitable area to be disforested. R. 4 prescribes that the Deputy Commissioner should specify in the permission the period within which the land "after its clearance shall be brought under cultivation either by the proprietor himself or through his lessee". This is a very precise condition and a breach of it would be punishable under S. 202 (1) of the C. P. Land Revenue Act. It is essential that in those cases the Deputy Commissioner should have an enforceable hold on the proprietor or his lessee, otherwise *mala fide* applicants will succeed in converting to their advantage, and nobody else's, big tree forest into mere scrub jungle and not crop-bearing lands. (*Jayaratnam.*) DIWAKARRAO *v.* RAGHUNATHDAS. 1950 N.L.J. 195.

———**Ss. 202 and 23**—*Forest Rules, R.* 4—*Communication of Prohibitory Order—Presumption from direction in order sheet.*

There is no provision in the Land Revenue Act as to the mode of communicating orders of Revenue Courts. Where in the case of a prohibitory order issued under R. 4 of the Rules under S. 202 of the Act there is in the order-sheet no copy of any 'parwana' which was issued nor an acknowledgment of any sort to show that any communication was made to the person concerned, a mere entry made in the order-sheet directing that the order should be communicated is not proof of service or communication, but is only proof of such an intention. No presumption adverse to a person affected by a prohibitory order can be drawn from a direction in an order-sheet of which there is no proof of completion either by acknowledgment of the person concerned or by substituted service on his refusal to acknowledge. (*Jayaratnam, F.C.*) RAMJILAL MALGUZAR, *In re.* 1948 N.L.J. 468.

———**S. 202**—*Forest Rules—R.* 5 (1) (*b*)—*Cutting of timber trees—If breach of rule—Maximum penalty.*

R. 5 (1) (*b*) of the rules framed under S. 202 of the C. P. Land Revenue Act empowers the Deputy Commissioner to penalise even the cutting of timber trees and in fact the cutting of any trees, in case, the conditions specified in that rule with regard to the trees left standing not being less than 90 per acre, are not followed under the Notification, dated the 16th May, 1945, the maximum fine that can be imposed under S. 202 has been raised from Rs. 200 to Rs. 1,000. (*Bambawale.*) Madhao Rao *v.* Tenants of Alada. 1949 N.L.J. 455.

——**S. 202**—*Forest Rules—R. 5 (2)—Lessee of forest growth on "chota ghas" land granting sub-lease—Unrestricted cutting of forest growth by sub-lessee—Liability of lessee.*

If a lessee of the forest growth standing on *"chota ghas"* grants a sub-lease and there is an unrestricted cutting of the forest growth by the sub-lessee, the lessee is liable for breach of R. 5 (2) of the Malguzari Forest Rules. (*Jayaratnam, F.C.*) Partapchand, *In re.* 1948 N.L.J. 552.

——**S. 202 (as amended by Act I of 1945)**—*Retrospective effect.*

The enhanced penalty of Rs. 1,000 under S. 202 of the C. P. Land Revenue Act was brought into force by Act I of 1945, which became law on 9th February, 1945, and can therefore only be imposed when it is proved that the breach was committed after that date. (*Jayaratnam, F.C.*) Kanji Bhai Tikamdas, *In re.* 1948 N.L.J. 329 and 429.

——**S. 203 (3)**—*Applicability—"Transfer"—Simple mortgage—If prohibited.*

A simple mortgage by a tenant of his house in the *abadi* together with a mortgage of the site under it, is not a "transfer" which would entitle the landlord to eject the tenant on the ground of the prohibition contained in S. 203 (3) of the C. P. Land Revenue Act. "Transfer" in that sub-section means a transfer of the right to possession. Since there is no transfer of a right of possession in a simple mortgage, there is no transfer within the meaning of S. 203 (3). (*Grille, C.J. and Hidayatullah, J.*) Shree Ramchandra Swami *v.* Yadorao. I.L.R. (1948) Nag. 259=A.I.R. 1948 Nag. 314=2 D.L.R. 631=1948 N.L.J. 580.

——**S. 211**—*Watandari patel—Succession—If regulated by personal law.*

Succession to the post of watandari patel is not regulated by personal law. There is no mention of personal law in S. 211 of the C. P. Land Revenue Act or the rules thereunder. The senior member of the senior branch of the family, if eligible, would ordinarily have the best claim. (*Ramsden, F.C.*) Bala Sadu *v.* Kesheo Tukaram. (1946 N.L.J. 600.

——**S. 218 (3), Proviso**—*Failure to serve notice before delegation—Effect of—Objection, if can be raised at any stage.*

Under S. 218 (3), proviso, of the C. P. Land Revenue Act, no delegation can be made until notice has been duly served on all persons having rights in the land affected, and their objections have been heard and considered. A failure to comply with this provision is a serious omission and apart from the inequity involved, may lead to a considerable confusion when the order of delegation is to be executed actually on the spot. The error is so fundamental that a legal objection based thereon can be urged at any stage.

(*Bambawale.*) Diwanchand *v.* Amritlal. 1949 N.L.J. 619.

——**S. 218 (4)**—*Mining lease—Area leased to another lessee after its abandonment by previous lessee—Landlord's right to fresh compensation—Compensation payable.*

Where after a previous lessee has abandoned the area leased to him, a new mining lease is granted to another party, the landlord is entitled to compensation from the latter although compensation has been paid by the previous lessee.

Compensation is not payable both for occupation and also for disturbance of the surface of the land. The word "or" in S. 218 (4) of the Land Revenue Act means whether by mere occupation without disturbance of the surface or by disturbance of the surface. (*Jayaratnam, F.C.*) Shamji Narayanji *v.* Manoramabai. 1948 N.L.J. 193.

——**S. 218 (7)**—*Applicability—Excavation made or digging well.*

The removal of minerals without lawful authority from mines and quarries is made punishable under S. 218 (7), Land Revenue Act. The words "mines and quarry" are applied usually only to those excavations which are made with the object of extracting minerals. An excavation made not for the purpose of extracting minerals but for the purpose of digging a well does not therefore come under S. 218 (7) of the Act. Of course, as the right to all minerals vests with Government, Government is entitled to get the necessary royalty on all minerals extracted from land. (*Rajan.*) Dhanwate, *In re.* 1950 N.L.J. 362.

——**S. 218, Expl.**—*"Minerals"—Boulders extracted from ground while digging well.*

The explanation given at the end of S. 218, Land Revenue Act, is not an exhaustive definition of the word "minerals." There is no doubt that the boulders extracted from the ground during the course of digging a well are "minerals". (*Rajan.*) Dhanwate, *In re.* 1950 N.L.J. 362.

CENTRAL PROVINCES LOCAL FUNDS AUDIT ACT (1933), S. 10—*"Gross negligence"—Meaning of.*

S. 10 of the C. P. Local Funds Audit Act imposes a liability for loss caused by gross negligence of a person; and "gross negligence" imports a high degree of careless conduct. A municipal member who acts with due care and attention as a man of ordinary prudence would act in his own affairs cannot be held to be grossly negligent. (*Sen, J.*) Memichand *v.* Commissioner, Nagpur Division, Nagpur. I.L.R. (1947) Nag. 256=228 I.C. 525=A.I.R. 1948 Nag. 24=1947 Nag. (Rul.) 55=1947 N.L.J. 281.

CENTRAL PROVINCES LOCAL SELF-GOVERNMENT ACT (IV OF 1920), S. 46—*Applicability—Case of disciplinary action.*

S. 46 of the C. P. Local Self-Government Act has no application to a case where the salary of an employee is reduced as a disciplinary measure and as such an appeal to the Financial Commissioner against such an order cannot lie.

(*Jayaratnam, F.C.*) CHHOTELAL KISHORILAL *v.* DT. COUNCIL, DAMOH. 1948 N.L.J. 283.

———S. 51—Tax on persons carrying on trade of husking, milling or grinding of grains—Levy of such tax in excess of Rs. 50 per annum from trader—Legality. *See* GOVERNMENT OF INDIA ACT, S. 142-A. 1948 N.L.J. 533.

———Ss. 71, 73 and 79—*Suit for refund of tax recovered in excess of what was legally recoverable—Maintainability—Notice under S. 73—If necessary.*

Per *Bose, J.*:—A civil suit for the refund of tax recovered in excess of what was legally recoverable is not incompetent by reason of the provisions of S. 71 and S. 79 (1) (*xxix*) of the C. P. Local Self-Government Act. Both S. 79 and the Rule framed under that section are confined to orders and decisions given under the Act". It is impossible to say that an order which contravenes the law or is made in the face of an express statutory prohibition can be said to be under the Act.

Such a suit is maintainable even without notice prescribed by S. 73 of the Act being given. The recovery of an amount in excess of what was legally recoverable is not an act done "under the Act" or "purported to be done" under the Act within the meaning of that section. (*Pollock and Hemeon, JJ.*) DISTRICT COUNCIL, BHANDARA *v.* KISORILAL LAXMINARAYAN. I.L.R. (1949) Nag. 87=A.I.R. 1949 Nag. 190=4 D.L.R. (Nag.) 42=1948 N.L.J. 533.

———S. 73 (2)—Applicability—Suit by member against District Council for travelling allowance. *See* LIMITATION ACT, ART. 115. 224 I.C. 12.

CENTRAL PROVINCES AND BERAR MAINTENANCE AND RESTORATION OF ORDER AND COLLECTION OF FINES (INDEMNITY) ACT (II OF 1945), S. 4—*If* ultra vires.

S. 4 of the C.P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act is not *ultra vires*. That section deals with various matters which fall under different heads of classification in Lists 2 and 3 of the Constitution Act. It is not necessary that all the provisions of an Act should fall within a single category. The legislature can derive its powers partly from one or more entries in the list and partly from those in another, and, provided the field is covered in one way or another, the legislation will be *intra vires*. (1940) F.C.R. 188, rel. on. (*Bose and Sen, JJ.*) SHANKARRAO *v.* SHAMBIHARI. I.L.R. (1949) Nag. 560=5 D.L.R. (Nag.) 6.

———S. 4—*Scope—Question of good faith—When relevant.*

Under S. 4 of the C.P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act, no question of good faith enters into consideration when the person proceeded against is a servant of the Crown. So long as he acts, or *purports* to act, for the purpose of maintaining or restoring order the section applies, without any question of good faith, and this is so, whether he himself does the immediate act complained of or orders the act to be done by another.

Under the section, the element of good faith is introduced when other persons *purport to act* under the orders of a servant of the Crown. Therefore, persons other than servants of the Crown have to establish either that they acted under the orders of a servant of the Crown for the purpose of maintaining or restoring order (in which case no question of good faith arises) or, that they purported to act for that purpose under such orders in *good faith.* If they can establish that they actually acted for the purpose specified, then no question of good faith arises, but if they are unable to establish that, then they can only be absolved if they show that they *purported* to act under the requisite orders for that purpose in good faith. (*Bose and Sen, JJ.*) SHANKARRAO *v.* SHAMBIHARI. I.L.R. (1949) Nag. 560=5 D.L.R. (Nag.) 6.

———S. 4—*Suit filed before Act—If automatically discharged—Subsequent sanction of Provincial Government—Effect of.*

If a suit has been instituted before the passing of the C.P. and Berar Maintenance and Restoration of Order and Collection of Fines (Indemnity) Act, the Court would be unable to proceed with it because S. 4 leaves the Court no discretion. The Act itself discharges the suit. It is not the Court which puts an end to the suit by the order but the Act which operates automatically as a guillotine. So long as the suit continues, it is a previously instituted suit within the meaning of the Act and it would not cease to be that simply because the Provincial Government accorded subsequent sanction. The only power conferred on the Provincial Government is to afford *previous* sanction to the institution of a suit and not to condone proceedings already instituted or to give its sanction retrospective effect. (*Bose and Sen, JJ.*) SHANKAR RAO *v.* SHAMBIHARI. I.L.R. (1949) Nag. 560=5 D.L.R. (Nag.) 6.

CENTRAL PROVINCES (AND BERAR) MAINTENANCE OF PUBLIC ORDER ACT (XV OF 1946)—*Whether* ultra vires—*Provincial Legislature—Government of India Act, Sch. VII, List II, Entry No.* 1.

The Central Provinces and Berar Maintenance of Public Order Act, 1946, is ***intra vires*** the Provincial Legislature and is not repugnant to the Trade Unions Act or the Trade Disputes Act.

The pith and substance of the Act is preventive detention for reasons connected with the maintenance of public order and not industrial and labour disputes. The Act has for its purpose the maintenance of public order and though incidentally it touches upon the subject of strikes and trade disputes, it does so merely because strikes promoted solely for the sake of causing unrest amoung workmen lead directly or indirectly to a subversion of public order. Since the entire subject of the Act fals within Entry No. 1 of List II of the Seventh of the Constitution Act no question of repugnancy either directly or indirectly arises. No sanction of the Governor-General was necessary because all the powers for the enactment of the Act are to be found in the Provincial Legislative List and it is not necessary to go to the Concurrent Legislative List at all. As the pith and substance of the Act falls fully within the Provincial Legislative List, it does not matter if it incidentally touches some matters included in the first and the third list. (*Bose and Hidayatullah, JJ.*) OM PRAKASH MEHTA *v.* EMPEROR. I.L.R. (1947) Nag. 579=A.I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

———**S. 2**—*Order of detention by Provincial Government — Validity—Presumption— Cr. P. Code, S.* 491.

S. 2 (1) of the C. P. and Berar Maintenance of Public Order Act invests the Provincial Government with the power to make orders of detention. If therefore an order of detention purports to have been made by the Provincial Government and is valid on the face of it and the detenu does not show that the authority which made the order is not the authority invested with the requisite powers under the Act, in summary proceedings under S. 491, Cr. P. Code, where the burden is on the detenu it is not permissible for the Court to presume that the order is invalid. (*Bose and Hidayatullah, JJ.*) OM PRAKASH MEHTA *v.* EMPEROR. I.L.R. (1947) Nag. 579 =A.I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

———**S. 2**—*Order of detention on basis of past acts—Legality.*

Under S. 2 of the C. P. and Berar Maintenance of Public Order Act, detention cannot be ordered on the basis of past actions. The section uses the words "is acting". That imports continuity of action sustained on and after the passing of the Act. It is not enough that the person concerned should have acted in the past. There must be material to indicate that he continued so to act after the Act was passed and that, but for his apprehension, he would be likely to go on doing so. (*Bose and Hidayatullah, JJ.*) OM PRAKASH MEHTA *v.* EMPEROR. I.L.R. (1947) Nag. 579=A.I.R. 1948 Nag. 199=49 Cr.L.J. 230=1947 N.L.J. 326.

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934)—*Applicability—Pending litigation.*

The C. P. Money-Lenders Act is clearly retrospective, except for Ss. 3, 4, 5, 6 and 7 and the retrospective provisions must be applied to pending litigation in the absence of anything to show that they were not intended to be so applied. (*Pollock and Hidayatullah, JJ.*) SHANTABAI *v.* NARAYANARAO. I.L.R. (1948) Nag. 290=A.I. R. 1949 Nag. 81=1949 N.L.J. 212.

———**Ss. 3 and 7 (b) and (c)**—*Applicability—Non-resident foreigner—Liability to penalties—Suit by foreigner in Court of Province—Effect of —Submission to jurisdiction.*

The C. P. Money-Lenders Act does not affect money-lenders residing outside the limits of the Province. Such money-lenders are therefore not bound by S. 3 of the Act, particularly in the matter of furnishing accounts to the debtors every year; nor can the penalties prescribed by S. 7 (*b*) and (*c*) be imposed on non-resident foreigners. But when a foreign money-lender

institutes a suit in a Court in the Province and thereby submits to the jurisdiction of the Court in the Province, he cannot be heard to repudiate the mode in which the authority of Court is exercised according to the law of the Province. (*Niyogi and Sen, JJ.*) PYARELALSA *v.* CHAMPALAL. I.L.R. (1947) Nag. 131=228 I.C. 457= 1947 Nag. (Rul.) 46=1947 N.L.J. 385=A.I.R. 1947 Nag. 201.

———**Ss. 7 and 8**—*Power of Court to re-open accounts—Repayments by debtor appropriated by creditor towards interest—Creditor not furnishing accounts for certain periods—Exclusion of such periods in computing interest—Duty of Court.*

In order to give effect to the provisions of S. 7 (*c*) of the C. P. Money-Lenders Act the Court is entitled to re-open the accounts to the limited extent indicated in that section. No express words are necessary to give the power to re-open accounts as the operation involved in computing the interest due on the loan requires the Court to traverse the entire period from the date of the loan or the date of the Act, whichever is later, provided of course that the proviso to S. 8 is applicable to the loan if the loan was given prior to the date on which the Act came into force, and to exclude such period or periods during which accounts were not furnished. The action of the parties is immaterial because the duty is laid on the Court to give effect to the Act. Once these periods are excluded, any repayment even if expressly made towards interest would go first towards the reduction of such interest as may be due and next towards the reduction of the principal sum regard being had to the circumstances of the case. The word "due" in S. 7 (*c*) is connected with the phrase "upon the loan" which follows it and shows that the Court has to compute the amount of interest for the whole period, making allowance for repayments and excluding from calculation such period or periods as are hit by S. 7 (*c*). (*Grille, C.J. and Hidayatullah, J.*) TULSIRAM SETH *v.* BADRIPRASAD. I.L.R. (1948) Nag. 203=A.I.R. 1949 Nag. 31=1948 N.L.J. 223.

———**S. 7, Proviso**—*Scope and effect—Creditor filing statements of accounts in substantial compliance with law—Sufficiency—Omission to comply with strict letter of the law—If fatal.*

In view of the proviso to S. 7 of the C. P. Money-Lenders Act a creditor who carries out the spirit of the law by filing complete statements of accounts before the Debt Conciliation Board must be held to have complied with the requirements, though he has not acted according to the strict letter of the law. (*Niyogi and Sen, JJ.*) PYARELALSA *v.* CHAMPALAL. I.L.R. (1947) Nag. 131=228 I.C. 457=1947 Nag. (Rul.) 46 =1947 N.L.J. 385=A.I.R. 1947 Nag. 201.

———**S. 9**—*Decree on account of arrears of interest—If includes interest after decree.*

S. 9 of the C. P. Money-Lenders Act means that a decree on account of arrears of interest cannot include interest for any period after the decree but will include interest for any period up to the date of the decree. (*Pollock, J.*) SARDARMAL LADHURAM *v.* GENDLAL. 227 I.C. 176= 1946 N.L.J. 364=A.I.R. 1946 Nag. 343.

———**S. 9**—*Intention and scope of—Balance of principal—How to be arrived at.*

S. 9 of the C. P. Money-Lenders Act was intended to incorporate the ordinary law of *damdupat* and the section means that as the time of the passing of the decree the Court must find out the sum due as principal. In doing this the Court must ordinarily take into account any repayment of the principal sum and find out the balance of the principal due on that date. (*Pollock and Hidayatullah, JJ.*) AMARSINGH GAJJAN SINGH *v.* RAM DAYAL TULSIRAM. I.L.R. (1948) Nag. 853=A.I.R. 1949 Nag. 195=1948 N.L.J. 277.

———**S. 11**—*Applicability—Amount in respect of which certificate is issued under S. 13 (3), Debt Conciliation Act—Application for instalments—If competent.*

If a Deputy Commissioner being unable to recover the sum settled by the Debt Conciliation Board issues a certificate under S. 13 (3) of the C. P. Debt Conciliation Act, that sum is recoverable under S. 13 (4) of that Act as if a decree of a Civil Court has then been passed. S. 13 (4) does not introduce a fiction nor does it create a decree. It merely prescribes a procedure by which the amount due is to be recovered. The procedure is the same as applies in the case of a Civil Court's decree. It follows therefore, that an application by the judgment-debtor for instalments in respect of that amount is incompetent under S. 11 of the C. P. Money-Lenders Act. This section cannot apply for two reasons. The first is that it applies only in respect of "any decree passed against him". No decree is passed in this case, nor is any decree deemed to have been passed. The second is that the section does not apply in the executing Court. (*Bose, J.*) DILLI SINGH *v.* THAKUR TEK SINGH. I.L.R. (1946) Nag. 821=226 I.C. 436=1946 Nag. (Rul.) 243=1946 N.L.J. 445=A.I.R. 1946 Nag. 371.

———**S. 11**—*Applicability—Mortgage executed prior to Act.*

S. 11 of the C. P. Money-Lenders Act, as the law stands to-day, applies to mortgage transactions entered into prior to the 1st April, 1935, the date of commencement of the Act, to the same extent as it does to unsecured loans of an anterior date, and it is not limited to transactions which took place after that date. (*Mudholkar, J.*) RAMJIYAWAN *v.* SHRIKRISHNA. 5 D.L.R. (Nag.) 181=1950 N.L.J. 370.

———**S. 11**—*Application for instalments after passing of final decree—If lies.*

S. 11 of the C. P. Money-Lenders Act has no application once a final decree for sale on a mortgage has been passed, and an application for instalments does not, therefore, lie thereafter. (*Bose, J.*) RAJARAM KONTU *v.* SETH RISHABHA KUMAR. I.L.R. (1947) Nag. 470=A.I.R. 1948 Nag. 180=1947 N.L.J. 391.

———**S. 11**—*Nature of proceedings—Application for instalments dismissed for default—Second application, if maintainable—Remedy of judgment-debtor—C. P. Code, S.* 141 *and O.* 9, *R.* 9.

The proceedings under S. 11 of the C. P. Money-Lenders Act are not, strictly speaking, execution proceedings, but as they have to be treated as proceedings under S. 47, C. P. Code, and as the order passed therein is to be deemed as an order under S. 47 and appealable as such, the provisions of O. 9 of the Code must, therefore, come into play. Where, therefore, an application for instalments under S. 11 of the C. P. Money-Lenders Act was dismissed for default, a second application based on the same identical allegations is barred by the provisions of O. 9, R. 9, C. P. Code. The only remedy of the judgment-debtor is to apply for setting aside the dismissal under O. 9, R. 9 read with S. 141, C. P. Code. The proceedings under S. 11 of the C. P. Money-Lenders Act are, undoubtedly, in the nature of original proceedings, which must attract the provisions of S. 141, C. P. Code. (*Shevde, J.*) THANDARAM MANWA *v.* KASHIPRASAD. A.I.R. 1948 Nag. 350.

———**S. 11**—*Order for instalments after passing of final decree—Whether can be passed—C. P. Code, O.* 34, *R.* 5.

An order directing payment by instalments can be passed under S. 11 of the C. P. and Berar Money-Lenders Act even after the passing of a final decree for sale under O. 34, R. 5, C. P. Code. When a final decree is passed, it continues to be a decree for the payment of a sum of money or for the payment of an amount found due. 1942 N.L.J. 150, overruled. (*Hemeon, Hidayatullah and Mudholkar, JJ.*) RUKHMANIBAI *v.* MAHENDRALAL. I.L.R. (1949) Nag. 182 =1949 N.L.J. 113=A.I.R. 1949 Nag. 174=4 D.L.R. (Nag.) 49 (F.B.).

———**S. 11**—*Order terminating scheme under S.* 13 (3), *Relief of Indebtedness Act—Recovery of amount remaining due—Order for instalments—Power of executing Court.*

The provisions of S. 11, C. P. Money-Lenders Act do not apply to the recovery of the amount remaining due on the termination of the scheme framed by D. R. Court by the Deputy Commissioner under S. 13 (3), Relief of Indebtedness Act and the Executing Court has, therefore, no power to grant instalments. I.L.R. (1946) Nag. 821, appl. (*Mudholkar, J.*) JAGANNATH *v.* GULABSINGH. I.L.R. (1949) Nag. 981=5 D.L.R. (Nag.) 57=A.I.R. 1950 Nag. 115=1949 N.L.J. 588.

C. P. MUNICIPALITIES ACT (II OF 1922), Bye-laws—Notice of meeting sent within time but not received three days before meeting—Irregularity, if curable. *See* CENTRAL PROVINCES MUNICIPALITIES ACT, S. 26. 1946 N.L.J. 227.

———**S. 3 (a)**—*"Building"—If includes compound wall.*

A compound wall is certainly an *enclosure* and would thus come under the definition of "building" in S. 3 (*a*) of the C. P. Municipalities Act. (*Bambawale.*) KEDIA GINNING FACTORY AND OIL MILL *v.* MUNICIPAL COMMITTEE, KHAMGAON. 1949 N.L.J. 610.

———**Ss. 3 and 103**—*"Building"—If includes wall—Person reconstructing dilapidated wall without Municipal Committee's permission—If can be proceeded against under S.* 103.

A wall is not included in the definition of a building in S. 3 (*a*), C. P. Municipalities Act, and the reconstruction of a dilapidated or a broken wall cannot be regarded as an alteration to or enlargement of a building. No action can therefore be taken under S. 103 of the Act against a person for reconstruction of the wall without the Municipal Committee's permission. (*Dastur.*) Harakchand *v.* Municipal Committee, Balapur. 1950 N.L.J. 524.

——**S. 4**—*"Good faith—Meaning of—Standard of Care.*

A thing must be held to be done in good faith, when it is in fact done honestly, whether it is done negligently or not. The standard of care is that of a man of ordinary prudence, and is not higher than that of a trustee under S. 15 of the Trust Act. (*Sen, J.*) Nemichand *v.* Commissioner, Nagpur Division, Nagpur. I.L.R. (1947) Nag. 256=228 I.C. 525=A.I.R. 1948 Nag. 24=1947 Nag. (Rul.) 55=1947 N.L.J. 281.

——**S. 10**—*Rules framed under R.* **9 (1) (i)** *—"Duly qualified elector"—Meaning of.*

"A duly qualified elector" in R. 9 (1) (*i*) of the rules framed under S. 10 of the C. P. and Berar Municipalities Act, can only mean a person entitled to vote and elect a candidate in the constitutency in which he is an elector. As each elector has only one vote and can only vote in one constituency under the Act, it follows that he cannot be a "duly qualified elector" except in the ward or constituency in which he is entitled to vote. It follows, therefore, that the proposer and seconder of a candidate must be electors in the ward in which the candidate is seeking election, and it is not enough if they are electors from other wards in the same municipality. (*Bose, C.J.*) Gendalal *v.* Lakshmi Kant. I.L.R. (1950) Nag. 340=A.I.R. 1950 Nag. 109=1950 N.L.J. 60.

——**S. 14 (3)**—*Nomination of same person in respect of two constituencies—Validity—Subsequent withdrawal of nomination paper in respect of one of them on date of scrutiny—Effect of.*

The nomination of a person in respect of two constituencies contravenes the provisions of S. 14 (3) of the C. P. and Berar Municipalities Act. The material date for determination of the question if a candidate was duly nominated, is the date of nomination and not the date of scrutiny. Any invalidity or lacuna in his nomination paper or in nomination cannot be legalised or rectified by a subsequent act of the candidate on the date of scrutiny. The object of the scrutiny is to see whether the nomination was valid on the date on which it was made. The date with reference to which the question of eligibility of a candidate is to be determined is the date fixed for the nomination, and if on that date a candidate is not eligible, his nomination paper must be rejected. The candidate has to make his choice in respect of his constituency on or before the date fixed for filing the nomination papers. The choice cannot be deferred till the date of scrutiny. (*Sen, J.*) Nandkishore *v.* Lalji. I.L.R. (1950) Nag. 975=5 D.L.R. (Nag.) 187=A.I.R. 1950 Nag. 195.

——**S. 14 (3)**—*Scope of—Candidature of same person for two wards—If prohibited.*

The language of S. 14 (3) of the C. P. and Berar Municipalities Act is plain and means that a person is entitled to contest an election from one constituency only—that constituency may be a ward or a special constituency. He cannot be a candidate for two wards, nor can he be a candidate for two special constituencies. Similarly, he cannot be a candidate for a ward and a special constituency. (*Sen, J.*) Nandkishore *v.* Lalji. I.L.R. (1950) Nag. 975=5 D.L.R. (Nag.) 187=A.I.R. 1950 Nag. 195.

——**Ss. 16 (3) and 21**—*Scope—Resignation of member—When takes effect.*

S. 16 of the C. P. Municipalities Act merely regulates the normal term of office of a member of a committee, and all that it says is that even if the term should happen to expire in any particular case the member in question will nevertheless continue in office until his successor is appointed and notified. It has nothing to do with cessation of membership by other means. S. 16 (3) of the Act does not govern S. 21. That section indicates that the resignation of a member of a committee becomes valid from the moment the President accepts it. No qualification is placed upon that and accordingly the resignation takes effect from the date of the acceptance. (*Bose, J.*) Model Industries, Dayalbag *v.* Rambhau Narayan. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

——**S. 20-A**—*Powers of High Court—Discretion of Judge under R.* 18 *of C. P. Municipal Electoral Rules—Interference.*

Under R. 18 of C. P. Municipal Electoral Rules, the Judge has a discretion if an election is declared void under R. 17 either to declare that a casual vacancy has been created or that the petitioner or any other candidate has been duly elected. It is not open to the High Court sitting in revision under S. 20-A, C. P. and Berar Municipalities Act to question the discretion exercised by the Judge in accordance with R. 18. (*Sen, J.*) Nandkishore *v.* Lalji. I.L.R. (1950) Nag. 975=5 D.L.R. (Nag.) 187=A.I.R. 1950 Nag. 195.

——**S. 20-A (2)**—*Enquiry into election petition—Power of Additional District Judge not specially empowered by Provincial Government.*

The words "specially empowered by the Provincial Government in this behalf" in S. 20-A (2), C. P. and Berar Municipalities Act, qualify not only "a Civil Judge" but also "the District Judge or Additional District Judge". That is to say, neither a District Judge nor an Additional District Judge can enquire into an election petition unless he has been specially empowered in that behalf. (*Kaushalendra Rao, J.*) Purshottam Vithal *v.* G. V. Pandit. 1950 N.L.J. 520=A.I.R. 1950 Nag. 212.

——**Ss. 21 and 16 (3)**—Scope—Resignation of member—When takes effect. *See* C. P. Municipalities Act, Ss. 16 (3) and 21. 1946 N.L.J. 227.

——**S. 23**—*Applicability—Decision of election tribunal declaring election invalid, set aside on appeal—If creates temporary vacancy—Transaction of municipal business—Section, if can be used to cure irregularity.*

The decision of the election tribunal declaring the election of a member of a municipal committee to be invalid creates a temporary vacancy on the committee, although it is set aside on appeal. The balance of advantage unquestionably lies in treating the decision of the tribunal as good and effective for purposes of transacting municipal business so long as it enures, and in using S. 23 of the C. P. Municipalities Act for curing irregularities should the decision be varied in appeal. (*Bose, J.*) Model Industries, Dayalbag *v.* Rambhau Narayan. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

———S. 23—*Irregularity — Prejudice—Burden of proof.*

Under S. 23 of the C. P. Municipalities Act, an irregularity is not to be treated as fatal unless it has occasioned prejudice. The burden of establishing prejudice is on the person seeking to vitiate the irregular proceedings. It must be pleaded, particulars must be furnished and it must be proved. (*Bose, J.*) Model Industries, Dayalbag *v.* Rambhau Narayan. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

———S. 23—*Notice of meeting sent within time but not received three days before meeting—Irregularity, if curable.*

Where a bye-law framed by the municipal committee requires that a notice of meeting should be sent to each member not less than three days before the date thereof, and the notice is sent in time, no question of illegality can arise on the score that the notice was not *received* three clear days before the meeting. All that the bye-law requires is that the notice shall be "sent" that is to say, despatched, not less than three days before the meeting. At best, this would be a curable irregularity under S. 23 of the C. P. Municipalities Act. (*Bose, J.*) Model Industries, Dayalbag *v.* Rambhau Narayan. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

———S. 25—*Rules, R. 2 (iii)—Scope and effect of—Powers of Government to frame rules as regards right of appeal—Appeal by Municipal Committee—If barred or prohibited.*

R. 2 (*iii*) of the rules framed under S. 25 of the C. P. Municipalities Act gives a right of appeal to the Commissioner. The right to appeal is not restricted to an employee; it does not prohibit an appeal at the instance of the Municipal Committee, if it is dissatisfied with the decision of the Deputy Commissioner. The rule, though in wide terms, can be justified by the terms of S. 175 of the Act which confers wide powers on the Provincial Government as regards the right of appeal. (*Sen, J.*) Nemichand *v.* Commissioner, Nagpur Division, Nagpur. I.L.R. (1947) Nag. 256=228 I.C. 525=A.I.R. 1948 Nag. 24=1947 Nag. (Rul.) 55=1947 N.L.J. 281.

———S. 25—*Rules under—R. 3—Scope—If* ultra vires.

S. 25 (7) of the C. P. Municipalities Act does not confer upon the Provincial Government any power to frame rules about the filing of revision applications. R. 3 of the rules framed under S. 25, in so far as it provides for a revision is in excess of the rule making power and is therefore to that extent *ultra vires.* (*Sen, J.*) Nemichand *v.* Commissioner, Nagpur Division, Nagpur. I.L.R. (1947) Nag. 256=228 I. C. 525=1947 Nag. (Rul.) 55=A.I.R. 1948 Nag. 24=1947 N.L.J. 281.

———S. 48—*Scope—Act of Municipal Committee prohibited by law.*

S. 48 of the C. P. Municipalities Act comes into play only when the act of the Municipal Committee is done or purported to be done under that Act. If its action is something which is prohibited by law, and so wholly beyond its jurisdiction, the section does not apply. (*Bose, A. C.J. and Mudholkar, J.*) Secretary, Municipal Committee, Karanja *v.* New East India Press Co., Ltd., Bombay. I.L.R. (1948) Nag. 971=1948 N.L.J. 541=A.I.R. 1949 Nag. 215=4 D. L.R. (Nag.) 1.

———S. 57 (2) and (4)—*Order superseding municipal committee for certain period—If may be amended extending that period—Power of State government—C. P. General Clauses Act, S. 20.*

Neither S. 57, C. P. Municipalities Act, nor S. 20, C. P. General Clauses Act, empowers the State government to amend its original order of supersession of a municipal committee for a certain period under S. 57 (2), C. P. Municipalities Act, by extending that period. The necessary conditions for supersession of a municipal committee are (*a*) the existence of the committee and (*b*) its incompetence, etc. After the supersession of the municipal committee these two conditions cease to exist, and therefore it would not be within the competence of the government to amend their previous order. The State government are bound to reconstitute the municipal committee under S. 57 (4), C. P. Municipalities Act, after the expiry of the period specified in the original order of supersession. (*Mudholkar, J.*) Gopal Jairam *v.* State of Madhya Pradesh. 5 D.L.R. (Nag.) 206=1950 N.L.J. 509.

———Ss. 58 (as amended) and 83 (1)—*Order passed on merits on appeal—Revision to Financial Commissioner's Court—If lies.*

No revision application lies to the Financial Commissioner's Court against an order passed on the merits in appeal under S. 83 (1) of the C. P. Municipalities Act. The amendment of S. 58 of the Act in 1947 does not alter the position in respect of this matter. The provisions of S. 84 (3) of the Act limit by specific provision the very wide powers conferred by the amended S. 58 of the Act on the Provincial Government (by delegation on the Financial Commissioner), in matters relating to objection to municipal assessments, taxation, etc. The words "in any other manner" occurring in S. 84 (3) of the Act are of considerable significance. The scheme for deciding objections to municipal assessments provides (cl. (2) of S. 83 of the Act) that the officer hearing the appeal may in certain circumstances refer any doubtful point of substance arising in the appeal to the High Court for decision. This clearly is the "manner" in which the legislature intended that these disputes should be finally resolved. It is manifestly impossible to reconcile any procedure in revision under S. 58 of the Act with the manner laid down for the final decision of the appeal under S. 83 (1) of the Act. Jurisdiction is limited to an appeal alone and the appellate authority is vested with discretion to seek guidance from the High Court. A power to revise an appellate order, in such circumstances, would be entirely illogical. [1942 N.L.J. 221, fol.] (*Jayaratnam, F.C.*) Bata Shoe Co., Ltd. *v.* Municipal Committee, Jubbulpore. 1948 N.L.J. 586.

———**S. 66**—*Rules framed under R. 1—Crude oil and diesel oil—Liability to* octroi *duty.*

Both crude oil and diesel oil, which is produced from crude oil, are petroleum within the meaning of R. 1 of the rules framed under the Municipalities Act and are therefore not liable to assessment of *octroi* tax. (*Pollock, J.*) Burma Shell Oil Storage and Distributing Co. *v.* Municipal Committee, Jubbulpore. I.L.R. (1948) Nag. 581=1948 N.L.J. 404=A.I.R. 1949 Nag. 148.

———**S. 66 (1)**—*Nagpur Civil Station Sub-Committee Assessment Rules, R. 3—Building not ordinarily let—Valuation of each building, occupied site and surrounding grounds—Alteration of assessment.*

S. 66 (1), C. P. Municipalities Act, draws a distinction between buildings and lands by referring to them separately. This distinction is made further clear in R. 3 of the Rules framed by the Provincial Government under S. 71 of the Act with regard to buildings and lands situate within the limits of Civil Station Sub-Committee, Nagpur. Under the Rule there is one uniform basis for determining the assessment on lands, whether they are ordinarily let or not, while the basis for determining the assessment on buildings depends upon whether they are ordinarily let or not.

According to R. 3 (1), the annual letting value of a building which is not ordinarily let out is to be determined by first ascertaining the estimated cost of constructing a similar building, deducting therefrom a reasonable amount on account of depreciation and adding thereto the estimated present value of the land as an occupied site. The word "land" in this connection means only the land on which the building stands and not the land surrounding the building. Therefore, a building (not ordinarily let) and the land on which it actually stands are to be valued in one way while the surrounding lands or grounds in another. The surrounding lands or grounds have to be valued in the manner provided by R. 3 (2) and the gross annual letting value of such lands should be deemed to be the gross annual rental at which they may be reasonably expected to be let.

R. 3 (4) of the Assessment Rules deals only with valuation and not assessment. Thus, while the valuation cannot be altered for five years, the assessment can be. There is no provision in the Act or the Rules made thereunder keeping the assessment once made inviolate or unalterable for any particular period. (*Mudholkar, J.*) Wilayatullah *v.* Civil Station Sub-Committee, Nagpur. I.L.R. (1950) Nag. 371=A. I. R. 1950 Nag. 223=5 D.L.R. (Nag.) 121=1950 N. L.J. 271.

———**S. 66 (1) (a)**—*Agricultural lands lying within municipal limits of Nagpur—Whether liable to be assessed to property tax.*

Agricultural lands lying within the municipal limits of Nagpur are liable to be assessed to property-tax under S. 66 (1) (*a*) of the C. P. Municipalities Act. (*Niyogi, C.J. and Hidayatullah, J.*) Ganpatrao Jageshwar *v.* Secretary, Municipal Committee, Nagpur. I.L.R. (1947) Nag. 305=229 I.C. 564=1947 Nag. (Rul.) 131=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

———**S. 66 (1) (a)**—*Assessment of property tax—Value of nazul land held by assessee under lease—If may be taken into consideration.*

In assessing the property tax imposed under S. 66 (1) (*a*) of the C. P. Municipalities Act, the value of the nazul land held by the assessee under a lease from Government cannot be taken into consideration. (*Padhye, J.*) Munje *v.* Secretary, Municipal Committee, Nagpur. 2 D.L.R. 470=A.I.R. 1949 Nag. 152=1947 N. L.J. 602.

———**S. 66 (1) (e) and Excise Salt Act (I of 1944)**—*Levy of octroi duty on tobacco by the Municipality—If contrary to provisions of the Excise and Salt Act—Government of India Act* (1935), *Ss.* 143, 292 *and Sch. VII—List I, Entry* 45 *and List II, Entry* 49.

The question was whether the levy of octroi duty by the Municipality on tobacco under S. 66 (1) (*e*) of the Central Provinces Municipalities Act before it was made into *bidis* conflicts with the legislative power of the centre in the matter of imposition of excise duty.

Held, the octroi duty as levied by the Municipality on tobacco under S. 66 (1) (*e*) of the Central Provinces Municipalities Act comes within the exact wording of Entry 49 of List II of the seventh Schedule to the Government of India Act. Such levy remains unaffected by reason of S. 292 of the Government of India Act. There is nothing in Excise and Salt Act to make its provisions contrary to the provisions of S. 66 (1) (*e*) of the Central Provinces Municipalities Act or to the levy of the octroi duty under the same.

Excise duty is a tax on manufactured goods. Octroi duty is a tax levied on the entry of goods within a particular area. Under the Excise Act, tobacco becomes excisable goods within the meaning of Item 9 in the Schedule. Therefore it becomes subject to excise duty when it reaches the stage of manufacture mentioned in Item 9 of the Schedule to the Excise Act. Even before it is converted into *bidis* or any other article mentioned in the entry, it has become excisable goods and liable to pay excise duty. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a certain area. It is wrong to think that any impost of tax from the time tobacco came into existence till the same was converted into *bidis* is necessarily excise duty. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan,* *Mukherjea and Das, JJ.*) Ram Krishna Ramnath *v.* Secretary, Municipal Committee, Kamptee. 1950 S.C.R. 15=1950 R.L.W. 109=5 D.L.R. (S.C.) 1=A.I.R. 1950 S.C. 11=(1950) S.C.J. 148.

———**S. 66 (1) (e)**—*Notification by Provincial Government—Levy of octroi duty by Municipal Committee on tobacco imported within municipal limits—Validity—Excise duty imposed on tobacco by Central Government under Central Excises and Salt Act—Double taxation of assessee.*

An octroi duty levied by a Municipal Committee under a notification issued by the Provincial Government under S. 66 (1) (*e*) of the Central Provinces Municipalities Act on tobacco imported into municipal limits for sale, consumption or use within those limits, falls within the ambit of Item 49 of List II to the 7th Schedule of the Constitution Act, and is *prima facie* valid. It is not rendered invalid by the mere fact than an excise duty has been imposed on tobacco by the Central Government under the Central Excise and Salt Act and the assessee is in consequence taxed twice. The Central Act taxes the manufacture or production of tobacco. The Provincial Law does not touch that. It taxes something quite different, namely: the import of the produced or manufactured article into a certain area for sale, use or consumption there. It is true that both tax the same commodity but they do so at different stages and there is no overlapping in law because the taxes are "separate and distinct imposts."

Even if the assessee is a manufacturer who has already paid excise duty on the tobacco, he is liable to the octroi duty because he *imports* it for a particular purpose and not because he *manufactures* the commodity.

If the power is validly exercised there is no limit in law to the number of times a commodity may be taxed, whether by the same or by different authorities. (1942) F.C.R. 90, applied. (1945) F.C.R. 179, referred to. (*Bose and Sen, JJ.*) Ramkrishna Ramnath *v.* Municipal Committee, Kamptee. I. L. R. (1949) Nag. 544=1950 N.L.J. 173.

———**Ss. 66 (1) (e), 71, 76 and 85**—*Rules for assessment, collection and refund of octroi tax, R. 6—Assessment of octroi tax—Powers of Municipal Committee—Inclusion of Excise duty into price of goods—Whether* ultra vires—*Jurisdiction of Civil Court.*

Under S. 66 (1) (*e*) of the C. P. Municipalities Act, a Municipal Committee can impose an octroi, on goods brought within the limits of the municipality for sale, consumption or use within those limits. Under the powers conferred by Ss. 71, 76 and 85 of the Act, the Local Government has made rules for assessment, collection and refund of the octroi tax. The powers of the Municipal Committee in these matters are circumscribed by these Rules. Under R. 6 of the rules framed by the Local Government, the price of the goods imported on which the Municipal Committee is to assess the octroi tax is to be made up of only the cost price and the cost of carriage and nothing else. If, therefore, the Municipal Committee assessees the octroi tax after including into the price of the goods the amount paid by the importer as Excise duty under the Central Excises and Salt Act, 1944, it acts illegally and *ultra vires*, and the Civil Court has jurisdiction to entertain a suit for refund of the tax.

Primarily the assessment and levy of a tax are governed by the common law rights of the subject and any grievance in that matter falls within the cognizance of Civil Courts under S. 9, C. P. Code, and any Special Act which ousts the jurisdiction of Civil Courts is to be very strictly construed. 35 C. 859; 18 N.L.R. 121; 24 M. 205; 27 M. 547; I.L.R. (1943) Nag. 525, relied upon; 30 N.L.R. 121 (P.C.), referred to. (*Padhye, J.*) Mesuram Kishunpershad *v.* Municipal Committee, Jubbulpore. I. L. R. (1948) Nag. 766=A.I.R. 1949 Nag. 270=4 D.L.R. (Nag.) 105=1949 N.L.J. 473.

———**S. 66 (1) (k)**—*Agricultural lands lying within municipal limits of Nagpur—Whether liable to be assessed to water-tax.*

Agricultural lands lying within municipal limits of Nagpur and already assessed to the land revenue under the C. P. Land Revenue Act are liable to be assessed to water-tax under S. 66 (1) (*k*) of the C. P. Municipalities Act and the bye-laws thereunder. (*Niyogi, C.J. and Hidayatullah, J.*) Ganpat Rao Jageshwar *v.* Secretary, Municipal Committee, Nagpur. I.L.R. (1947) Nag. 305=229 I.C. 564=1947 Nag. (Rul.) 131=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

———**S. 66 (1) (k)**—*Land containing well—If liable to be assessed with water rate.*

Where a piece of land contains a well and by reason of that well an increase in value results, assessment to water rate can be made taking into account the increased value of the land due to the well. (*Niyogi, C.J. and Hidayatullah, J.*) Ganpatrao Jageshwar *v.* Secretary, Municipal Committee, Nagpur. I.L.R. (1947) Nag. 305=229 I.C. 564=1947 Nag. (Rul.) 131=A.I.R. 1948 Nag. 38=1947 N.L.J. 216.

———**S. 66 (1) (o)**—*Goods imported into Municipality for immediate export—Terminal tax—Liability for.*

Goods imported into the Nagpur Municipality by road with the express purpose of exporting them by rail are liable to an import terminal tax. So also goods imported by rail with the express purpose of further and immediate export by rail without the goods leaving the station yard. (*Grille, C.J. and Puranik, J.*) Kashiram *v.* Municipal Committee, Nagpur. I.L.R. (1946) Nag. 99=1946 N.L.J. 190=A.I.R. 1946 Nag. 190=228 I.C. 82=1947 Nag. (Rul.) 35.

———**S. 66 (1) (o)**—*Goods passing through municipal limits—Liability to export terminal tax.*

Goods passing through the limits of Wardha Municipality by road dispatched from Yeotmal to their destination at Nagpur without being unloaded or reloaded at Wardha are liable for an export terminal tax. The word "terminal" refers not to the destination or origin of the goods but to the terminii of the municipal limits. The words "export" and "import" have no special meaning but bear the ordinary dictionary meaning. These words mean only "taking out of" and "bringing into". (*Hidayatullah, Mudholkar and Sen, JJ.*) Central India Spinning, Weaving and Manufacturing Co., Ltd. *v.* Municipal Committee, Wardha. I.L.R. (1950) Nag. 403=5 D.L.R. (Nag.) 151=A.I.R. 1950 Nag. 169 (F.B.).

———**S. 67 (5) and (7)**—*Sanction by Government for imposition of tax—Publication in Gazette—If necessary—Omission to direct imposition of tax and to fix date for its coming into effect—Effect of.*

If the Municipal Committee is imposing a new set of taxes the sanction of the Local Government under S. 67 (5) of the Municipalities Act is necessary but not publication of the sanction in the Gazette. The sanction can be accorded in the usual manner. But in that event it will also be necessary for Government to direct the imposition of the tax under S. 67 (7) and fix a date for the coming into effect of the tax. The latter need not find place in the notification because if no date is fixed, then the tax comes into operation at once. But the other provision cannot be ignored. If the Local Government does not direct the imposition of a tax under S. 67 (7), the tax cannot come into effect. (*Bose, Ag.C.J. and Sen, J.*) Municipal Committee, Akola *v.* Samudra. I.L.R. (1949) Nag. 778.

———**Ss. 71 and 175 (3)**—*Rules by Local Government—Mode of publication—Publication in Gazette—If conclusive proof of their Legality—C. P. General Clauses Act, S. 22 (2), (3) and (5).*

Before a tax can be imposed the procedure prescribed by Ss. 66 and 67 of the C. P. Municipalities Act must be followed. But as regards the making of rules the only restrictions are the onus imposed by S. 22 of the C. P. General Clauses Act and S. 175 (3) of the C. P. Municipalities Act. S. 175 (3) requires that all rules shall be subject to previous publication. No particular mode of publication is enjoined, therefore S. 22 of C. P. General Clauses Act is called into play. S. 22 (3) of this Act does not require publication in the Gazette, nor does it prescribe any particular mode of publication. On the other hand, sub-S. (2) indicates that the previous publication may be in different ways and leaves that to the discretion of the authority making the rule. Sub-S. (5) prescribes that once the rule is published in the Gazette it shall be *conclusive* proof that it was duly made. This cannot be understood to mean that this will cure all defects. If there was complete want of authority to tax, or if the tax had been prohibited, or if the manner of assessment and collection were to be prohibited by the Act or any other law, sub-S. (5) would not cure such fundamental defects. Sub-S. (5) only extends to the mode and manner of making the rule, that is to say, to the procedure prescribed for bringing a rule into being and not to the power or authority to make a rule at all. If the right to make the rule is there, then once there is publication in the Gazette the Act directs the Courts to regard that as *conclusive* proof that the rules were "duly" made. It follows that Courts are prohibited from looking into any facts directed to indicate that they were not. (*Bose, Ag.C.J. and Sen, J.*) Municipal Committee, Akola *v.* Samudra. I.L.R. (1949) Nag. 778.

———**S. 71**—*Rules framed under, R. 19—If ultra vires.*

R. 19 of the Rules published by the Local Government in the Notification, dated 21st March, 1936, requiring the owner of every bicycle within municipal limits to inform the Secretary of the fact of possession within a certain time, is not in contravention of S. 72 of the C. P. Municipalities Act, and is not, therefore, *ultra vires.* I.L.R. (1941) Nag. 722, disapproved. (*Bose, Ag.C.J. and Sen, J.*) Municipal Committee, Akola *v.* Samudra. I.L.R. (1949) Nag. 778.

———**Ss. 81 and 66 (1) (a)**—*Property tax—Whether recoverable from occupier.*

Though the property-tax must be assessed on the owner under S. 66 (1) (*a*) of the C. P. Municipalities Act, the Municipality can under S. 81 of that Act recover it also from the occupier who is entitled in his turn to recover it from the owner unless there is a contract to the contrary. (*Niyogi, C.J. and Hidayatullah, J.*) Ganpatrao Jageshwar *v.* Secretary, Municipal Committee, Nagpur. I.L.R. (1947) Nag. 305=229 I.C. 564=1947 Nag. (Rul.) 131=A. I. R. 1948 Nag. 38=1947 N.L.J. 216.

———**Ss. 83 and 84**—*Jurisdiction of civil Court—Suit to recover tax illegally recovered—Government of India Act, S. 142-A.*

A suit for refund of tax illegally recovered by a Municipal Committee is not barred by the provisions of Ss. 83 and 84 of the C. P. Municipalities Act as applied to Berar. These provisions come into play only when the Municipal Committee acts within the scope of its authority, that is to say, when it is acting or purporting to act under the Act. When a Municipality is prohibited by S. 142-A of the Government of India Act from imposing a tax in excess of a certain amount, it cannot be said to be acting either under the Act or purporting to act under the Act if it exceeds that amount, and in such a case the jurisdiction of the civil Courts is not barred. (*Bose, A.C.J. and Mudholkar, J.*) Secretary, Municipal Committee, Karanja *v.* New East India Press Co., Ltd., Bombay. I.L.R. (1948) Nag. 971=4 D.L.R. (Nag.) 1=A.I.R. 1949 Nag. 215=1948 N.L.J. 541.

———**S. 83 (2)**—*Contents of reference.*

A reference under S. 83 (2) of the C. P. Municipalities Act should clearly state the facts and formulate the point referred. (*Pollock, J.*) Burma Shell Oil Storage and Distributing Co. *v.* Municipal Committee, Jubbulpore. I. L.R. (1948) Nag. 581=1948 N.L.J. 404=A.I. R. 1949 Nag. 148.

———**S. 83 (2)**—*Reference under—Contents.*

In a reference under S. 83 (2) of the C. P. Municipalities Act, the High Court should be provided with the facts of the case and the referring officer's own opinion. (*Grille, C.J. and Puranik, J.*) Kashiram *v.* Municipal Committee, Nagpur. I.L.R. (1946) Nag. 99=1946 N.L.J. 190=A.I.R. 1946 Nag. 190=228 I.C. 82=1947 Nag. (Rul.) 35.

———**S. 103**—*Applicability—Unauthorised construction of compound wall.*

A compound wall is certainly an *enclosure* and would thus come under the definition of "building" in S. 3 (*a*) of the C. P. Municipalities Act. Similarly, the construction of a compound wall, would under S. 3 (*d*) amount to "erect or re-erect any building". There is, therefore, no doubt that the provisions of S. 103 of the Act apply to an unauthorised construction of a compound wall. 1945 N.L.J. 136 (Notes), referred to. (*Bambawale.*) KEDIA GINNING FACTORY AND OIL MILL *v.* MUNICIPAL COMMITTEE, KHAMGAON. 1949 N.L.J. 610.

———**Ss. 103, 167 and 168 (4)**—*Building erected after refusal of sanction—Right to prosecute—When arises—Notice requiring demolition not fixing time—Validity.*

S. 103 of the C. P. Municipalities Act makes no distinction between a case of building without sanction and a case of building where sanction has been refused. If a building is erected when sanction is refused, the only power the committee has, in the first place, is to issue a notice under S. 103 and fix a reasonable time for the demolition under S. 167. The right to prosecute only arises on a failure to comply with this notice provided the notice is valid and according to law. The fixing of a time for demolition in the notice is a matter of substance and not of form, and S. 168 (4) of the Act cannot therefore validate a notice which omits to fix a time. No conviction can, therefore, be based on these sections in such a case. (*Bose, J.*) GULABCHAND *v.* MUNICIPAL COMMITTEE, BULDANA. I.L.R. (1948) Nag. 373=49 Cr.L.J. 602=A.I.R. 1949 Nag. 18=1948 N.L.J. 105=2 D.L.R. 772.

———**S. 103—Person reconstructing dilapidated wall without Municipal Committee's permission—If can be proceeded against under section.** *See* C. P. MUNICIPALITIES ACT, Ss. 3 AND 103. 1950 N.L.J. 524.

———**S. 167**—Scope—Mandatory—Failure to fix time in notice under S. 103—Effect—Prosecution and conviction for non-compliance with notice—Sustainability. *See* C. P. MUNICIPALITIES ACT, Ss. 103 AND 167 AND 168 (4). 2 D.L.R. 772=I.L.R. (1948) Nag. 373.

———**S. 168 (4)**—Applicability—Notice under S. 103—Absence of time limits—Defect—If one of form—Notice, if validated. *See* C. P. MUNICIPALITIES ACT, Ss. 103 AND 167 AND 168 (4). 2 D.L.R. 772=I.L.R. (1948) Nag. 373.

———**(as applied to Berar), S. 176 (1)**—*Rules under R. 1 (v)—"Offence"—Meaning of—Absence of employee from service due to his arrest by Police—If "good and sufficient cause" for suspension.*

The term "offence" as used in R. 1 (*v*) framed under S. 176 (1) of the C. P. Municipalities Act, as applied to Berar, does not necessarily imply anything criminal, nor yet anything malicious or wilfully negligent. It merely imports such matters as constitute a breach of the conditions, express or implied, of service, and may be due, in given circumstances, to no fault of the servant at all. As the fundamental condition of a contract of service is that the employee should serve, if the employee does not serve, even though it is due to his arrest by the Police on a charge of embezzlement of the Municipal funds, he commits a breach of his contract of service and therefore commits an "offence" within the meaning of the rule, unless the Municipal Committee is responsible for this breach. The burden of proof as regards this is on the employee. The moment it is shown that he absented himself from service, then a *prima facie* case for suspension is at once made out and thereafter it is for the employee to justify his absence. If the employee absents himself from duty for a long period, there is "good and sufficient cause" within the meaning of the rule for his suspension. (*Bose, J.*) MUNICIPAL COMMITTEE, BULDANA *v.* DATTATRAYA. 224 I.C. 567=1946 Nag. (Rul.) 169 1946 N.L.J. 495=A.I.R. 1946 Nag. 347=I.L.R. (1946) Nag. 789.

———**S. 176 (2) (i)**—***Election Petition Rules, R. 22 (3)—If* ultra vires.**

Rule 22 (3) of the Election Petition Rules, even if it be regarded as a legitimate exercise of the power to make rules of procedure, is *ultra vires* in so far as it directs the High Court to dismiss an appeal for failure to deposit Rs. 250 as security for the costs of the appeal. Under S. 176 (2) (*i*), C. P. and Berar Municipalities Act, rules can be made only for regulating the procedure to be followed by the Judge in inquiries relating to petitions presented under S. 20-A of the Act and not the procedure of the High Court in hearing the appeal. The High Court in dealing with an appeal may act under O. 41, R. 10, C. P. Code, and make an order for security for costs of the appeal. But that, however, is entirely discretionary except in a case falling under the proviso to sub-r. (1). (*Kaushalendra Rao, J.*) PURSHOTTAM VITHAL *v.* G. V. PANDIT. 1950 N.L.J. 520=A.I.R. 1950 Nag. 212.

———**S. 176 (2) (i)**—***Rules framed under R. 22 (2)—If* ultra vires.**

R. 22 (2) of the Rules framed under S. 176 (2) (i), C. P. and Berar Municipalities Act is *ultra vires* the Provincial Government's Power. This section enables the Provincial Government to frame rules relating to inquiries by the Judge relating to petitions presented under S. 20-A and some other allied matters but it says nothing about revision applications before the High Court. (*Mudholkar, J.*) KISHANCHAND SHARMA *v.* BISHABH KUMAR. I.L.R. (1950) Nag. 572=A.I.R. 1950 Nag. 208.

———**S. 176 (2) (i)**—***Rules framed under, R. 22 (2)—Revision petition not accompanied with requisite deposit—Maintainability.***

R. 22 (2) of the Rules framed under S. 176 (2) (i) of the C. P. and Berar Municipalities Act, does not make the making of the deposit a condition precedent. It only provides that the application for revision and the deposit be made simultaneously. Where they are not so made, the application will be regarded as imperfect and the Court will not be competent to adjudicate upon its merits. But it does not mean that the application cannot be allowed to be presented or that it must be dismissed *eo instante*. There is nothing to prevent a party from remedying the defect existing at the time of presentation before the application goes up before the Court in the ordinary course provided that there is no other impediment. If the applicant does nothing till the period of limitation provided by S. 20-A (5) elapses, the defect will be incapable of being cured and the application will lapse. If, however, the defect is removed while the application is yet within time the application can and ought to be regarded as having been made on that date for it is only on that date that it becomes perfect in form. (*Mudholkar, J.*) KISHANCHAND SHARMA *v.* BISHABH KUMAR. I.L.R. (1950) Nag. 572=A.I.R. 1950 Nag. 208.

——**S. 176 (2) (ii)**—*Rules framed under, R. 1 (b)—Corrupt or illegal practice—Employment of municipal servant for painting posters and leading processions.*

Under R. 1 (*b*) of the Rules framed under S. 176 (2) (ii) of the C. P. and Berar Municipalities Act, what is regarded as a corrupt or illegal practice is the employment of a municipal servant (i) as an agent or (ii) for canvassing. The employment of a municipal servant for painting posters and leading processions, though highly improper, does not amount to canvassing in the proper sense of the term, even though such acts may indirectly influence the votes of electors. (*Mudholkar, J.*) KISHANCHAND SHARMA *v.* BISHABH KUMAR. I.L.R. (1950) Nag. 572 =A.I.R. 1950 Nag. 208.

——**Ss. 215 and 159 (3)**—*Accused not asked if he consented to destruction of unfit article—Power to fine.*

The condition precedent to an exercise of authority under S. 215 of the C. P. Municipalities Act is that the article which is unfit for human consumption should be brought before the Magistrate under S. 159 (3). S. 159 (3) cannot come into play until the person in possession has been asked whether he will consent to the destruction of the unfit article. Therefore, before such person is fined he must be afforded the chance of exercising the option of consenting to the destruction of the offending article or of fighting the case before a Magistrate. An omission to do so is not a curable irregularity. (*Bose, J.*) HEMKARAN *v.* MUNICIPAL COMMITTEE, BETUL. I.L.R. (1946) Nag. 976=226 I.C. 286=1946 Nag. (Rul.) 242=1946 N.L.J. 479=47 Cr.L.J. 891 =A.I.R. 1946 Nag. 432.

C. P. AND BERAR OIL CAKE (CONTROL) ORDER—*"Dealer"—If includes producer.*

The word "dealer" in the C. P. and Berar Oil Cake (Control) Order includes a person who manufactures and sells, and is not confined to a person who merely buys and sells as is generally understood. (*Hidayatullah, J.*) BHALCHAND TIKARAM *v.* EMPEROR. 3 D.L.R. (Nag.) 10.

C. P. AND BERAR PROVINCIAL CO-OPERATIVE BANK BYE-LAWS, Bye-Law 40—*Board of Directors of Provincial*

Bank—Right of affiliated Central Banks to send representatives.

All Central Banks which are affiliated to the Provincial Bank are entitled to be represented on the Board of Directors of the Provincial Bank by their representative under Bye-law 40 (1) (4) of the Provincial Co-operative Bank bye-laws. The representatives sent by each of the affiliated Banks have to be accepted as directors by the Provincial Bank provided that they do not suffer from any disability, such as being ineligible for being directors of the affiliated Banks. (*Mukhtyar.*) C. P. AND BERAR PROVINCIAL CO-OPERATIVE BANK, LTD. *v.* S. R. SHROUTI. 1950 N.L.J. 501.

C. P. AND BERAR PUBLIC SAFETY ACT (XXXVIII OF 1947)—*Applicability—Membership of communist party.*

Mere membership of the communist party which has not been declared illegal, without anything else, does not *prima facie* attract the provisions of the C. P. and Berar Public Safety Act. (*Hemeon and Padhye, JJ.*) R. L. REDDY *v.* PROVINCIAL GOVERNMENT, C. P. AND BERAR. I.L.R. (1949) Nag. 363=A.I.R. 1949 Nag. 146=50 Cr.L.J. 363.

——**(LXII OF 1948), S. 2 (1) (a)**—*Validity of—Extent—Constitution of India, Art. 22 (7).*

Reading Arts. 13 (1), 21, 22 and 372 (1) of the Constitution of India together, only those provisions of the C. P. and Berar Public Safety Act which are inconsistent with the provisions of Part III, have now become void. Art. 22 of the Constitution contemplates and permits the preventive detention of a person, though subject to certain conditions. Therefore, S. 2 (1) (*a*) of the C. P. and Berar Public Safety Act, in so far as it provides for the detention of certain classes of persons is not rendered void by the Constitution. What is rendered void, however, is the implied provision conferring a power to detain a person for an indefinite period because Art. 22 (7) (*b*) requires a maximum period to be fixed by the law governing preventive detention. Therefore, S. 2 (1) (*a*) of the Act, being still extant, is "any law" within the meaning of the expression used in Art. 22 (7) (*a*). (*Hemeon and Mudholkar, JJ.*) TRIMBAK SHIVRUDRA *v.* STATE. 5 D.L.R. (Nag.) 138=4 A.I.Cr.D. 432=A.I.R. 1950 Nag. 203=51 Cr.L.J. 1372.

——**S. 35 (2) and S. 4, Proviso**—*Scope and effect—Grounds communicated to detenu under S. 5 of Act of 1947 vague—Defect, if cured.*

S. 35 (2) of the C. P. and Berar Public Safety Act of 1948 merely continues the order of detention made under the Act of 1947, but it does not give retrospective effect to S. 4 of the Act of 1948 nor is there anything in that section which indicates that it is to have retrospective effect. In fact the proviso to that section refers specifically to the communication made to a detenu under the section itself and there is no reference whatever to S. 5 of the Act of 1947. If, therefore, the grounds communicated to a detenu under the latter section are vague and insufficient, the defect cannot be cured by invoking the proviso to S. 4 of the Act of 1948. (*Hemeon and Padhye, JJ.*) R. L. REDDY *v.* PROVINCIAL GOVERNMENT, C. P. AND BERAR. I.L.R. (1949) Nag. 363=A.I.R. 1949 Nag. 146=50 Cr.L.J. 363.

C. P. REDUCTION OF INTEREST ACT (XXXII OF 1936), S. 3 (1)—*Nature of interest—Determining factor.*

The nature of the interest to be awarded is to be determined according to the agreement between the parties, and it is not permissible to change from one side of the schedule in the Act to the other simply because one works out at a higher amount than the other. (*Bose and Sen, JJ.*) BHAYYAJI *v.* DAMODAR. I.L.R. (1946) Nag. 334=1946 N.L.J. 336=A.I.R. 1946 Nag. 336.

C. P. AND BERAR REDUCTION OF INTEREST (AMENDMENT) ACT (X OF 1938)—*Validity—Whether repugnant to Contract Act—If contravenes O. 34, R. 11, C. P. Code, or S. 58, T. P. Act—Government of India Act, S. 107.*

Act X of 1938 which purports to amend the C. P. Reduction of Interest Act, 1936, is *intra vires* the Provincial Legislature. There is no repugnancy between this Act and the Contract Act, as S. 37 of the latter Act itself contemplates other laws which may override the contract between the parties. S. 37 of the Contract Act is not limited to cases where performance as a whole is dispensed with, but covers cases of partial performance as well. This Act does not contravene O. 34, R. 11, C. P. Code, which besides being permissive is subject to S. 4 (1) of the Code. This Act does not contravene S. 58 of the T. P. Act. This section is by virtue of S. 4 of that Act subject to S. 37 of the Contract Act as are the relevant sections in the Contract Act itself. (*Bose and Sen, JJ.*) **BHAYYAJI *v.* DAMODAR.** I.L.R. (1940) Nag. 334=1946 N.L.J. 336=A.I.R. 1946 Nag. 336.

C. P. AND BERAR REGULATION OF LETTING OF ACCOMMODATION ACT (1946) and House Rent Control Order (1947), Para. 13—*Applicability—Pending proceedings.*

The right of a landlord to terminate the tenancy of his tenant must be determined according to the state of affairs existing on the date he files the suit and the plaintiff in such a case acquires a vested right which cannot be taken away except by legislation which is either expressly or by necessary implication made retrospective. There are no circumstances which take the Regulation of Letting of Accommodation Act, 1946, or para. 13 of the House Rent Control Order, 1947, out of the application of the rule that all legislation affecting substantive rights are prospective and therefore, they do not apply to past transactions or pending proceedings. (*Hidayatullah, J.*) POPATLAL GOKULCHAND *v.* RAMCHANDRA. I.L.R. (1948) Nag. 910=A.I.R. 1949 Nag. 3=1948 N.L.J. 323=3 D.L.R. (Nag.) 49.

C. P. AND BERAR RELIEF OF INDEBTEDNESS ACT (XIV OF 1939), S. 1 (3), Proviso—*If ultra vires—Absence of assent of Governor-General.*

The proviso to S. 1 (3) of the C. P. and Berar Relief of Indebtedness Act, added by Act XI of 1942, is not *ultra vires* the Governor, although it has not been assented to by the Governor-General. The pith and substance of the main Act is not laying down procedure; on the contrary, it aims at affecting substantive rights. In as much as the Act provides for the relief of indebtedness of agriculturists, it falls partly within entry No. 20 and partly within entry No. 27 of the Provincial List and therefore the Act falls within the provincial field. The fact that some of the provisions of the Act appear to trench upon some provisions of the C. P. Code, does not render the Act, or the repugnant provisions void, as the invasion upon the law of Civil Procedure is no more than was necessary to carry into effect the purpose of the Act. It follows then, that the Act is within the competence of the Provincial Legislature. Therefore, it was wholly unnecessary to obtain the assent of the Governor-General. The mere fact that such assent was obtained makes little difference to the question whether assent for the amending Act was also necessary. As no such assent was necessary, Act XI of 1942 is *intra vires* the Governor. [1947 P.C. 60 and 1940 F. C.R. 188, rel.] (*Sen and Mudholkar, JJ.*) BALMUKUND *v.* MANIRAM. I.L.R. (1949) Nag. 829=5 D.L.R. (Nag.) 33=1949 N.L.J. 545.

———S. 2 (d)—'Debt'—If includes claim on promissory note. [*See* Q.D. 1941-1945, Vol. I, Col. 667.] **BALMUKAND *v.* AMBADAS. A.I.R.** 1946 Nag. 81.

———Ss. 2 (d) and 11 (1)—*Mortgage—Final decree for sale—Scheme of conciliation in respect of debt—Jurisdiction of Debt Relief Court.*

A mortgage debt does not cease to be a "debt" within the meaning of S. 2 of the C. P. Relief of Indebtedness Act, merely by reason of a final decree for sale having been passed in a suit upon that mortgage debt. Hence the Debt Relief Court has jurisdiction under S. 11 (1) of the Act to conciliate such a mortgage debt and prepare a scheme for its repayment. (*Shevde, J.*) SADASHEORAO *v.* LAXMICHAND. I.L.R. (1949) Nag. 81=1949 N.L.J. 18=3 D.L.R. (Nag.) 70=A.I.R. 1948 Nag. 355.

———S. 6 (3)—*Sale held after issue of notice by Debt Relief Court but before its receipt—Validity.*

Under S. 6 (3) of the C. P. Relief of Indebtedness Act the stay of proceedings before a Civil Court only operates from the date on which notice is *given* to it by the Debt Relief Court. A sale held after the issue of notice of stay by the Debt Relief Court but before its receipt by the Civil Court is, therefore, valid, and must be confirmed. (*Bose, J.*) RAJARAM KONTU *v.* SETH RISHABHA KUMAR. I.L.R. (1947) Nag. 470=A.I.R. 1948 Nag. 180=1947 N.L.J. 391.

———S. 8—*Defendant-debtor making payment to plaintiff—Latter appropriating it towards entire debt and balance towards rent of holding held by him—Defendant applying to Debt Relief Court—Plaintiff not appearing thinking that debt has been satisfied—Subsequent rent suit by plaintiff—Court appropriating payment made by defendant entirely towards rent in suit—Suit by plaintiff thereupon to recover debt—If maintainable.* [*See* Q.D. 1941-1945, Vol. I, Col. 670.] **CHITAR *v.* DATTATRAYARAO.** A.I.R. 1946 Nag. 130.

———S. 8 (1)—*"Claim"—Meaning of—Creditor failing to submit his claim for village profits—Effect of.*

The word "claim" in S. 8 (1) of the C. P. and Berar Relief of Indebtedness Act is not restricted to a claim which the Debt Relief Court is competent to decide, but means all claims including those which have been specifically enumerated in S. 4 of the Act. A failure of the creditor to submit his claim for village profits will, therefore, result in the automatic discharge thereof under S. 8 (1) of the Act. I.L.R. (1944) Nag. 416, referred to. (*Shevde, J.*) **TARACHAND *v.* TAIBAI.** I.L.R. (1948) Nag. 789=A.I.R. 1949 Nag. 227=1949 N.L.J. 150.

———S. 11—*Conditional scheme—Power to prepare.*

There is nothing in the C. P. & Berar Relief of Indebtedness Act which prohibits the Debt Relief Court from preparing a conditional scheme of repayment of the debts. It is therefore competent to that Court to attach any condition to the scheme under S. 11 of the Act. (*Shevde, J.*) **SADASHEORAO *v.* LAXMICHAND.** I.L.R. (1949) Nag. 81=3 D.L.R. (Nag.) 70=A.I.R. 1948 Nag. 355=1949 N.L.J. 18.

———S. 11—*Final mortgage decree for sale—Order for instalments—Jurisdiction of Debt Relief Court.*

A final mortgage decree for sale continues to be a decree for the payment of a sum of money. The Debt Relief Court has, therefore, jurisdiction to order the payment of the amount due under the decree in instalments. 1949 N.L.J. 113, foll. (*Sen and Mudholkar, JJ.*) **BALMUKUND *v.* MANIRAM.** I.L.R. (1949) Nag. 829=5 D.L.R. (Nag.) 33=1949 N.L.J. 545.

———Ss. 11 and 19—*Scope—Jurisdiction—Powers of Debt Relief Court—Order for transfer of property not carried out—Sale-deed by Court directing creditor to take possession—Effect of—Suit in Civil Court for possession—Bar of.*

The Debt Relief Court constituted under the C. P. and Berar Relief of Indebtedness Act has no power either to pass a decree for possession or to execute it. It has power only to do two things: (1) to sanction a transfer of property under S. 11, and (2) to fix instalments for any decree it may pass. It has no power to direct delivery of possession. In executing an order under S. 11, as regards transfer of property, the only power of the Court is to execute the deed of transfer; it has no power to do anything else. Even if the deed of transfer executed by the Debt Relief Court contains a provision "you should take possession of the........from this Court, by taking out execution in execution thereof", that would form no part of the operative order of the Court and that Court has no power either to pass a decree for possession or to execute one for delivery on the basis of such a provision in the sale-deed. A civil suit is the proper remedy for obtaining possession and the Civil Court's jurisdiction in that respect is not barred or ousted by reason of such a provision in the sale-deed executed by the Debt Relief Court. (*Bose, J.*) **KUNDANLAL *v.* RAMCHARAN.** I.L.R. (1949) Nag. 633=4 D.L.R. (Nag.) 126=A.I.R. 1949 Nag. 370=1949 N.L.J. 597.

———Ss. 12 and 13 (3)—*Tender of instalments refused by creditor—Debtor taking no further action to pay—Court, if bound to terminate scheme.*

The legal fiction that a tender refused amounts to a payment created by S. 38 of the Contract Act, does not apply in respect of the words "be paid" in S. 12 of the Relief of Indebtedness Act, which specially provides an alternative in case the tender is refused by the creditor. If therefore a tender of instalments by a debtor is refused by the creditor and no further action is taken by the debtor to pay or deposit, there is no compliance with the terms of S. 12 of the Act and the Court is bound to order the termination of the scheme under S. 13 (3) of the Act. (*Ramsden, F. C.*) **PURUSHOTTAMDAS *v.* AMBALAL.** 1947 N.L.J. 171.

———S. 12 (2)—*Applicability—Debtor not being occupant of land—Whether can claim benefit of sub-section.*

A debtor who has been given the protection afforded by the Relief of Indebtedness Act as an "agriculturist", cannot claim the benefit provided by S. 12 (2) of the Act which is clearly intended to apply to landlords and tenants, if he is not the occupant of the land in question and is not recorded in the village papers as tenant or even as sub-tenant and no rent is shown as due from him. (*Ramsden, F.C.*) **B. K. RAI *v.* THUMMUN SINGH.** 1946 N.L.J. 681.

———S. 12 (2)—*Joint debtors—Land revenue of one of them remitted in year of debt instalment—Whole instalment, if suspended.*

If there is remission of land revenue in respect of one of two joint debtors in the year of the debt instalment, that debtor is entitled to suspension of the debt instalment of that year under the mandatory provision in S. 12 (2) of the Relief of Indebtedness Act, and as it is not possible to determine separately the extent of the liability of each for the payment of such instalment, the whole of the instalment must remain suspended. As the debt instalment cannot be split up so as to enable the recovery to be made separately from one who is not entitled to suspension, such debtor must get the same benefit which his co-debtor is entitled to get under S. 12 (2). (*Dastur.*) **BALIRAM *v.* BENI SINGH.** 1950 N.L.J. 517.

———Ss. 12 (2) and 13 (2)—*Suspension of instalment because of remission—Omission to pay* *instalment—If amounts to default—Order under S. 13 (2)—Legality.*

Where there is a suspension of instalment payable under a scheme by Debt Relief Court, because of a remission in respect of the just prior agricultural year, the omission to pay that instalment will not amount to a default. Where such an omission is treated as a default and an order is passed under S. 13 (3) of the C. P. and Berar Relief of Indebtedness Act, it is one without jurisdiction and it would be open to the executing Court to refuse to execute the decree in such cases. (*Shevde, J.*) DAYARAM KISANDAS *v.* MANNULAL. I.L.R. (1948) Nag. 376=A.I.R. 1949 Nag. 106=1948 N.L.J. 272.

———S. 13—*Instalments—Meaning of—Order of Debt Relief Court regarding interest not specifying sums payable—Whether can be treated as instalments.*

In dealing with debt relief instalments, the Revenue Courts are only concerned with concrete and specific sums described as "instalments" in the order of the Debt Relief Court. Subsidiary entries in the order or elsewhere regarding interest, etc., which do not specify specific sums payable on specified dates cannot be treated as "instalments". This may be part of the scheme of repayment of the debt, but it is no part, of the scheme of "instalments" which Revenue Courts are directed or empowered to recover under S. 13 of the Debt Relief Act. (*Jayaratnam, F.C.*) DURGABAI *v.* BAJIRAO. 1948 N.L.J. 343.

———S. 13 (1)—*Applicability—Conditional scheme—Breach of condition precedent—Effect—Application to Deputy Commissioner and certificate under S. 13 (2)—Necessity.*

S. 13 (1) of the C. P. and Berar Rel. of Indebtednesss Act comes into operation only on the basis of a subsisting scheme of repayment made by the Debt Relief Court. When that Court has prepared a scheme subject to a condition precedent and there is breach of the condition by which the scheme ceases to have legal effect, the scheme no longer exists. A creditor in such a case is not required to apply to the Deputy Commissioner under S. 13 (1) of the Act. He is entitled to approach the civil Court direct and to ask that Court to carry on the proceedings from the stage at which they were stayed at the instance of the Debt Relief Court, to their legal termination, without any certificate under S. 13 (2). (*Shevde, J.*) SADASHEORAO *v.* LAXMICHAND. I.L.R. (1949) Nag. 81=3 D.L.R. (Nag.) 70=A.I.R. 1948 Nag. 355=1949 N.L.J. 18.

———S. 13 (1) and (3)—*Deputy Commissioner rejecting application under sub-S.* (3)—*If should grant relief under sub-S.* (1).

When an application to the Deputy Commissioner specifically made under S. 13 (3) of the Relief of Indebtedness Act fails, it is no part of the Deputy Commissioner's function to proceed to take action under S. 13 (1). It is not a case of granting some minor relief when a major relief is found inadmissible. The reliefs which the different sub-sections provide are entirely different in character. (*Jayaratnam.*) KAPURCHAND *v.* GULABCHAND. 1950 N.L.J. 38.

———S. 13 (3)—*Application under—Limitation.*

The limitation of eighteen months for an application under sub-S. (1) does not apply to an application under sub-S. (3) of S. 13 of the Relief of Indebtedness Act. The creditor as well as the debtor has his rights under the debt relief scheme prepared under S. 11 of the Act, and one of these is the choice of proceedings under sub-S. (1) within eighteen months or waiting till two consecutive instalments have been defaulted and then proceeding under sub-S. (3). (*Ramsden, F.C.*) B. K. RAI *v.* THUMMUN SINGH. 1946 N.L.J. 681.

———S. 13 (3)—*Arrears of two consecutive instalments offered after due date—Creditor refusing to accept payment—Deputy Commissioner, if obliged to issue certificate.*

All the Deputy Commissioner has to do on receipt of an application under S. 13 (3) of the C. P. and Berar Relief of Indebtedness Act is to verify that two consecutive instalments remained —even for one day only—in arrears and if he finds that this is so, he *must* issue the certificate demanded. The words "remain in arrears" in S. 13 (3) mean remain on the date fixed for payment of the second consecutive instalment if that instalment and the previous one have not been duly paid by them. The cause for action really *arises* then, although action by the Deputy Commissioner cannot start except on an application by the creditor. Even if the debtor offers to pay the amounts due after the due date and before the date of the application by the creditor, the creditor is entitled, if he chooses, to refuse to accept the payment, and the Deputy Commissioner is obliged to issue the certificate. (*Ramsden, F.C.*) JAGANNATH *v.* SHANKAR. 1946 N.L.J. 535.

———S. 13 (3)—*Certificate granted by Deputy Commissioner—Existence of arrears—Jurisdiction of Civil Court to go into.*

The Deputy Commissioner is authorised by S. 13 (3) of the C.P. and Berar Relief of Indebtedness Act, to give the certificate if two consecutive instalments of a debt remain in arrears and it is obvious that he and he alone is empowered to decide whether or not such arrears exist. Scrutiny thereof is not contemplated in the Act by the civil Court and it follows that if he makes adequate investigation and comes to a conclusion in the matter, he acts with jurisdiction and the question of the propriety or otherwise of his decision cannot bring the civil Courts into the picture. While the civil Courts have power to decide whether the Deputy Commissioner has acted with jurisdiction, they have no power to decide whether he has exercised his jurisdiction rightly or wrongly. I.L.R. (1947) Nag. 838, approved. I.L.R. (1946) Nag. 786 and I.L.R. (1948) Nag. 142, comm. on. (*Hemeon and Mangalmurthi, JJ.*) PURSHOTHAMDAS *v.* AMBALAL HAJARIMAL. I.L.R. (1950) Nag. 314=A.I.R. 1950 Nag. 97=5 D.L.R. (Nag.) 126=1950 N.L.J. 137.

———S. 13 (3)—*"Consecutive instalments."*

Where the instalment of a particular year is suspended on account of the suspension of the rents of that year, the instalment of the immediately succeeding year becomes payable after that of the immediately preceding year. In other words these two become consecutive. (*Rau, F.C.*) SUGANMAL *v.* RAMLAL. 1946 N.L.J. 112.

——Ss. 13 (3) and 11 (3)—*Defaulted instalments paid but not interest—Instalments, if "remain in arrears"*.

Under S. 11 (3) of the Relief of Indebtedness Act, the Court "shall" fix the instalment and "may" also fix interest in case of default. Interest is therefore not part of the instalment, but only the penalty which may be fixed for default. Where, therefore, the defaulted instalments alone are paid without the interest due, the instalments cannot be deemed to "remain in arrears" within the meaning of S. 13 (3) of the Act. (*Ramsden, D.A.*) **BALMUKUND *v.* MADHAO JAGOBA. 1946 N.L.J. 239.**

——Ss. 13 (3) and 12 (2)—*Grant of certificate—Power of Deputy Commissioner—Remission of only a minute fraction of land revenue payable by debtor.*

The Deputy Commissioner cannot issue a certificate under S. 13 (3) of the Relief of Indebtedness Act if a part of the land revenue due from the debtor has been remitted. It may be that the debtor owns property in several villages and that only a small sum was remitted in one of the villages, but the words "in whole or part" occurring in S. 12 (2) are entirely unambiguous and have to be interpreted as they are. The question whether the debtor's capacity to pay the instalment was impaired or not by the remission of only a fraction of his land revenue is not relevant. (*Jayaratnam.*) KAPURCHAND *v.* GULABCHAND. **1950 N.L.J. 38.**

——**S. 13 (3)**—*"Instalment"—Interest, if and when forms part of instalment—Duty of Revenue Court.*

Under S. 13 (3) of the Relief of Indebtedness Act, the Revenue Court in dealing with debt relief instalments is only concerned with concrete and specific sums described as instalments in the order of the Debt Relief Court. Interest can only form a part of an "instalment" if it is so calculated and described by the Court. Where the Court's order states that the debtor should pay the scaled down debt by certain instalments of a specified sum and also provides for payment of interest on such debt, the Revenue Court in interpreting the word "instalment" in S. 13 (3) cannot say instalment of the specified sum *plus* interest. It is no part of the Revenue Court dealing with an application under S. 13 (3) of the Act to attempt to *interpret* an order of a Debt Relief Court or discover what the Court *intended* by its order. 1948 N.L.J. 343, referred to. (*Jayaratnam.*) KANHAIYALAL *v.* RAMAKANT. 1949 N.L.J. 439.

——**S. 13 (3)**—Instalments in arrears—Relevant date. [*See* Q.D. 1941-1945, Vol. I, Col. 671.] **VITHAL RANGRAO *v.* LAXMAN. I.L.R. (1945) Nag. 973=A.I.R. 1946 Nag. 45.**

——**S. 13 (3)**—Judgment-debtor applying to **Debt Relief Court after preliminary decree for foreclosure—Instalments not paid—Order of Deputy** Commissioner that balance is recoverable as if final decree passed—Effect of—Right of decree-holder to be placed in possession of property. [*See* Q.D. 1941-1945, Vol. I, Col. 671.] VITHAL RANGRAO *v.* LAXMAN. I.L.R. (1945) Nag. 973=A.I.R. 1946 Nag. 45.

——**S. 13 (3)**—*Order of Deputy Commissioner—Legality—Amount of both instalments paid before order.*

The wording of S. 13 (3) of the Relief of Indebtedness Act is imperative and all that the Duputy Commissioner has to do is to ascertain whether two consecutive instalments did or did not remain in arrear. The Deputy Commissioner has no power to grant any extension of time and if he finds, at the very latest at the time that the application by the creditor is made, a cause of action he is bound to pass the order under S. 13 (3) after satisfying himself that the arrears did subsist at that time. Such an order is not *ultra vires* merely by reason of the fact that it was passed after the amount due on both instalments was paid. (*Grille, C.J.*) KRISHNA SONABA ZADE *v.* UDHAORAO. I.L.R. (1946) Nag. 786=A.I.R. 1947 Nag. 78=1946 N.L.J. 481=1946 Nag. (Rul.) 233=226 I.C. 294.

——**S. 13 (3)**—*Order of Debt Relief Court in a case of* lahan-gahan *mortgage—Powers of executing Court—Order directing delivery of possession to decree-holder—Legality—C. P. Code, O. 34, R. 4 (3)—Notice to judgment-debtor—If must be issued.*

A Civil Court executing an order of a Debt Relief Court under S. 13 (3) of the Relief of Indebtedness Act in a case of a mortgage, must enforce the mortgage according to its terms and regard the matter as if a decree in terms of the mortgage had been passed. If the mortgage is a *lahan-gahan* mortgage, an order directing delivery of possession to the decree-holder is right. The Civil Court at that stage is merely an executing Court and therefore cannot exercise the discretion which O. 34, R. 4 (3), C. P. Code, confers on the Court before the stage of final decree either to pass a decree for foreclosure or one for sale.

The Civil Court when executing the order of the Debt Relief Court cannot go behind the Deputy Commissioner's certificate. The only person who could issue notice to the judgment-debtor about the passing of a final decree would be the Deputy Commissioner because the law regarding execution in the Civil Court does not take effect until he has issued his certificate. That being the case, and the Deputy Commissioner acting under the Debt Relief Act not being subordinate to the Civil Court, the latter has no power to go behind his certificate. (*Bose, J.*) KAMLU AMRITA *v.* EKNATH ANANDA. I.L.R. (1947) Nag. 838=A.I.R. 1948 Nag. 136=1947 N.L.J. 342.

——**S. 13 (3)**—*Order of Duty Commissioner issuing certificate—Preliminary enquiry to ascertain whether there was ground for seeking Commissioner's sanction to review—Inherent power of successor of Deputy Commissioner to hold.*

A Deputy Commissioner has inherent power to hold a preliminary inquiry in order to ascertain whether there was any ground for seeking the Commissioner's sanction to review an order passed by his predecessor issuing a certificate under S. 13 (3) of the Debt Relief Act. That power cannot be questioned on the ground that the inquiry would be infructuous. The time for questioning anything in revision or appeal is when an order is passed in pursuance of the inquiry. (*Jayaratnam.*) SATYANARAYAN *v.* GOVIND MAHIPATI. 1950 N.L.J. 155.

——**S. 13 (3)**—*Order terminating scheme—Recovery of balance of amount—Limitation.*

It is clear from the terms of S. 13 (3) of the Relief of Indebtedness Act that once the Deputy Commissioner passes an order that the scheme framed by the Debt Relief Court fixing instalments shall cease to have effect, any balance remaining due on that date will be recoverable by the creditor. S. 13 does not provide any period of limitation for making an application under sub-S. (3) thereof and therefore the question of the recovery of any instalments being barred by time does not at all arise. All that S. 13 (1) of the Act says is that if a creditor wants to have a defaulted instalment recovered as an arrear of land revenue, he has to move the Deputy Commissioner within a particular time and that if he does not do so, he loses that right. This obviously cannot affect the other right conferred upon him by sub-S. (3) of S. 13 which is to move the Deputy Commissioner to terminate the scheme because of two consecutive defaults made by the debtor. (*Mudholkar, J.*) **JAGANNATH *v.* GULABSINGH. I.L.R. (1949) Nag. 981=5 D.L.R. (Nag.) 57=A.I.R. 1950 Nag. 115=1949 N.L.J. 588.**

——**S. 13 (3)**—*Order under—Legality—Claim of one of two legal representatives of deceased debtor not enquired into.*

An order under S. 13 (3) of the Relief of Indebtedness Act without enquiring into the claim of one of the two legal representatives of a deceased debtor, who contested the creditor's application, is bad and is liable to be set aside. (*Jayaratnam.*) BHAGIRATHIBAI *v.* TRIMBAK. **1950 N.L.J. 69.**

——**S. 13 (3)**—*Order under—Power of Extra-Assistant Commissioner.*

An Extra-Assistant Commissioner exercises all the powers conferred by the Land Revenue Act on a Deputy Commissioner. He does not become a Deputy Commissioner generally for other purposes as well. He has thus no power to pass an order under S. 13 (3) of the Relief of Indebtedness Act. (*Sanyab.*) KANHAIYALAL *v.* RAMA KANT. 1950 N.L.J. 290.

——**S. 13 (3)**—*Order under—Review—Extension of time for payment of instalments—Power of Deputy Commissioner.*

The Deputy Commissioner is empowered to review his own order passed under S. 13 (3) of the C. P. Relief of Indebtedness Act. But in reviewing his order, he has no jurisdiction to enlarge the time for the payment of the instalments in default. The penalty under S. 13 (3) is incurred on the failure to pay the instalments on the due date and the Deputy Commissioner on an application has to pass an order under S. 13 (3) if the instalments are in arrears atleast on the date of the filing of the application. It is open to the Civil Court to question the jurisdiction of the Deputy Commissioner. (*Hidayatullah, J.*) **NETRAM SADARAM *v.* LAXMAN HARI. I.L.R.** (1948) Nag. 142=1948 N.L.J. 20=A.I.R. 1948 Nag. 409=2 D.L.R. 624.

——**S. 13 (3)**—*Scope—Mandatory—Duty of* ***Deputy Commissioner—Extension of time—Jurisdiction to grant.***

S. 13 (3) of the C. P. Relief of Indebtedness Act is imperative and all that the Deputy Commissioner had to do is to ascertain whether two consecutive instalments were or were not in arrears. He has no power to grant any extension of time and if he finds a cause of action for the application before him, he is bound to pass an order after satisfying himself that there are arrears. If two consecutive instalments are in arrears and the creditor makes the application, the order is inevitable. (*Grille, C.J.*) **KRISHNA *v.* UDHAORAO.** I.L.R. (1946) Nag. 786=A.I.R. 1947 Nag. 78=226 I.C. 294=1946 N.L.J. 481.

——**S. 13 (3)**—*Two consecutive instalments—Meaning of.*

The words "two consecutive instalments" in S. 13 (3) of the Relief of Indebtedness Act mean complete instalments and not a part of the instalments. (*Ramsden, F.C.*) B. K. RAI *v.* THUMMUN SINGH. 1946 N.L.J. 681.

——**S. 13 (3)**—*Two instalments remaining unpaid—Duty of Deputy Commissioner to pass order—Creditor's right to refuse payment after second instalment falls due.*

Under S. 13 (3) of the Relief of Indebtedness Act, the Deputy Commissioner is bound to pass an order terminating the repayment scheme in two consecutive instalments if the debt remain unpaid on the date when the second instalment falls due. The credtior is entitled to refuse to accept payment after that date. (*Ramsden, F.C.*) **MADANSA *v.* WAMAN RAO. 1946 N.L.J. 683.**

——**S. 15 (2)**—*Sanction for transfer of property—Grant of—Creditor's right to be heard.*

Under S. 15 (2) of the Relief of Indebtedness Act, the Deputy Commissioner cannot sanction transfer of the property without giving the creditor an opportunity to be heard. (*Ramsden, F.C.*) **JAGANNATH SHALIGRAM *v.* SHANKER. 1946 N.L.J. 680.**

——**Ss. 16 and 13 (3)**—***Substitution of legal representatives of deceased party—Case deposited in record room.***

Legal representatives of a deceased party cannot obviously be substituted in cases which have been disposed of and are deposited in the record room. It can only be done in current proceedings. The words "so far as may be" which occur in S. 16 of the Relief of Indebtedness Act, cover cases of this sort. (*Jayaratnam.*) **BHAGIRATHIBAI *v.* TRIMBAK. 1950 N.L.J. 69.**

——**S. 19**—*Order for costs by Debt Relief Court—Jurisdiction of Civil Court to execute—C. P. Code, Ss. 36 and 38.*

The Civil Court has no jurisdiction to execute an order for costs passed by the Debt Relief Court. Although the Debt Relief Court has jurisdiction to pass an order for costs, there is no machinery provided in the Act for execution of that order. (*Sen, J.*) RAMGOPAL *v.* RAMCHANDRA KRISHNARAO. I.L.R. (1949) Nag. 187=1949 N.L.J. 201=A.I.R. 1949 Nag. 359=4 D.L.R. (Nag.) 179.

———**Ss. 20 and 23**—*Order of Deputy Commissioner under S. 13 (3)—Jurisdiction of Civil Court.*

As an order passed by a Deputy Commissioner under S. 13 (3) of the Relief of Indebtedness Act is not one passed by the Debt Relief Court, the limitations imposed by Ss. 20 and 23 of the Act have no effect, and it is open to the Civil Courts to determine whether the Deputy Commissioner had jurisdiction or no, the question depending on the fact whether the instalments did or did not remain in arrears. (*Grille, C.J.*) KRISHNA SONABA ZADE *v.* UDHAORAO. I.L.R. (1946) Nag. 786=A.I.R. 1947 Nag. 78=1946 N.L.J. 481=1946 Nag. (Rul.) 233=226 I.C. 294.

———**Ss. 23 and 11 (1)**—*Debtor bound by scheme under S. 11 (1)—Whether can file insolvency petition—Provincial Insolvency Act, S. 28.*

A debtor who is bound by a scheme framed under S. 11 (1) of the C. P. and Berar Relief of Indebtedness Act, is not entitled to file an insolvency petition and the Insolvency Court has no jurisdiction to adjudge him an insolvent. The vesting of the property in the Insolvency Court under S. 28 of the Provincial Insolvency Act is the test to determine whether the debtor is entitled to make an insolvency application. Such vesting is impossible so long as the scheme under S. 11 (1) of the Relief of Indebtedness Act remains in force, as under S. 15 (2) of that Act the debtor who is bound by the scheme is incompetent to sell his immovable property without the sanction of the Deputy Commissioner. (*Niyogi, J.*) MANIRAM GOMAJI *v.* CHUDAMAN JAJRAM. **I.L.R. (1946) Nag. 490=224 I.C. 558=1946 Nag. (Rul.) 159=1946 N.L.J. 276 =A.I.R.** 1946 Nag. 315.

———**S. 23**—*Jurisdiction of Civil Court—Pre-emption decree passed by such Court on basis that transaction by applicant before Debt Relief Court was a sale—Finding by Debt Relief Court that it was a mortgage—If affects validity of pre-emption decree.*

A Debt Relief Court is only concerned with debts, and the subject-matter which is barred in the Civil Courts when a question of debts is pending before a Debt Relief Court must have a very definite relation to those debts. Proceedings in respect of a suit for pre-emption have nothing to do with an application for the settlement of debts. If in a suit for pre-emption the Civil Court passes a decree on the basis that the transaction by the applicant before the Debt Relief Court for settlement of debts was an out-and-out sale, a finding by the Debt Relief Court that it was only a mortgage does not affect the validity of the pre-emption decree or the rights of parties under that decree. As the matter before the Civil Court trying the pre-emption suit was not one which was pending in the Debt Relief Court, the decision in the Civil Court was not barred and was valid independent of anything that took place in the Debt Relief Court. 1942 N.L.J. 113, rel. on. (*Grille, C.J.*) RAJARAM *v.* BINDRAWAN. I.L.R. (1949) Nag. 457=A.I.R. 1949 Nag. 381=1949 N.L.J. 234.

———**S. 23**—*Preliminary mortgage decree for sale passed against several mortgagors—Application by one of them to Debt Relief Court—Debt scaled down—Right of mortgagee to proceed against other mortgagors—Rights and privileges of debtor-applicant.*

Per *Full Bench* (*Pollock, J., dissenting*):—If after a preliminary decree for sale is passed in a mortgage suit against several mortgagors, one of them applies to the Debt Relief Court which scales down the whole of the debt and gives him the right to redeem the whole mortgage on his paying the reduced amount and also grants him instalments, it is open to the mortgagee to proceed against the rest of the mortgagors in respect of the whole debt and to throw the entire burden on to the remaining property excluding the debtor-applicant's share. The remaining mortgagors will of course be entitled to credit for such payments as the debtor-applicant may make. The order of the Debt Relief Court has the effect of not only releasing the debtor-applicant's share in the mortgage from liability in the civil suit but also the debtor-applicant himself. This does not have the effect of splitting up the mortgage or releasing the others from liability.

S. 23 (1) of the Relief of Indebtedness Act only excludes the jurisdiction of the Civil Courts in respect of the *recovery* of the debt against the debtor-applicant. It does not touch the privileges and the rights which he has obtained under the preliminary decree. Therefore he must be given the privilege of redeeming the whole on payment of the whole, if he wants, because the preliminary decree gives him that privilege and the Debt Relief Court does not take away the privilege. But so far as his liabilities go, the jurisdiction of the Civil Courts is barred. Therefore, if he does not redeem, the mortgagee cannot proceed against either his property or him and must content himself with his rights against the rest and their share in the property. (*Niyogi, C. J., Pollock and Bose, JJ.*) HARDAS *v.* RAMGULZARILAL. I.L.R. (1947) Nag. 1=229 I.C. 360=1947 Nag. (Rul.) 98=1947 N.L.J. 55=A.I.R. 1947 Nag. 61 (F.B.).

———**S. 23**—*Scope—Plea of* res judicata—*If may be raised—Decision of Debt Relief Court—Whether may operate as* res judicata—*C. P. Code, S. 11.*

S. 23 of the C. P. and Berar Relief of Indebtedness Act deals with the matters in respect of the jurisdiction of the Civil Courts and the Courts having jurisdiction under the Provincial Insolvency Act is barred and not with the question of *res judicata*. So, the section does not come in the way of the raising of the question of *res judicata*.

If a Debt Relief Court having jurisdiction to entertain the application of the debtor decides that a transaction included by him in his debts is a mortgage and not a sale, that decision operates as *res judicata*, although it does not come under any of the clauses of S. 23 of the Act. The Debt Relief Courts like the Small Cause Courts and Revenue Courts are Courts of exclusive jurisdiction, and it is not S. 11, C. P. Code, but the general principle of *res judicata* that applies to their decisions. [1940 P.C. 222, dist. 1937 Lah. 346 and 1935 Lah. 826, ref.] (*Mangalmurti, J.*) YADAO RAMASA *v.* KESARBAI. I.L.R. (1949) Nag. 220=5 D.L.R. (Nag.) 14=A.I.R. 1949 Nag. 304=1949 N.L.J. 244.

CENTRAL PROVINCES REVENUE BOOK CIRCULAR, Vol. II, S. IV-3, R. 39 —"Dastaki" *appointments—Interference by Chief Controlling Revenue Authority.*

"Dastaki" appointments are more in the nature of token appointments which have no concern with the revenue administration of the locality. Exceptional circumstances must therefore be shown to exist for intervention by the Chief Controlling Revenue Authority in orders relating to *"dastaki"* appointments. (*Jayaratnam, F.C.*) **BALWANT BHASKAR *v.* BALWANT GUNWANT. 1948 N.L.J. 88.**

C. P. AND BERAR SALES TAX ACT (XXI OF 1947), S. 2 (g)—*"Sale"—Test—Order placed with printing press for printing pamphlets—Delivery of pamphlets not taken—Transaction, if sale.*

Where goods are merely ordered but delivery is not given or taken and there is nothing from which it can be ascertained that the property in the goods has actually been transferred from the seller to the buyer it cannot be said that there was a sale as defined in S. 2 (*g*), C. P. and Berar Sales Tax Act. A contract of sale is not the same thing as sale. Where therefore an order was placed with the owner of a printing press for printing certain pamphlets but delivery of those pamphlets was not taken, the transaction does not amount to a sale. (*Mudholkar, J.*) **PUNAM CHAND *v.* EMPEROR. I.L.R. (1950) Nag. 991=4 A.I.Cr.D. 723=5 D.L.R. (Nag.) 199=1950 N.L.J. 558.**

——**S. 2 (g), Expl. II**—*Trading concern sending goods outside State to its agents for disposal—Liability to pay sales tax.*

Where a trading concern having its principal place of business in Madhya Pradesh despatches goods to its agents outside the State for disposal, and the invoice specifically states quantities, rates, total price, discount, etc., and the account books are entered up from the invoices, the whole transaction is a trading one and not a mere transfer of goods from one warehouse to another, and is covered by Explanation II below S. 2 (*g*) of the C. P. and Berar Sales Tax Act. There is an implied contract of sale between the trading concern and its agents outside the State and it must be deemed to have been made in the State. The transaction in question is therefore liable to

the payment of sales tax. (*Jayaratnam and Sanyab.*) **SHREERAM GULABDAS, *In re.* 1950 N.L.J. 277.**

——**S. 4 (1)**—*Private concern converted into private limited company—If different entities.*

Where the private concern of a single individual is converted into a private limited company, the latter is not the same entity as the previous single proprietary concern. Legally they are not identical for the purposes of determining the taxable turnover. (*Jayaratnam and Sanyab.*) **REKCHAND MOHATA SPINNING AND WEAVING MILLS, LTD., HINGANGHAT, *In re.* 1950 N.L.J. 63.**

——**Ss. 4 (1) and 8 (1)**—*"Year"—Meaning of—Dealer maintaining accounts from Diwali to Diwali—When liable to get himself registered.*

The word "year" in S. 4 (1) of the C. P. and Berar Sales Tax Act means the "year" as defined in S. 2 (*j*) of the Act, and not the 12 months preceding the 1st June, 1947, the date on which the Act was brought into force. Where a dealer maintains accounts from *Diwali* to *Diwali* and he exercised his option under S. 2 (1) (*a*) by making his year the *Diwali* year, his gross turnover for the period between the 4th November, 1945, and the 24th October, 1946, must exceed the taxable quantum to render him liable to get himself registered under S. 8 (1) of the Act. (*Jayaratnam and Sanyab.*) **REKCHAND MOHATA SPINNING AND WEAVING MILLS, LTD., HINGANGHAT, *In re.* 1950 N.L.J. 63.**

——**S. 22 (5) and R. 57, Proviso**—*Powers of revisional authority—"Substantial question of law"—Question of liability to pay sales tax.*

Under the proviso to R. 57 of the Rules under the C. P. and Berar Sales Tax Act, a revision application cannot be entertained unless it raises a "substantial question of law". Where the point raised is the *liability* of the applicant to pay any sales-tax at all, the question of law must be regarded as substantial because it affects the practical issue fundamentally. If the arguments adduced on the applicant's behalf were not adduced earlier, the Revisional Authority cannot reject the application summarily on that ground or refuse to consider them. The Revisional authority, which is in a sense a superintending authority, would not be violating the Law or exceeding its authority if it gives a decision on merits in the case. (*Jayaratnam and Sanyab.*) **SHREERAM GULABDAS, *In re.* 1950 N.L.J. 277.**

——**S. 22 (5)**—*Revisional application against Commissioner's revisional order—Jurisdiction of Board.*

Under S. 22 (5) of the C. P. and Berar Sales Tax Act, the Board has jurisdiction to entertain a revision application against an order passed in revision by the Sales Tax Commissioner. The words "in like manner" in S. 22 (5) cannot be interpreted to mean that the Board can only entertain a revision application against the Commissioner's appellate order but not against the Commissioner's revisional order. (*Jayaratnam and Sanyab.*) **REKCHAND MOHATA SPINNING AND WEAVING MILLS, LTD., HINGANGHAT, *In re.* 1950 N.L.J. 63.**

C. P. STATES LAND TENURE ORDER, (1949), Cls. 3 and 27—*Retrospective effect.*

The provisions of cls. 3 and 27 of the C. P. States Land Tenure Order, 1949, were brought into force with effect from the 16th March, 1949, and are inapplicable to a case where the ryot died before that date. Such a case must be decided in accordance with the State *wajib-ul-arz* as it existed on the date of the death of the ryot. (*Bambawale.*) DEOBATI *v.* MEGHRAJ KANMAL. 1950 N.L.J. 141.

C. P. AND BERAR TEMPLE ENTRY AUTHORIZATION ACT, Ss. 8 (2) (c); 3 (1) and 6—*"Worship"—Meaning—Rules regarding religious service not made—Conviction for preventing worship by member of excluded class—If sustainable.*

The word "wordship" in S. 3 (1) of the C. P. and Berar Temple Entry Authorization Act must be construed in the terms of its definition in S. 2 (*c*) of that Act. The religious service which members of an excluded class may at present offer in a temple is not only that which the bulk of the worshippers may offer or participate in but a religious service which is in accordance with rules, and regulations to be made under the Act. If such rules and regulations have not been made, it is not possible for the Court to determine the exact nature of the religious service which a member of an excluded class is entitled to take part in or to offer. Therefore, in the absence of rules and regulations, it is not open to the Court to hold that a person acted illegally in preventing a member of an excluded class from offering worship in a temple, and his conviction under S. 6 of the Act cannot be sustained. (*Hemeon, J.*) SHRIDHAR *v.* EMPEROR. I.L.R. (1949) Nag. 421=4 D.L.R. Nag. 151=A.I.R. 1949 Nag. 383=51 Cr.L.J. 95=3 A.I.Cr.D. 559=1949 N.L.J. 508.

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 2 (11)—Gaontias *of Sambarpur village—If occupancy tenants—Transfer of* gaonti rayoti *lands—Validity.*

As Government has parted with its proprietary rights in the Sambarpur village, that village is no longer "the property of Government" within the meaning of S. 2 (18), Land Revenue Act, and therefore, the *gaonti rayoti* lands (*i.e.*) khudkasht lands of the *gaontias* of the village are not "survey numbers" within the meaning of S. 2 (18), and as they are not "survey numbers", Expl. II to S. 2 (11), Tenancy Act does not come into play. As history makes it clear that the *gaontias* held this village before the Zamindar came on the scene, the Zamindar did not let them into possession of either the village or the lands, and there is nothing to show that they have since attorned to him. There is no evidence to the effect that the *gaontias* pay any rent to the Zamindar. They do not therefore come within the definition of "tenant" in S. 2 (11) and cannot claim protected status. As there are no restrictions on transfer of the *gaonti rayoti* lands, a mortgage of such lands is valid. (*Bose, C.J. and Mangalmurti, J.*) DHARAMSINGH *v.* MAYARAM SADHURAM. I.L.R. (1950) Nag. 97=5 D.L.R. (Nag.) 39=1950 N.L.J. 528.

——**S. 6 (before amendment)**—*Applicability—Exchange of land between two tenants.*

The provisions of S. 6 (old) of the Tenancy Act were intended to apply only to a unilateral transaction by a tenant and not to a bilateral transaction like an exchange of land between two tenants of the same village. (*Jayaratnam, F.C.*) SHREE DEO RADHAKRISHNAJI *v.* SETHANI GHISI BAI. 1948 N.L.J. 384.

——**S. 6 (before amendment)**—*Decree for rent transferred for execution to Collector—Collector permitting tenant to sell privately portion of* **holding—Landlord's right of pre-emption—C. P.** *Code, O. 21, R. 83 and Sch. III, para. 11.*

In execution of a decree for arrears of rent obtained by the landlord, the Collector, to whom the decree was transferred for execution, gave permission to the defaulter tenant to sell privately a portion of the holding. On an application by the landlord for pre-emption under S. 6 of the old Tenancy Act,

Held, that as the decree was one for arrears of rent of an absolute occupancy holding which was a first charge on the holding the permission given by the Collector could not be under O. 21, R. 83, C. P. Code, which could not be invoked if the property was directed to be sold in execution of a decree for sale in enforcement of a charge on such property. It could only be regarded as an open permission given to the judgment-debtor under paragraph 11, Sch. III, C. P. Code, releasing a portion of the property in the hope that the judgment-debtor would negotiate a private sale and find the money to satisfy the decree. Such a transaction was not a sale "in pursuance" of the decree, but only *because* of the decree. The sale being a private one, a right of pre-emption accrued to the landlord under S. 6 of the Tenancy Act. (*Jayaratnam, F.C.*) NIRBHAI SINGH *v.* ASARAM. 1948 N.L.J. 373.

——**S. 6-A**—*Landlord not making deposit being misled by Court—If entitled to reasonable time to make deposit.*

Where the original notice by the tenant was invalid, and the landlord's failure to pay the deposit wihin time after the transfer was completed was the result of his being misled by the attitude of the Court, the landlord should be permitted within a reasonable time to apply, paying the necessary amount into the office of the Tahsildar, to get a sale deed executed in his favour. (*Braye, F.C.*) GANPATRAO *v.* BHAWANSAO. 1946 N.L.J. 188.

——**S. 6-A (10)**—*Sale of holding to stranger in execution of money decree—Surplus used to satisfy rent decree—Landlord's right of pre-emption—Presence of his agent at auction sale—Equitable estoppel.*

Two decrees were pending for execution with the Collector at the date of sale of an absolute occupancy holding held by him: (1) a money decree obtained by a stranger, and (2) a decree for arrears of rent obtained by the landlord. The holding was sold to a stranger in execution of the money decree and the surplus was used for satisfying the rent decree also. On an application by the landlord for pre-emption, it was contended for the auction-purchaser that the two decrees were merged and therefore the words "other than a decree obtained by the landlord" in S. 6-A (10) of the Tenancy Act removed the landlord's right of pre-emption. It was further contended that the landlord acquiesced in the auction as his agent was actually present thereat and therefore in equity he was estopped from exercising the right to pre-empt after the sale. Overruling both the contentions,

Held, that the holding was actually sold in execution of the money decree, that fact was not altered by use of some of the surplus for satisfying the rent decree also and that S. 6-A (10) of the Tenancy Act therefore applied. Moreover the landlord was bound to wait, under the provisions of that sub-section, until possession had been obtained by the auction-purchaser and there could be no waiving of his right or estoppel before that (*e. g.*, the auction) because that right had not then accrued. (*Ramsden, F.C.*) Bhowrilal *v.* Kunwar Pratap Singh. 1949 N.L.J. 109.

———**S. 6-A (10) (a) and (12) (b)**—*Sale of mortgaged holding in execution of money decree against tenant—Pre-emption by landlord—Price payable.*

Where an absolute occupancy holding subject to a mortgage is sold in execution of a money decree against the tenant and purchased by the mortgagee, the landlord is entitled to pre-empt the holding under S. 6-A (10) (*a*) of the C. P. Tenancy Act for the amount of the purchase money paid at the sale. The mortgagee-purchaser cannot contend that the value of the holding should be fixed by the Revenue Officer under S. 6-A (12) (*b*) of the Act. Sub-S. (12) of S. 6-A can only come into play when there is other immoveable property in the lot, or the right is foreclosed. (*Braye, F.C.*) Manorama Bai *v.* Ganpati. 1948 N.L.J. 190.

———**S. 6-A (11) (a)**—*Deposit within one year—If necessary—Power of Court to extend time.*

Under S. 6-A (11) (*a*) of the Tenancy Act, though the deposit need not accompany the application, it must, like the application itself, be made within one year of the loss of possession. The Court has no power to extend the time for deposit. (*Ramsden, J.*) Gangadhar *v.* Daulat Rao. 1945 N.L.J. 549.

———**S. 12-A (5) and (11)**—*Tenant giving notice to landlord of his intention to sell—Application by latter for getting sale-deed executed—Intending purchaser—If necessary party.*

Where an occupancy tenant gives the landlord notice of his intention to sell his right in his holding to a person for a sum specified in it and the landlord applies under S. 12-A (5) of the Tenancy Act to the Tahsildar for getting a sale-deed executed by the tenant and to be placed in possession of the right, the intending purchaser is not a necessary party to the proceeding. In a case under S. 12-A (5), when the original tenant is still in possession of the right and no sale has actually taken place, the only party to the proceeding started by the landlord will be the tenant and not the intending purchaser. (*Sanyab.*) Laxman *v.* Ganesh Prasad. 1950 N.L.J. 18.

———**Ss. 46 (3), 47 and 48**—*Transfer of occupancy holding—If void.*

Obiter:—There is no prohibition on a transfer of an occupancy holding in the sense that the transfer is void. S. 46 (3) of the Tenancy Act makes such transfers "voidable in the manner and to the extent provided by the two next following sections". Those sections only give certain heirs, and after them the landlord, the right to avoid those transactions and then only by application to a Revenue Officer. 8 N.L.R. 22; 22 N.L.R. 128 and A.I.R. 1937 Nag. 43, referred to. (*Bose, C.J. and Mangalmurti, J.*) Dharamsingh *v.* Mayaram Sadhuram. **I.L.R. (1950) Nag. 97=5 D.L.R. (Nag.) 39=1950 N.L.J. 528.**

———**Ss. 56 and 58**—*Construction*—Wajib-ul-arz—*Entries in—Presumption of correctness—*Lambardar *and* Punches—*Order dismissing* Nariha—*Jurisdiction of Revenue Officer to examine lawfulness or otherwise—Rule—Procedure.*

Under Ss. 56 and 58 of the C. P. Tenancy Act, and the *Wajib-ul-arz,* the entries in which must, under S. 82, C. P. Land Revenue Act, be presumed to be correct, the *Lambardar* and the *Punches* have no unfettered right to dismiss a *Nariha.* They have no doubt the power to dismiss the *Nariha* on his failure to perform his service; but if they want it to be followed up by deprivation of the service lands held by him that can be done only through the machinery of a decree by the Revenue Officer. The power of the latter to eject the *Nariha* in pursuance of the dismissal by the *Lambardar* and *Punches* is a mere power to execute and give effect to the order of dismissal. When approached to give effect to the dismissal by ejecting the *Nariha,* the Revenue Officer has the right and the duty to examine the *factum* and the legal validity of the dismissal. He has full jurisdiction to inquire into the lawfulness or otherwise of the order of dismissal passed by the *Lambardar* and the *Punches.* Substantial defects in procedure, *e.g.,* failure to frame a proper or specific charge, the omission to give the *Nariha* a reasonable opportunity to show cause, or any substantial defect in the constitution of the authority dismissing him, or fraud in the exercise of the power of dismissal, for instance, really for a private grudge though ostensibly on the ground of failure to perform service, would be clear grounds for holding the dismissal unlawful. The Revenue authorities can enquire and see whether any such defects vitiate the order of dismissal, though they are not vested with any appellate or revisional powers over the *Lambardar* and the *Punches.* At the same time the revenue authorities are not mere confirming or executing Courts in respect of the orders of the village officers. (*Das and Narasimham, JJ.*) Province of Orissa *v.* Durjodhan Das. **I.L.R. (1949) Cut. 540.**

———**S. 58**—*Scope—If overrides* wajib-ul-arz *—Conflict between the two—If any—Weight to be attached to each.*

There is no conflict between S. 58, C. P.

Tenancy Act and the provisions in the *wajib-ul-arz;* both of them have to be construed together. Even if there be any conflict the provisions in the statute would obviously over-ride any entry regarding the village customs contained in the *wajib-ul-arz*. (*Das and Narasimham, JJ.*) PROVINCE OF ORISSA *v.* DURJODHAN DAS. **I.L.R. (1949) Cut. 540.**

——**Ss. 58-C and 58-D**—*Strict adherence to procedure—Need for.*

A Tahsildar has no jurisdiction to act under S. 58-D of the Tenancy Act until he has properly complied with the provisions of S. 58-C of the Act. (*Ramsden, F.C.*) NARAYAN PAIKAJI *v.* NARAYAN. 1946 N.L.J. 609.

——**S. 61**—*Sub-tenant declared to have rights of ordinary tenant—Status of, after enactment of Act of 1920—Rights to transfer holding.*

A sub-tenant in an occupancy holding who was declared under the provisions of S. 61 of the C. P. Tenancy Act, 1898, to have all the rights of an ordinary tenant, continues only to have the rights of an ordinary tenant under that Act even after the Act of 1920 was enacted. He can thus have no rights of transfer in the holding and his special tenure is regulated by the relevant provisions in the Act of 1898. No question of pre-emption can therefore arise on an alleged sale of a holding of this kind. (*Jayaratnam and Sanyal.*) SETH KISANDAS *v.* MAHOMED SHAFIC. 1949 N.L.J. 402.

——**S. 69 (c)**—*Applicability—Sikmi* raiyat *holding* bhogra *land in Sambalpur District—Liability to ejectment.*

S. 69 (*c*), C. P. Tenancy Act, can apply only if the tenant sought to be ejected is an ordinary tenant and the holding consists entirely of *sir* land. *Bhogra* land in Sambalpur District is *sir* land. *A sikmi* raiyat is not an occupancy tenant under the Act, but is only an ordinary tenant.

A tenant recorded as a *sikmi* raiyat in respect of *bhogra* land in the district of Sambalpur is therefore liable to eviction under S. 69 (*c*) of the Act. 13 Cut.L.T. 10, dist. (*Reuben and Ramaswami, JJ.*) MADANPADHAN *v.* JAGABHUNDU. **27 Pat. 391.**

——**Ss. 89 and 13**—*Occupancy tenant allotted to co-sharer at private partition surrendering his land in his favour—Validity of surrender—Lambardar, if can challenge.*

Where by virtue of a private partition an occupancy tenant in a patti was allotted to the share of a co-sharer who thus became his landlord, a surrender of the occupancy land by the tenant in favour of the co-sharer landlord is perfectly valid under the provisions of S. 89 of the C. P. Tenancy Act, and it cannot be challenged by the lambardar of the patti under the provisions of S. 13 of the Act. (*Shevde, J.*) PREMLAL DOMAJI *v.* NATHULAL BRIJLAL. A.I.R. 1948 Nag. 365.

——**S. 97**—*Applicability—Suit for declaration of sole and exclusive right of* Lambardar *and* Punches *to dismiss* Nariha—*If barred—Specific Relief Act, S. 42—Application—Suit to construe Act, competency.*

S. 97 of the C. P. Tenancy Act contemplates a suit between a landlord and a tenant. A suit by the *Lambardar* and *Punches* of a village for a declaration of their sole and exclusive right to dismiss a *Nariha* is in substance one merely for a true construction of S. 58 of the C. P. Tenancy Act and the *Wajib-ul-arz*, and cannot be held to fall under S. 97, and as such not cognizable by an Ordinary Civil Court. Such a suit cannot also be held to be barred under S. 42, Specific Relief Act. A pure declaratory suit of this type is clearly maintainable; a suit to have true construction of a statute declared and to have an act done in contravention of the statute pronounced void does lie and is not barred under S. 42, Specific Relief Act. 22 Mad. 270 (P.C.); A.I.R. 1933 All. 488; A.I.R. 1931 Mad. 502; A.I.R. 1933 Mad. 618, foll. (*Das and Narasimham, JJ.*) PROVINCE OF ORISSA *v.* DURJODHAN DAS. I.L.R. (1949) Cut. 540.

——**(I OF 1920), (as amended in 1940), S. 2 (5)**—*Improvement—Construction of temple.*

The construction of a temple by an occupancy tenant of a holding on lands let out for agricultural purposes of cultivation, cannot by any stretch of reasoning, be said to be an improvement as defined by S. 2 of the C. P. Tenancy Act. Such a construction cannot be said to be for the betterment of the crops and for the improvement of agriculture. (*Shevde, J.*) FATELAL SHAH *v.* DAYA LAL. I.L.R. 1949 Nag. 167=3 D.L.R. (Nag.) 89=A.I.R. 1949 Nag. 218=1948 N.L.J. 575.

——**Ss. 2 (5) (d) and 25**—Erection of building on agricultural land—Improvement of land—Burden of proof. [*See* Q.D. 1941-1945, Vol. I, Col. 676.] GANASHPRASAD *v.* NANDAN LAL. A.I.R. 1946 Nag. 131.

——**S. 2 (10)**—*Application for pre-emption—Whether may be sent for enquiry to Naib Tashildar—C. P. Land Revenue Act, Ss. 3 and 19.*

It is not illegal for a Tahsildar to send an application for pre-emption to a Probationary Naib Tahsildar who was not empowered under S. 2 (10) of the C. P. Tenancy Act read with S. 19 of the Land Revenue Act. Under S. 3 of the Land Revenue Act, all Naib Tahsildars are "Revenue Officers" and para. 3 of the introduction to that Act makes it clear that, even before they are empowered under S. 14 of the Act, they may "investigate and report on cases for the orders of the Tahsildars". If the final order is passed by the Tahsildar, there is nothing whatever illegal in this procedure. (*Ramsden, F. C.*) CHOUBEY JAIGOPAL *v.* PUNA. 1947 N.L.J. 137.

——**S. 6**—*Oral sale alleged—Tenant continued to be recorded in revenue papers—Possession with vendee—Landlord's claim for pre-emption—If sustainable.*

It is possible that in certain circumstances a transfer, irregular under the civil law can nevertheless be taken cognizance of under the Tenancy Act for purposes of pre-emption. But where it is alleged that there has been an oral sale by the tenant but the tenant continued to be recorded as tenant in the revenue papers and the alleged vendee who was put in possession as sub-tenant, there must be something more tangible than this to support a landlord's pre-emption claim. (*Jayaratnam, F.C.*) Choudhary Adharsingh *v.* Sheocharanlal. 1948 N.L.J. 330.

———**S. 6**—*Sale of absolute occupancy holding in execution of decree—Effect of—Position of purchaser from date of transfer until avoided by landlord—Liability for rent.*

If an absolute occupancy holding is sold in execution of a decree, the tenant loses his rights from the moment of the transfer and the purchaser becomes a tenant from the date of the transfer till it is avoided by the landlord in the manner and to the extent provided by S. 6 of the C. P. Tenancy Act. The purchaser is, therefore, liable to pay rent to the landlord for that period. (*Mangalmurti, J.*) Kamalnayan *v.* Shamrao Bapuji. I.L.R. 1949 Nag. 251=A.I.R. 1949 Nag. 364=1949 N.L.J. 180=4 D.L.R. (Nag.) 113.

———**S. 6**—*Transfer not covered by Cls.* (a), (b) and (c) *of sum-S.* (1) *Covenant for reconveyance therein—If binds landlord or his lessee.*

Any transfer by an occupancy tenant, which is not covered by S. 6 (1) (*a*), (*b*) and (*c*) of the Tenancy Act, is not binding on the landlord. It follows that a covenant for reconveyance in such a transfer is equally inoperative as against the landlord or his lessee to whom the landlord leased out the occupancy field after obtaining possession by proceedings under S. 6-A of the Act. (*Kaushalendra Rao, J.*) Bhaiyalal *v.* Kishorilal. I.L.R. (1950) Nag. 719=A.I.R. 1950 Nag. 198=5 D.L.R. (Nag.) 185=1950 N.L.J. 390.

———**S. 6-A**—*Pre-emption against person substituted by Court in transferee's place—If lies.*

The right of pre-emption under S. 6-A of the Tenancy Act accrues only to the landlord. Pre-emption can only lie against the transferees of the tenant of the holding and not against the person who was substituted in place of the transferees by a Court which dealt with the pre-emption application of the person so substituted. (*Jayaratnam, F.C.*) Kashi Prasad *v.* Ramkisan. 1948 N.L.J. 333.

———**Ss. 6-A and 63-A**—*Re-assessment of holding—Buildings constructed by tenant thereon—Sale by tenant of land and buildings—Landlord, if entitled to pre-empt only land.*

S. 63-A of the Tenancy Act deals with tenancy holdings diverted to non-agricultural purposes. The sole object of this section is to enable Revenue Officers to revise the rent of a diverted holding with reference to its increased value during the currency of a settlement. Sub-S. (3) of the section however throws the holding back into the category of an agricultural tenancy by postulating that even after the revision of rent the tenant will have the same rights in the holding as he had in it before diversion. If a tenant of a holding which has been re-assessed under S. 63-A exercises his right and constructs a building, the building becomes merged in his right in the holding. If the land and the building are sold by the

tenant without notice to the landlord, the landlord is not entitled to pre-empt only the land. It would be illogical for him to contend that a building on a non-agricultural absolute occupancy holding is not an inseparable adjunct of the holding. (*Jayaratnam.*) Mahebub Khan *v.* Karamkhar. 1949 N.L.J. 395.

———**Ss. 6-A and 12-A**—*Right to apply for pre-emption—Cause of action arising pending appointment of lambardar in death vacancy.*

If pending the appointment of a *lambardar* in a death vacancy, a cause of action for pre-emption under S. 6-A or 12-A of the Tenancy Act arises in a village, an application for pre-emption can only be made by the whole proprietary body or a single *de facto* landlord, if there is such a one, as the latter takes the place of the lambardar. [1947 N.L.R. 309, appl.] (*Jayaratnam, P. and Sanyal, M.*) R. S. P. S. Sial *v.* Mahadeorao. 1949 N.L.J. 377.

———**(as amended by Act XI of 1940), S. 6-A**—*Sale of holding before amendment—Possession taken by auction-purchaser after amendment—Landlord, of the pre-empt.*

A sale of an absolute occupancy holding in realisation of a debt conciliation instalment took place before the (C. P. and Berar Act XI of 1940) came into force, and the auction-purchaser entered into possession after the Amendment Act came into force. Thereupon the landlord applied under the new S. 6-A of the Tenancy Act for pre-emption.

Held, that the Amendment Act had no retrospective operation, that when the new S. 6-A came into force the auction-purchaser had already purchased the holding and had acquired the right to hold it without let or hindrance from the landlord and to deprive him of that right (because the law was afterwards altered and gave the landlord the right to pre-empt even in the circumstances of the case) was to apply the new law restrospectively in an indirect manner and that the landlord was, therefore, not entitled to pre-emption. (*Rau, F.C.*) Kashiram *v.* Chokhkal. 1946 N.L.J. 94.

———**S. 6-A**—*Tenant transferring holding to brother's daughter and her male heirs—Landlord's right to pre-emption.*

A transfer by a tenant of his absolute occupancy fields to his brother's daughter and her male heirs for maintenance, is a transaction which falls under S. 6 (1) (*a*) of the C. P. Tenancy Act in as much as it is made not only to the brother's daughter but also to her male heirs who are also the heirs of the transferor, and the landlord cannot therefore claim pre-emption under S. 6-A of the Act. (*Ramsden, F.C.*) Hazari Lal Nandkishore *v.* Tulsiram. 1947 N.L.J. 146.

———**S. 6-A (8) and (15)**—*Landlord failing in civil suit under sub-S.* **(15)**—*Whether can seek pre-emption in Revenue Court under sub-S.* **(8)**.

A landlord failing in a civil suit for pre-emption filed under sub-S. (15) of S. 6-A of the Tenancy Act, cannot seek pre-emption in the Revenue Court under sub-S. (8) of that section (*Jaya-*

ratnam, F.C.) Budhram *v.* Sheodutt Prasad. 1948 N.L.J. 442.

———S. 6-A (8) (a)—*Application for pre-emption—Deposit by landlord—If mandatory.*

A landlord applying for pre-emption under S. 6-A (8) (*a*) of the C. P. Tenancy Act must make the deposit as required by sub-S. (11). Not only no permission of the Court is required for it, but the deposit is mandatory. A tender is not a deposit. (*Ramsden, F.C.*) Choubey Jaigopal *v.* Puna. 1947 N.L.J. 137.

———S. 6-A (8) (a)—*Landlord's consent not in writing—Proof of such consent—Burden of proof.*

The written consent of the landlord is not legally necessary under sub-S. (8) (*a*) second second option, as it is under sub-S. (2) of S. 6-A of the C. P. Tenancy Act. But if consent in writing is not forthcoming, the tenant must carry a heavy burden of proof that consent was in fact given or else the landlord's claim for pre-emption in accordance with the first option holds good. (*Ramsden, F.C.*) Laxminarayan *v.* Beharilal. 1946 N.L.J. 570.

———S. 6-A (12) (c)—*Omission to deposit pre-emption amount within period fixed by Revenue Officer—Right of pre-emption—If lost.*

The period fixed by the Revenue Officer under S. 6-A (12) (*c*) of the C. P. Tenancy Act for the deposit of the pre-emption amount by the landlord must be rigidly observed. Otherwise the right of pre-emption would be lost. The delay cannot be condoned. 1941 N.L.J. 50 and 1945 N.L.J. 165, rel. on. (*Bambawale.*) Jiwanlal *v.* Bittibai. 1949 N.L.J. 385.

———S. 8-A and R. 3—*Preliminary order under R. 3—Appeal, if competent—Final order passed before filing of appeal.*

The words "preliminary order" occurring in R. 3 must mean that the Revenue Officer takes a *decision* after inquiring into the Malguzar's objections, if any. An appeal lies from a preliminary order and it is not rendered incompetent by the passing of a final order under R. 4 before the appeal is filed. 27 N.L.R. 197, applied. (*Jayaratnam, F. C.*) Shamrao Damodhar *v.* Sadasheo Krishnarao. 1949 N.L.J. 53.

———S. 8-A—*Tenant applying three out of seventeen* khasra *members to be declared* malik-makbuza—*These members shown in* jamabandi *in numerical order—Originally held by two persons as two separate holdings—Separate identity preserved by separate rents—Application, if competent.*

A tenant holding 17 *khasra* numbers in absolute occupancy right applied to have 3 *khasra* numbers out of them declared *malik-makbuza*. The application was refused on the ground that under the proviso to S. 8-A of the C. P. Tenancy Act the applicant could not have a portion of the holding declared *malik-makbuza*. In the *jamabandi* these numbers were not shown separately from the others, and the 17 numbers went through in numerical order. They were originally two separate holdings held by two different people and they came to the applicant for different reasons at different times. Their separate identity was preserved by separate rents.

Held, that they were two separate holdings and the fact that they were not shown in two separate groups was only a result of the land record procedure whereby the *khasra* numbers were placed in numerical order, and that therefore the application was completent. (*Braye, F.C.*) Satyabhamabai *v.* Ganpatrao. 1946 N.L.J. 274.

———S. 9—*Mortgagee of holding paying rental arrears to avert sale—If entitled to reimbursement from purchaser of holdings—Purchaser not party to rent decree—Contract Act, S. 69.*

S. 9 of the C.P. Tenancy Act is a special enactment which overrides the general law. Under this section a mortgagee of an absolute occupancy holding is entitled to pay rental arrears to avert a sale of the holding in execution of a rent decree, and recover the amount so paid under S. 69 of the Contract Act from a purchaser of the holding although the latter was not a party to the rent decree which related to the period during which he was in occupation. Even assuming that the mortgagee, on the strict view of law could not be deemed to be interested in payment, he would get the benefit of S. 69 of the Contract Act if he made the payment under the *bona fide* belief that it was necessary for him to save the mortgaged property from being sold. (*Niyogi, J.*) Gangadhar Krishna Rao *v.* Mahadeo. 1946 N.L.J. 360.

———S. 9—*Sale of holding—Auction-purchaser, if takes subject to existing encumbrances.*

An auction-purchaser in a sale in execution of a decree for arrears of rent under S. 9 of the C. P. Tenancy Act purchases the holding subject to any encumbrances that may exist on it. Such an auction-purchaser steps into the shoes of the holder of the first charge and he may either redeem the mortgage or fall back on his prior charge and it makes no difference whether the auction-purchaser is himself the decree-holder or no. (*Grille, C.J.*) Sheolal *v.* Balkrishna. I.L.R. (1948) Nag. 573=A.I.R. 1949 Nag. 114=1948 N.L.J. 430.

———S. 9—*Scope and effect—Landlord's charge for rent on absolute occupancy holding—Priority over prior charge holders—Remedies of latter—Landlord purchasing holding in execution of rent decree—Rights of prior charge-holder—Holding consisting of two fileds—Charge only on one of them—Piecemeal redemption—T. P. Act, Ss.* 60, 92 *and* 101.

S. 9 of the C. P. Tenancy Act which makes the rent a first charge on an absolute occupancy holding gives the landlord priority over other charge-holders and mortgagees. It merely means that even though the landlord's right to recover the rent may have arisen after a prior encumbrance the landlord shall be put in the same position as if it had occurred first. Though the prior charge-holder is postponed to the landlord and is thus relegated to the position of a subsequent encumbrancer by the section, his charge is not wiped out altogether. He can therefore redeem the landlord's charge either under S. 9 (3) of the act by depositing the amount of the decree in Court any time before the sale, or by a subsequent suit.

What the landlord sells at the auction in execution of his rent decree is the tenant's interest in the holding and not his (the landlord's) fee simple in the land. Accordingly, a stranger auction-purchaser gets only the tenant's rights in the land and he does not acquire any of the landlord's superior rights. He cannot, therefore, step into the landlord's shoes and acquire his charge. But the position is otherwise if the landlord himself purchases in execution of his rent decree. He does not of course redeem his own charge but extinguishes it by the sale and accordingly he does not come in under S. 92 of the T. P. Act. But S. 101 of that Act comes into play, and he is entitled to set up his own charge against any other charge-holder or encumbrancer. In such a case, therefore, the prior charge-holder who is relegated to the position of a subsequent encumbrancer under S. 9 of the C. P. Tenancy Act must redeem the landlord's charge before he can enforce his own charge.

Where the absolute occupancy holding purchased by the landlord in execution in execution of his rent decree consists of two fields a plaintiff charge-holder suing to enforce his charge on one of them cannot obtain the other field to which he has no title. The defendant landlord, on the other hand, is entitled to use his prior charge as a shield against the plaintiff's attack on the field in suit. But as regards the other field, the defendant is its owner having purchased it. Therefore, so far as the prior charge which relates to both fields is concerned, the defendant is in the position of a charge-holder who has acquired an indefeasible right as owner to a portion of the charged property. This attracts the provisions of S. 60 of the T. P. Act and results in a splitting up of the charge, and that results in piecemeal redemption. (*Bose and Padhye, JJ.*) SHAMRAO *v.* KAMAL NAYAN. I.L.R. (1947) Nag. 912=A.I.R. 1948 Nag. 316=1948 N.L.J. 231.

———S. 10—*Malguzar's servant entered in settlement parcha as* mamuli, muafi khairati—*If becomes an occupancy tenant.*

A malguzar's servant who was entered in the settlement parcha as "*mamuli, muafi khairati*" was an ordinary tenant under the Old Tenancy Act of 1898. The Land Records Manual prescribes that such tenants should be recorded as occupancy tenants under the Act of 1920. S. 10 of this Act clearly authorises this. The fact that in the current jamabandi he has been shown only as "*kabzedar*" and that entry has not been corrected, cannot take away his existing right of tenancy. (*Ramsden, F.C.*) SADASHIV RAO *v.* GULABIA. 1947 N.L.J. 110.

———S. 11—*Construction and scope—Survivorship—If excluded.*

S. 11 of the C. P. Tenancy Act rules out survivorship. The use of the word "inheritance" together with the proviso manifestly rules out survivorship. (*Meredith and Ray, JJ.*) MADHUBAN *v.* BASANTA. 25 Pat. 764=A.I.R. 1947 Pat. 424.=14 Cut.L.T. 35.

———Ss. 12 and 13 (as amended)—*Partially excluded area—Transfer of occupancy holding to stranger by some of co-tenants—Right of others to apply to be placed in possession.*

S. 12 of the C. P. Tentancy Act, 1920, as amended by Act XI of 1940, does not apply to partially excluded areas. But S. 13 of the Act as amended by Act XI of 1940 is in force in those areas. If, therefore, some of the co-tenants of an occupancy holding in a partially excluded area transfer the holding to strangers in contravention of S. 12 of the Act of 1920, which is still in force in that area, the other co-tenants are entitled to apply to be placed in possession under the amended S. 13 of the Act. This section provides for the placing in possession of certain entitled persons by dispossessing certain other persons who are in actual possession by virtue of a prohibited transfer. (*Jayaratnam.*) RAMNARAIN *v.* PATIRAM. 1949 N.L.J. 183.

———Ss. 12 and 13—*Sale by tenant of holding* worth Rs. 100 by unregistered deed—Landlord's remedy for ejecting transferee—If lies in revenue or Civil Court—T. P. Act, S. 54. [*See* Q.D. 1941-1945, Vol. I, Col. 681.] CHINDHU PATEL v. DADU PATEL. 221 I.C. 437=1946 Nag. (Rul.) 30.

———S. 12—*Scope—Contravention—Effect of—Suit in Civil Court—Maintainability—Remedy.*

The fact that a sale is liable to be set aside as being in contravention of S. 12, C. P. Tenancy Act, in itself affords no remedy by suit, but only by an application under S. 13. A suit in the Civil Court is barred under S. 105. The only remedy so far as the contravention is concerned is an application under S. 13. (*Meredith and Ray, JJ.*) MADHUBAN *v.* BASANTA. 25 Pat. 764=A.I.R. 1947 Pat. 424=14 Cut.L.T. 35.

———Ss. 12, 13 and 14—*Transfer of holding to stranger by unregistered sale-deed—Possession transferred to purchaser—Transfer, if in contravention of S.* 12.

A transfer of an occupancy holding to a stranger to whom possession is transferred, is a transfer in contravention of S. 12 of the C. P. Tenancy Act, although the value of the property exceeds Rs. 100 and the transfer is effected by a document which is not registered, and the provisions of Ss. 13 and 14 of the Act can therefore come into operation. 1947 N.L.J. 170, appr. (*Bambawale and Sanyal.*) MAHABIR PRASAD *v.* SAMROO. 1950 N.L.J. 349.

———Ss. 12 (1) and (4), and 12-A—*Transfer by tenant—Landlord's right to pre-empt.*

A tenant can only transfer in one of the three ways stated in cls. (*a*), (*b*) and (*c*) of sub-S. (1) of S. 12 of the C. P. Tenancy Act. Sub-S. (4) of that section does not constitute any other kind of transfer. Under S. 12-A, the landlord is entitled to pre-emption on a transfer of the holding by the tenant. (*Greenfield.*) MURLIDHAR *v.* SHAMRAO. 1946 N.L.J. 184.

———Ss. 12 (1) (c) and 13—*Sale by Hindu widow—Remedy of reversioner.*

A transfer by sale by the recorded occupancy tenant of a holding, even though she may be a

Hindu widow, is not a transfer in contravention of S. 12 (1) (*c*) of the Tenancy Act, and the reversioners have, therefore, no remedy under **S. 13 of the Act.** The Revenue Courts cannot short circuit the Civil Courts by attempting a final adjudication of a dispute between a Hindu widow and her reversioners by a resort to the provisions of that section. (*Jayaratnam, F.C.*, Lachhmanprasad *v.* Chhitiya. 1948 N.L.J. 410.

———S. 12 (2)—*Occupancy tenant adjudicated insolvent—Power of Insolvency Court to compel him to transfer land—Provincial Insolvency Act, S. 28.*

S. 12 (2) of the C. P. Tenancy Act which has not been amended by Act XI of 1940 prevents the interest of an occupancy tenant in his holding from vesting in the Insolvency Court on his adjudication as an insolvent. It is not open to the creditor to ask the Insolvency Court to compel the tenant to transfer the land; nor is it competent for the Insolvency Court to do so. (*Pollock and Sen, JJ.*) Bakaram Bapuji *v.* Chirkutya. I.L.R. (1947) Nag. 296=229 I.C. 266=1947 Nag. (Rul.) 92=1947 N.L.J. 21.

———S. 12 (5)—*Tenant's notice defective—Failure of landlord to reply—If fatal to his claim for pre-emption.*

A landlord is not entitled to set pre-emption proceedings in motion under cl. (5) of S. 12-A of the Tenancy Act without disclosing his intention to purchase the land by replying under cl. (2) of that section to the tenant's notice under cl. (1), although the tenant's notice is incorrect in material particulars and would be subject to the mischief of cl. (9) of the section. Cl. (5) of the section must be read with the preceding cl. (4) and the malguzar becomes entitled to purchase the right only after he gives notice to the tenant. An application to a Revenue Officer under cl. (5) is not a reply to the tenant. The failure of the malguzar to reply to the tenant's notice disclosing his desire to purchase the holding is a fatal defect. By failure to reply to the notice he never became entitled to purchase the right before it was sold. (*Jayaratnam, F.C.*) Sheocharanlal *v.* Pachkoud. 1948 N.L.J. 332.

———S. 12-A—*Applicability—Unregistered sale.*

S. 12-A of the C. P. Tenancy Act covers all sales effected under S. 12 (1) (*c*) whether they are registered or not. (*Ramsden, F.C.*) Saraswatibai *v.* Kailasgir. 1947 N.L.J. 170.

———S. 12-A—*Application by landlord for pre-emption—Parties—Tenant, if necessary party.*

A tenant who has sold his holding is not a necessary party to an application for pre-emption by the ladlord uder S. 12-A of the C. P. Tenancy Act. (*Jayarantnam, F.C.*) Ramdulare *v.* Mt. Parbatibai. 1949 N.L.J. 123.

———S. 12-A—*Application for pre-emption dismissed for default—Restoration—Duty of Revenue Court.*

The restoration of an application for pre-emption dismissed for default is correct even if there has been considerable delay in applying for it, if the same has been adequately explained. As a general principle there should be no hesitation on the part of the Revenue Courts to re-open a matter which has not been finally adjudicated upon on merits. (*Bambawale.*) Sahadu *v.* Rajabahadur. 1949 N.L.J. 393.

———Ss. 12-A and 36-A—*Declaration of tenant to be* malik-makbuza—*When takes effect—Sale of holding by tenant after such declaration and before it takes effect—Effect of—Landlord's right to pre-empt.*

Under S. 36-A (2) of the Tenancy Act, an order of the Deputy Commissioner declaring an occupancy tenant to be a *malik-makbuza* of the land comprised in his holding does not become effective until the commencement of the agricultural year next following the date of the declaration. In between the date of the declaration and the date on which it takes effect, the tenant is in the position of an occupancy tenant *vis-a-vis* his landlord. If during this period the tenant sells his occupancy holding, he loses his prospective right of becoming *malik-makbusa* proprietor of his holding, which is not a transferable right while it is in abeyance, and the landlord is entitled to pre-empt against the transferee even though he may have consented to the conferral of *malik-makbuza* status on the transferring tenant. (*Jayaratnam, F.C.*) Mahomed Ahiya *v.* Tribeni Prasad. 1949 N.L.J. 484.

———S. 12-A—*Joint notice by two tenants—Landlord's right to pre-empt holding of each tenant separately.*

Under S. 12-A of the C. P. Tenancy Act, a landlord has the right to deal with each of his tenants individually. If a tenant joins with another tenant and gives a joint notice under S. 12-A (1) that is his own business. It does not affect the landlord's right to pre-empt his holding separately. (*Jayaratnam, F.C.*) Sitaram Raghoba *v.* Krishna Rao. 1949 N.L.J. 95.

———S. 12-A—*'Landlord'—Status of lambardar—Whether affected by private partition.*

The word "landlord" occurring in the various clauses of S. 12-A of the Tenancy Act refers to the lambardar of the *mahal* or patti, unless he is expressly excluded by any contrary substantive provision in the Act itself. The Revenue Courts are not concerned with persons who claim to be *de facto* landlords under the civil law. Nor are they concerned with the consequents which follow pre-emption decisions on this basis as between the co-sharers in a *mahal* or patti.

A partition under the provisions of Ch. XI of the Land Revenue Act is a partition by metes and bounds. A private partition, by allotment of tenants to the different co-sharers, amounts, in revenue law, to no more than a consent given by the lambardar to the co-sharers to receive rents direct from certain tenants instead of these sums passing through the lambardari accounts. It cannot have the effect of depriving the lambardar of his statutory status of landlord in the *mahal* or patti of which he has been appointed lambardar by a Revenue Court. The Revenue Courts are bound to give effective recognition to such an appointment, and a private partition is not a matter which the Revenue Courts can take cognisance of so as to deprive a lambardar of his statutory rights as the managerial landlord, if he may be so termed, of a *mahal*, or patti. (*Jayaratnam, F.C.*) Sheoratri Prasad *v.* Narain Prasad. 1948 N.L.J. 412.

———S. 12-A—*Notice by tenant defective—Landlord, if can initiate proceedings.*

All that is necessary to enable a landlord to initiate proceedings under S. 12-A of the Tenancy Act is the receipt of a notice from a tenant stating his intention to make a sale as provided for in S. 12 (1) (*c*) of the Act. It is the disclosing by the tenant of his intention to sell any right in his holding which is the essence of the notice. The fact that the notice is defective is immaterial. A defective notice is still a notice. (*Jayaratnam, F.C.*) Sitaram Raghoba *v.* Krishna Rao. 1949 N.L.J. 95.

———S. 12-A—*Partial pre-emption by landlord—Permissibility.*

Under S. 12-A of the C. P. Tenancy Act it is the duty of the landlord to claim pre-emption of the whole of that part of the property sold as to which he has a right of pre-emption. Thus in a case where a tenant has sold four *khasra* numbers forming part of the same holding, the landlord has no option but to seek pre-emption of all the four numbers together, although the position may be different if these numbers formed part of different holdings. (*Jayaratnam, F.C.*) Jagmohan Singh *v.* Raghuwar Singh. 1948 N.L.J. **419.**

———Ss. 12-A and 49—Person selling *malguzari* share in village reserving proprietary interest in *Sir* land—Position of—Occupancy tenant or *Malik-makbuza* of that land—Subsequent sale of *Sir* land—If gives rise to pre-emption right. *See* C. P. Land Revenue Act, Ss. 106 and 67. 1949 N.L.J. 172.

———Ss. 12-A and 12-B—*Pre-emption—Landlord's rights—"Stranger"—If includes landlord.*

The amendments made in 1940 restrict rather than liberalise the landlord's rights *vis-a-vis* those of tenants, and priority should still go to the co-tenant, and after him, to the heirs before the landlord. This position is also prescribed for sales in execution of rent decrees under S. 12-A (10) of the C. P. Tenancy Act. Under the old S. 12-A and the new S. 12-B the word "stranger" is used to denote any one who is not specifically referred to in the section itself. A landlord is therefore a "stranger" within the meaning of S. 12-B of the Act. (*Ramsden, F. C.*) Mulchand Daulat *v.* Pohap Singh. 1947 N.L.J. 20.

———S. 12-A—*Pre-emption of holding by landlord—Doubt regarding transferee's right—Whether to be decided in landlord's favour.*

In a case relating to the pre-emption of an occupancy holding by the landlord of the village, any genuine doubts regarding the right of a transferee to inherit a tenant's occupancy rights must be decided by the Revenue Courts in the landlord's favour. (*Jayaratnam, F.C.*) Shankar Ganba *v.* Gopal Adku. 1948 N.L.J. 81.

———S. 12-A—*Pre-emption proceeding—Landlord's oral consent—When may be pleaded.*

The landlord's oral consent, whether implied or express, cannot be pleaded in pre-emption cases unless special circumstances are proved, (*e.g.*) the acceptance of consent money before the transfer. (*Jayaratnam.*) Balwant *v.* Sukdeo. 1950 N.L.J. 257.

———S. 12-A—*Pre-emption proceedings—Position of landlord.*

The landlord acts not in his personal capacity but as the agent of the proprietary body in pre-emption proceedings. If a holding is pre-empted and consequently becomes *khudkasht*, the benefits out of that *khudkasht* land are not enjoyed only by the landlord and his family, but are enjoyed by the whole proprietary body. Again, if the landlord accepts *nazarana* in lieu of pre-emption, then the amount of *nazarana* is not enjoyed by the landlord himself but it goes into the village profits which are distributed amongst all the co-sharers. (*Rajan.*) Gopinath *v.* Fakirchand. 1950 N.L.J. 533.

———S. 12-A—*Purchase of occupancy land by sub-lessee of tenant during currency of sub-lease—Landlord's right to pre-emption—If postponed until termination of sub-lease.*

Where the sub-lessee of the original tenant is himself the purchaser of the occupancy land during the currency of his sub-lease, pre-emption by the landlord is not subject to the sub-lease right of the purchaser. The law does not contemplate postponement of pre-emption of occupancy lands which are held by the lessees of the tenant. (*Jayaratnam.*) Jamuna *v.* Harbhajan. 1950 N.L.J. 307.

———S. 12-A and Land Revenue Act, S. 187 (3)—*Right to apply for pre-emption—Minor lambardar—His natural guardian or lambardar gumastha.*

If a lambardar is a minor and a lambardar gumastha has been appointed under S. 187 (3) of the Land Revenue Act, the latter derives his authority to function as lambardar from the Act and his appointment under that Act results in the ouster of the lambardar under a disability so long as it lasts. This is so even if in matters unconnected with the village management he is competent to act on the minor's behalf. A natural guardian of such a minor cannot function as lambardar as he derives no such authority from the Act. The lambardar or when he is under a disability the *gumastha* must be deemed the landlord within the meaning of the C. P. Tenancy Act and nobody else. Therefore, the minor's natural guardian, if he is not the gumastha, is not competent to apply for pre-emption under S. 12-A of that Act. (*Sanyal.*) Sheobalak Bhagwandas *v.* Ishwar Industries, Ltd. 1949 N.L.J. 323.

———S. 12-A—*Right to pre-emption*—Lambardar *of* mahal *or purchaser of share* in mahal *of ex-proprietary occupancy tenant—C. P. Land Revenue Act, S.* 188 (2).

Sir land held in "exclusive ownership" by a co-sharer forms part and parcel of the *mahal* in which it lies and with which it is assessed to land revenue. When such land becomes ex-proprietary occupancy land it continues to form part and parcel of the *mahal*. Under S. 188 (2) of the

Land Revenue Act *lambardar* is deemed to be the landlord in the *mahal* or *patti* for which he is appoined. He is clearly therefore the landlord of the ex-proprietary occupancy tenant. Consequently, for purposes of pre-emption under the provisions of S. 12-A of the Tenancy Act, the lambardar of a mahal and not the purchaser of a share in the *mahal* of an ex-proprietary occupancy tenant has to be regarded as the "landlord" of that tenant. 1945 N.L.J. 102, 1947 N.L.J. 403 and 1948 N.L.J. 412, foll. I.L.R. (1941) Nag. 54 (F.B.), Not Foll. (*Jayaratnam and Sanyal.*) Dada Ganbaji *v.* Dharnodra Kumar. 1949 N.L.J. 447.

———S. 12-A—*Tenants' notice not mentioning purchaser's name—Landlord acting on such notice and applying fr pre-emption—Whether can plead invalidity of notice.*

Where a landlord receiving a notice from the tenant of his intention to sell a holding for a named price acts on that notice and applies to the Tahsildar electing to purchase the right and asking to have the price fixed, and his application is rejected for failure to deposit the amount of the notice within the time allowed, he is not entitled to plead that the original notice of the tenant was invalid in that it did not mention the name of the purchaser. (*Eraye, F.C.*) Mt. Akabai *v.* Rajeba. 1946 N.L.J. 187.

———S. 12-A—*Transfer of holding before lambardar coming into office—Right of latter to apply for pre-emption.*

A lambardar in office is entitled to apply for pre-emption in respect of a transfer of an occupancy holding which took place before he came into office. (*P. G. Braye, F.C.*) Ganpatlal *v.* Narayandas. 1947 N.L.J. 309.

———S. 12-A—*Transfer of holding when there is no lambadar—Notice, to whom to be given.*

If a transfer of an occupancy holding takes place when there is no lambardar—the lambardar having died and a successor not having been appointed—the notice under S. 12-A of the Tenancy Act must be given to the manager of the family of the deceased lambardar, and if no such manager exists, all the members of the proprietary body are entitled to receive a notice. (*P.G. Braye, F.C.*) Ganpatlal *v.* Narayandas. 1947 N.L.J. 309.

———S. 12-A—*Validity of notice—Notice not mentioning consideration for which holding is to be sold or name of intending purchaser.*

A notice by a tenant which offers to sell to the *malguzar* certain named fields at a certain rate per acre and declares an intention to sell to others if the offer is declined, is a statutory notice under the provisions of S. 12-A of the C. P. Tenancy Act, although it does not mention the amount of consideration for which the holding is to be sold or the names of the intending purchasers. Such a notice is a perfectly valid one, although it is incomplete. The landlord is entitled to apply to a Revenue Officer under the provisions of sub-Cl. (12-a) of the section and to ask that the value of the right which the tenant proposes to sell may be fixed by him. (*Jayaratnam, F.C.*) Khanderao *v.* Dukhuram. 1949 N.L.J. 31.

———S. 12-A (1) and (8)—*Irregular notice—Whether can be regularised by landlord's action.*

An irregular notice by the tenant under S. 12-A (1) of the C. P. Tenancy Act, (*e.g.*) a notice not mentioning the name of the prospective purchaser, cannot be regularised by any action the landlord may see fit to take on its receipt. As the notice is defective in a material particular, the landlord is free to apply under S. 12-A (9) of the Act although he had reacted to the notice by filing an infructuous application before the Tahsildar to fix the price. (*Jayaratnam, F. C.*) Mangilal *v.* Ramji Ramchand. 1948 N.L.J. 396.

———S. 12-A (1)—*Notice not mentioning name of prospective purchaser—Validity.*

A notice given by the tenant to his landlord under S. 12-A (1) of the Central Provinces Tenancy Act, which does not mention the name of the prospective purchaser in invalid. (*P. S. Rau, F.C.*) Krishnaji *v.* Khan Mahomed. 1945 N.L.J. 605.

———S. 12-A (4) and (5)—*Notice by tenant to landlord—Latter replying that he would buy only at lower price—Effect—Tenant, if bound to defer intended sale for 30 days.*

If in reply to a notice under S. 12-A (1) of the Tenancy Act, the landlord states that he is prepared to buy the land only at a price lower than that stated in the notice, the tenant is not bound to defer proceeding with the intended sale for a period of 30 days. S. 12-A (4) and (5) impose a limitation on the landlord, as well, of the period within which he must put the transaction through. A reply to the effect that he will buy at a lower price amounts to a refusal to buy at the price stated. This must amount to a permission to the tenant to sell at the higher price. The law does not contemplate the existence of a bargaining period of 30 days. (*Jayaratnam.*) Gulabrao *v.* Govind. 1950 N.L.J. 104.

———S. 12-A (5) (as amended in 1939)—*Application by landlord—Deposit within thirty days of notice—If necessary.*

A landlord applying under S. 12-A (5) of the Tenancy Act to the revenue officer for the fixation of fair prices must deposit the amount mentioned in the notice of the tenant within thirty days. Otherwise, he would lose his right to pre-empt. (*P.S. Rau, F.C.*) Namdeo *v.* Nago. 1945 N.L.J. 575.

———S. 12-A (5) (as amended in 1939)—*Landlord considering price stated in tenant's notice as excessive—Whether can apply to revenue officer to fix fair price.*

Where a tenant gave notice of his intention to sell his holding for a sum named and the landlord replied that he was willing to buy the right but that the price quoted was exorbitant and applied to the revenue officer for the determination of a reasonable price,

Held, that the landlord must be deemed to have permitted the sale, that if he intended to purchase the right he must purchase it from the tenant at the price stated in the notice, and that the revenue officer was not competent in the circumstances of the case to fix the fair price. (*P. C. Rau, F.C.*) S. Namdeo *v.* Nago. 1945 N.L.J. 575.

———S. 12-A (5) and (11)—*Tenant giving notice to landlord of his intention to sell—Application by latter for getting sale-deed executed—Intending purchaser—If necessary party.*

Where an occupancy tenant gives the landlord notice of his intention to sell his right in his holding to a person for a sum specified in it and the landlord applies under S. 12-A (5) of the Tenancy Act to the Tahsildar for getting a sale-deed executed by the tenant and to be placed in possession of the right, the intending purchaser is not a necessary party to the proceeding. In a case under S. 12-A (5), when the original tenant is still in possession of the right and no sale has actually taken place, the only party to the proceeding started by the landlord will be the tenant and not the intending purchaser. (*Sanyal.*) LAXMAN *v.* GANESH PRASAD. 1950 N.L.J. 18.

———S. 12-A (7)—*Applicability—Tenant not giving notice of sale—Landlord, if can be deemed to have permitted it.*

S. 12-A (7) of the C. P. Tenancy Act comes into operation only when cl. (1) and cls. (2) or (3) *have* been invoked, *i.e.*, when the tenant gives notice as required by cl. (1), and the landlord either agrees to purchase the right or permits the sale [cl. (2)], or fails to give notice [cl. (3)]. Where no notice of the sale has been given by the tenant, the landlord cannot 'be deemed to have permitted it." Unless the tenant has given notice and the landlord failed to reply, the latter cannot be held to have waived his right or deemed to have permitted the transfer. (*Rau, F.C.*) DAMODAR GOVIND *v.* RAJANNA. 1946 N.L.J. 435.

———S. 12-A (8)—*Application for pre-emption by lambardar—Limitation Starting point.*

Limitation for an application for pre-emption by a lambardar who is a sub-tenant of the occupancy holding, runs from the date of the loss of possession of the occupancy tenant and not from the date of the loss of his possession as a sub-tenant. (*Jayaratnam.*) BALWANT *v.* SUKDEO. 1950 N.L.J. 257.

———S. 12-A (8) and Sch. II—*Application for pre-emption—Limitation—Starting point.*

The right to apply for pre-emption under S. 12-A (8) of the Tenancy Act arises when a tenant "makes a sale" and the purchaser "temporarily or permanently obtains possession". Under Sch. II of the Act the period of limitation for pre-emption application is one year counting from the date on which the purchaser obtained possession. The date of registration of the sale deed is of no relevance. (*Jayaratnam, F.C.*) MUSERAM SAO *v.* HARIDAS. 1948 N.L.J. 115.

———S. 12-A (8)—*Interpretation—Sale of holding by tenant and subsequent reconveyance to him—Possession not delivered to purchaser—Application for pre-emption—If lies.*

The words "right in" in S. 12-A (8) of the C. P. Tenancy Act simply mean the straightforward right which accrues from tenancy (*e.g.*) to grow crops, the rights defined in Ss. 95 and 96 of the Act, the right to sublet and the liability to pay rent. To justify an application for pre-emption under sub-S. (8) it has also to be proved that the purchaser temporarily or permanently obtained possession of that right. Where, therefore, an occupancy tenant sold his holding in order to raise a loan and later obtained a reconveyance of it from the purchaser who never in fact took possession of the holding, the landlord is not entitled to apply for pre-emption under S. 12-A (8) of the Act. (*Ramsden, F.C.*) KOUSHALYA *v.* BABULAL. 1947 N.L.J. 136.

———S. 12-A (8)—*Sale deed by tenant in favour of lessee—Application for pre-emption—Limitation—Starting point—Date of execution or registration.*

Where on a sale of an occupancy holding by the tenant to his lessee, the Lambardar who had no notice of the sale applies for pre-emption under S. 12-A (8) of the Tenancy Act, the starting point of limitation of one year is the date of the execution of the sale deed when the purchaser who was already in possession as a lessee obtained possession as vendee, and not the date of registration. The word "right" in sub-S. (8) of S. 12-A of the Act is not synonymous with the word "title". When a tenant sells the right to cultivate, possession can only be of the land and not of any intangible title created by a registration of a document. The words "obtain possession of the right" in the sub-section must mean the right to cultivate land by obtaining physical possession of the land. (*Jayaratnam, F.C.*) RAMRAO *v.* GULAM HUSSAIN. 1948 N.L.J. 385.

———S. 12-A (8) and (11) (a) and S. 2 (4)—*Sale of two occupancy fields by tenant—Landlord's right to pre-empt each field separately—Each field, if separate holding.*

All the land which a tenant holds in occupancy right in one village forms one holding as defined in S. 2 (4) of the Tenancy Act, no matter when each field came into his possession. The fact that the fields are not contiguous to each other does not matter. If the tenant sells two of his occupancy fields in the village for a composite price, the landlord has no right to file separate pre-emption applications in respect of each of the fields and ask that the price of each field may be fixed by Court. As both the fields constitute one holding, the landlord is bound to apply for pre-emption of both the fields and deposit the composite price stated in the sale deed within the period of limitation as provided in S. 12-A (11) (*a*) of the Act; otherwise he would lose his right of pre-emption. (*Jayaratnam.*) SHAMRAO BAPUJI *v.* SHRI LAXMINARAYAN. 1949 N.L.J. 206.

———S. 12-A (8)—*Sale with condition permitting re-purchase—Landlord's right to pre-empt.*

If a tenant sells his occupancy holding with a condition permitting re-purchase by him within a specified time, the landlord is entitled to pre-empt so much of the rights in the land which the tenant has lost as a result of the transaction he has entered into with the purchaser and he is entitled to be placed exactly in the same position as the purchaser. The tenant is entitled to re-purchase from the purchaser even though pre-emption proceedings are pending and if a genuine and legally valid repurchase takes place the pre-emption proceedings will abate. The tenant will be entitled to repurchase from the landlord even if he has pre-empted the purchaser's rights. (*Jayaratnam, F. C.*) Nathu Sukharam v. Deokisan Gangabisan. 1948 N.L.J. 291.

———S. 12-A (8) (a)—*Waiver by landlord not in writing—Burden of proof.*

Although the written consent of the landlord is not prescribed by sub-S. (8) (*a*) as it is under sub-S. (2) of S. 12-A of the C. P. Tenancy Act, in the absence of a written waiver the transferee must carry a heavy burden of proof. (*Ramsden, F.C.*) Saraswatibai v. Kailasgir. 1947 N.L.J. 170.

———S. 12-A (9)—*Limitation for application—Suspension of—Mistake of Court.*

The limitation for an application by the landlord under S. 12-A (9) of the C. P. Tenancy Act is one year from the date of loss of possession of the holding by the tenant. Once limitation begins to run no mistakes committed by the parties or the Courts can have the effect of suspending it. (*Jayaratnam, F.C.*) Mangilal v. Ramji Ramchand. 1948 N.L.J. 396.

———S. 12-A (11)—*Application by landlord under—Parties—Tenant if necessary party.*

A tenant who has transferred his interest is not a necessary party to an application by the landlord under S. 12-A (11) of the C. P. Tenancy Act. (*Braye, F.C.*) Jankibai v. Pandit Beharilal. 1946 N.L.J. 238.

———S. 12-A (11) and (15)—*Landlord simultaneously filing suit in Civil Court and applying for pre-emption before Revenue Court—Subsequent withdrawal of civil suit—Effect on application before Revenue Court.*

An application by the landlord for pre-emption before the Revenue Court under S. 12-A (11) of the C. P. Tenancy Act is perfectly legal although the landlord withdraws his suit which he simultaneously filed in the Civil Court under S. 12-A (5) of the Act, when he clearly states in the application before the Revenue Court that he is if necessary prepared to pay the amount mentioned in the sale deed, which he deposits. (*Braye, F.C.*) Jankibai v. Pandit Beharilal. 1946 N.L.J. 238.

———S. 12-A (12) (a)—*Application by landlord for pre-emption—Sale deed by tenant not registered—Fixing of price—Duty of Revenue Court.*

If a tenant sells his holding without giving notice to the landlord as required by S. 12-A (1) of the C. P. Tenancy Act, and the sale deed is not registered, the landlord applying for pre-emption must be assumed to have had no knowledge of the consideration which passed between the parties. ' He is quite free to state what he likes in his application, but it is for the Revenue Court to fix the price if it finds that the application must be allowed. (*Jayaratnam, F.C.*) Ramdulare v. Mt. Parbatibai. 1949 N.L.J. 123.

———S. 12-A (15)—*Civil suit by landlord for pre-emption—Consideration not proved to have been stated fraudulently in sale-deed—Maintainability.*

The only ground on which a landlord can bring a suit under S. 12-A (15) of the C. P. Tenancy Act is that he considers and claims that the consideration in the sale-deed has been fraudulently stated and does not represent the actual consideration. Under the section what the landlord is entitled to sue for is the determination of the consideration if the consideration stated in the sale-deed has been stated fraudulently. The Civil Court has jurisdiction to determine what the consideration should be if fraud is established, but it has no jurisdiction to determine the consideration to be that which is stated in the sale-deed. The landlord has no right in law to ask, and the Court has no jurisdiction in law to give the landlord a decree in consonance with the terms of the sale-deed. 1945 N.L.J. 404, approved. (*Grille, C.J. and Hidayatullah, J.*) Govinda v. Krishnarao. I.L.R. (1949) Nag. 191=1949 N.L.J. 197 (S.B.).

———S. 12-A (15)—*Landlord's suit for pre-emption dismissed by Civil Court—Pre-emption though Revenue Court—Permissibility.*

Where a landlord's suit for pre-emption under S. 12-A (15) of the C. P. Tenancy Act is dismissed by the Civil Court on the ground that he had given oral consent to the sale, he cannot be allowed to pre-empt through the Revenue Court subsequently. 1948 N.L.J. 442, foll. (*Bambawale.*) Dewaji Rajaram v. Shamrao. 1949 N.L.J. 538.

———S. 12-A (15)—*Suit by landlord for pre-emption—Right to standing crops—Sale-deed, if necessary for delivery of possession.*

A landlord obtaining a decree for pre-emption of an occupancy holding in a suit brought under S. 12-A (15) of the C. P. Tenancy Act has a right to take the crops standing on the field along with the field. [1945 N.L.J. Note No. 95, rel. on. 76 I.C. 193, ref.]

A suit under S. 12-A (15) of the Act being a pre-emption suit, a decree in terms of O. 20, R. 14, C. P. Code, is passed. No sale-deed is necessary for delivery of possession in execution of the decree. Under O. 20, R. 14 (*b*), the title in a pre-emption suit accorues from the date of the deposit and no registered document is necessary for the passing of title. [1929 All. 237, ref.] (*Grille, C.J.*) Bajirao Somaji v. Abdul Gaffar. 1949 N.L.J. 205=A.I.R. 1949 Nag. 338.

———S. 12-A (15)—Suit for pre-emption—Limitation. *See* Limitation Act, Arts. 10 and 95 and S. 18. 1950 N.L.J. 396.

———S. 12-B—*Sale of shares of both co-tenants of holding—Wife of one—If entitled to pre-empt whole holding.*

On a sale of the shares of both the co-tenants of a holding, the wife of one of them can claim to pre-empt not only her husband's share as his heir, but the whole holding. (*Braye, F.C.*) Bhikam Singh v. Jankibai. 1946 N.L.J. 286.

———S. 12-B—*"Stranger"—Meaning.*

The word "stranger" in S. 12-B of the C. P. Tenancy Act, contemplates a person who has no

claim on the tenancy rights of the land in question, either as a co-tenant or as a possible heir. *(Braye, F.C.)* Bhikam Singh *v.* Jankibai. 1946 N. L.J. 286.

———S. 13—*Applicability—Transfer under S. 12 (1) (c)—Application by co-tenant.*

An application for ejectment under S. 13 of the C. P. Tenancy Act by a co-tenant does not lie on a transfer of an occupancy field made by a tenant in accordance with S. 12 (1) (*c*) of the Act. It is only when the transfer is not in accordance with any part of S. 12 that ejectment under S. 13 arises. Sale under S. 12 (1) (*c*), is subject only to the landlord's right of pre-emption under S. 12-A. A co-tenant may pre-empt only in the case of involuntary sale described in S. 12-B. *(Ramsden, F.C.)* Khuti *v.* Shankar. 1947 N.L.J. 149.

———S. 13—*Application by landlord for possession on tenant transferring occupancy holding by conditional gift—Tenant revoking gift while application pending in appeal—Landlord's cause of action—If ceases to subsist.*

Where on a tenant transferring his occupancy holding by a conditional gift revocable at his will the landlord applies under S. 13 of the Tenancy Act to be placed in possession of the holding on the ground that the transfer is in contravention of S. 12 of the Act and while the application is pending before the appellate Court the tenant revokes the gift and regains the possession of the holding, the landlord's cause of action for continuing the proceedings thereby ceases to exist.

In the above case the tenant reserves to himself the right of re-entry and to that extent maintains control over the disposition of the holding. In other words he has not divested himself of his entire rights in the holding. S. 13 of the Tenancy Act says "if a tenant transfers *his* right in his holding, etc." This must be construed as transfer of the tenant's entire right. The law, however, does not provide for partial divestment to be followed by dispossession of the tenant, except in the case of a sub-lease in contravention of S. 12 (1) (*a*) of the Act when, instead of dispossessing the tenant, the Revenue Officer may replace the tenant in possession of the holding by cutting short the period of the lease. In other words, the right of re-entry inherent in a lease is recognised and given effect to in favour of the tenant by modifying the period of the lease in preference to conceding the right of possession of co-tenants or others which accrued to them as a result of the contravention of the provisions of S. 12. In the absence of any specific provision in the law applicable to the facts of the case a revenue Court would be fully justified in applying the principle stated above and recognising the re-entry of the tenant into possession of the holding. *(Jayaratnam, F.C.)* Baburao *v.* Muniyabai. 1948 N.L.J. 50.

———S. 13—*Application by landlord—Maintainability—Landlord not admitting title of non-applicant as occupancy tenant.*

A landlord applying for relief under S. 13 of the Tenancy Act must admit that the non-applicant is his occupancy tenant. If he denies it, his application is liable to be rejected summarily. *(Jayaratnam.)* Dandige *v.* Mt. Jainabbi. 1950 N.L.J. 84.

———S. 13—*Landlord of ex-proprietary tenant—Purchaser of his share or lambardar.*

S. 49 of the C. P. Tenancy Act secures to a co-sharer, who parts with his share, occupancy rights in his *sir* land, but it does not automatically partition the newly purchased share from the rest of the mahal. The landlord of an ex-proprietary tenant for the purpose of S. 13 of the Act is, therefore, the lambardar of the village and not the purchaser of his share. *(Braye, F.C.)* Aley Mahomed *v.* Mustafa Khan. 1947 N.L.J. 403.

———Ss. 13 and 14—*Rights and liabilities of incoming tenant—Structures erected by previous tenant.*

A tenant placed in possession of an occupancy holding under the provisions of S. 14 of the Tenancy Act cannot be made to pay any cost of improvement which the previous tenant or transferee did to the holding. His liabilities are limited to arrears of rent and advances for necessary expenses of cultivation. The in-coming tenant has to be placed in possesssion of the whole holding irrespective of whatever structures the transferee may have erected on the land. It does not matter when these structures were erected. *(Jayaratnam, F.C.)* Chunta Muluwa *v.* Thakur Durjan Singh. 1948 N.L.J. 321.

———S. 14 (as amended)—*Retrospective operation.*

A transfer made by an occupancy tenant in contravention of S. 12 of the C. P. Tenancy Act of 1920, before it was amended by the C.P. and Berar Act XI of 1940 was set aside by a Sub-Divisional Officer as illegal and the son of the transferring tenant was placed in possession after the amending Act came into force. On appeal a joint brother of the transferring tenant contended that he had a preferential claim under the amended S. 14 (3) as the son was placed in possession after the Amending Act had come into force.

Held, that the brother could not oust the son as the provisions of the new Act could not be construed so as to take away rights that had accrued under the old Act. *(Rau, F.C.)* Babya Ramchandra *v.* Gulzar Fakru. 1947 N.L.J. 150.

———(as amended in 1940), S. 27 (1)—*Diversion of land by tenant—If entails forfeiture automatically and forthwith—Right to eject tenant—Notice under section—If condition precedent.*

A diversion of lands by a tenant does not automatically work a forfeiture under S. 27 (1) of the C. P. Tenancy Act. The landlord cannot straightaway eject a tenant following a diversion unless and until he gives the tenant an opportunity to remove the diversion under S. 27 (1). *(Shevde, J.)* Fatelal Shah *v.* Dayalal. I.L. R. (1949) Nag. 167=1949 N.L.J. 575=A.I.R. 1949 Nag. 218=3 D.L.R. (Nag.) 89.

———S. 27 (7)—*Notice under—Object of—Form of notice—Holding recorded in names of two brothers—Elder in actual occupation and on the spot as manager—Notice to him alone—Sufficiency and validity of.*

S. 27 (2), C. P. Tenancy Act, does not prescribe any particular form of notice. The object of the notice prescribed by the section is only to give a previous warning to the tenant to undo the wrong done by him before taking the drastic step of ejecting the tenant by a suit, in other words, to give the tenant, so to say, a *locus penitentiae* to mend matters. In the case of a holding recorded in the names of two brothers the elder being the *de facto* and *de jure* manager of the property and being also on the spot in actual occupation, a notice to that elder brother is a valid notice not only to him but also to his younger brother, under S. 27 (1) of the Act. (*Shevde, J.*) FATELAL SHAH *v.* DAYALAL. I.L.R. (1949) Nag. 167=3 D.L.R. (Nag.) 89=A.I.R. 1949 Nag. 218=1949 N.L.J. 575.

———S. 35—Abandonment of holding—Proof—Tenant purporting to transfer holding under void sale-deed—Suit by landlord for ejectment of transferee—Tenant pleading that he claimed no interest in holding. [*See* Q.D. 1941-1945, Vol. I, Col. 687.] CHINDHU PATEL *v.* DADU PATEL. 221 I.C. 437=1946 Nag. (Rul.) 30.

———Ss. 35 and 36—*Intention to abandon holding—Scope of enquiry.*

It was not intended that S. 35 of the Tenancy Act should prescribe tests by which a tenant's intention to abandan a holding could be established. Nor is it a penal section for confiscation of a holding in certain contingencies. It seems to lay down certain *ad hoc* circumstances in which a landlord can publish a notice and treat a tenant's holding as abandoned, so that he can allot it to another or cultivate it himself. The enquiry under S. 36 must be as entirely independent one and a tenant should be free to establish as best he can that he had no intention of abandoning the holding in spite of the truth of what was stated in the notice. Therefore under S. 36 of the Act all circumstances, and not only those specified in S. 35, must be taken into account. (*Jayaratnam, F.C.*) RAMDIN HARI PRASAD *v.* BERENDRA KUMAR. 1948 N.L.J. 309.

———S. 36-A—*Applicability—Zamindaris.*

Zamindaris have not been excluded by notification from the operation of S. 36-A of the C. P. Tenancy Act. The *malik makbuza* tenure is not unknown in inalienable or impartible zamindaris. The contention that the creation of proprietary rights within a zamindari is a violation of the incidents of the zamindari tenure is untenable. The section admits of no such interpretation. (*Jayaratnam, F.C.*) LAL AMOLSIN *v.* MRS. M. UNGER. 1948 N.L.J. 43.

———S. 36-A—*Application for malik-makbuza rights—Discretion of Revenue Officer—Possible contingency of land being bought by another person and used for non-agricultural purposes.*

A missionary society acquired occupancy right in land and applied under S. 36-A, C. P. Tenancy Act, for declaration to be a *malik-makbuza* of the land.

Held, that the discretion of the Revenue Officer could be rightly used to refuse the application. In permitting the tenancy right to pass to the missionary society, the landlord was presumably actuated by a desire to facilitate the philanthropic object of the society, whereas, if the discretion allowed in S. 36-A is to be exercised in such a way as to transfer the proprietary rights to the society, the result may well be, if at any time the society decides to close down this particular activity, the land would be bought by any person and used for a non-agricultural commercial purpose. If the landlord had been approached to part with proprietary rights unconditionally to the society, he might well have refused to do so in view of this possible contingency. (*Braye, F. C.*) MENNONITE CHURCH OF NORTH AMERICA *v.* LAL BAHADUR SINGH. 1946 N.L.J. 285.

———S. 36-A—*Application under—Maintainability—Title of applicant as occupancy tenant in dispute.*

An application under S. 36-A of the Tenancy Act to be declared as *malik makbuza* of a certain *khasra* number, cannot be made by a person whose title to that land as occupancy tenant is in dispute. (*Jayaratnam.*) GHASIN *v.* NATHMAL. 1950 N. L.J. 98.

———Ss. 36-A and 12-A—Declaration of tenant to be *malik-makbusa*—When takes effect—Sale of holding by tenant after such declaration and before it takes effect—Effect of—Landlord's right to pre-empt. *See* C. P. TENANCY ACT, Ss. 12-A AND 36-A. 1949 N.L.J. 484.

———S. 36-A—*Discretion of Revenue Officer.*

A Revenue Officer has a discretion to reject an application by an occupancy tenant to be declared *Malik Makbusa* under S. 36-A of the Tenancy Act, even if all the prescribed requirements of that section are fulfilled. The section cannot be invoked to operate in certain circumstances where the occupancy tenant is not merely a tenant pure and simple, but is also a *Maufidar* of the landlord with which status the tenancy right may be interconnected. (*Jayaratnam, F. C.*) ZAINABI *v.* SADASHIV RAO. 1948 N.L.J. 109.

———S. 36-A—*Proceeding under—Notice—Service on all co-sharers—If necessary.*

Rule 2 of the Rules under S. 36-A, Tenancy Act, requires a notice to the landlord only, and under the provisions of S. 188 (2) of the Land Revenue Act, the lambardar is deemed to be the landlord. Therefore, in proceedings under S. 36-A of the Tenancy Act, it is enough if the notice is served on the lambardar and it need not be served on all the co-sharers. (*Jayaratnam.*) CHAMPALAL *v.* RAMCHAND. 1950 N.L.J. 143.

———S. 40—*Application by sub-tenant for declaration—Expiry of his lease—Date of—Presumption.*

Under S. 40, C. P. Tenancy Act, a declaration can be made only in favour of a person who is a sub-tenant and in possession on the date of the commencement of the proceedings. Sub-tenants are virtually tenants-at-will and the terms of their tenure are determined by their agreements with their lessors. Where an agricultural lease does not refer to any crop that the lessee may grow in the holding leased out and does not specifically state the period in terms of dates but with reference to cultivation generally, the presumption is that the lessee retains possession of the land till the end of the agricultural year. (*Sanyal.*) **GURUPRASAD *v.* DHANNU SURTA. 1949 N.L.J. 602.**

———**S. 40, Expl.**—*Scope and effect.*

The explanation appended to S. 40, C. P. Tenancy Act, merely lays down a rule of presumption regarding habitual sub-letting although this presumption does not arise until seven years have elapsed, a declaration can be made taking into account a shorter period if the fact of habitual sub-letting can be otherwise proved. (*Sanyal*). **GURUPRASAD *v.* DHANNU SURTA. 1949 N.L.J. 602.**

———**S. 40 (1), proviso (2)**—*Application by sub-tenant holding lease made after 1st November, 1932—Proof of habitual sub-letting—Evidence of leases made prior to that date—Admissibility.*

According to the second proviso to S. 40 (1) of the C. P. Tenancy Act, no declaration under the section can be made in the case of a sub-tenant holding land under a lease made before 1st November, 1939. Where an application for a declaration is made by a sub-tenant holding land under a lease made after that date, the proviso does not suggest the exclusion from the evidence to prove habitual sub-letting of leases made prior to that date. (*Sanyal.*) **GURUPRASAD *v.* DHANNU SURTA. 1949 N.L.J. 602.**

———**S. 41**—*Declaration in favour of person not sub-tenant on date of proceedings—If can be made.*

S. 41, C. P. Tenancy Act, shows that the declaration can only be made in favour of a person who was a sub-tenant on the date of the beginning of the proceedings. If a person is not a sub-tenant on the date of application, he has no right to apply under the section. Even if the Revenue Officer acts on his motion, the person in question has to be a sub-tenant on the date when he initiates the proceedings. (*Rajan.*) **KRISHNARAO *v.* RAMRAO. 1950 N.L.J. 345.**

———**S. 45**—*Land recorded as* "Muafi Khairati Sadharan" *held by* Bhumak—*Latter ceasing to perform services—Liability to ejectment.*

Ordinarily, if land is recorded as *"Muafi Kkairati Sadharam"*, and there are no other conditions attached to it, under instructions contained in paragraph 20 of the C. P. Settlement instructions No. 1, the land would be treated as occupancy land. But if such land is held by a *Bhumak* in consideration of rendering services as a *Bhumak*, it should be recorded as *"Muafi Khidmati"*. Where the *Bhumak* has to do service not only to the Malguzar but to the Government Officers visiting the village, the land can be rightly treated as village service land, and the *Bhumak* is liable to ejectment under S. 45 of the C. P. Tenancy Act on his ceasing to perform the services of *Bhumak*. (*Bumbawale, J.*) **GODRYA JAIRAM *v.* MUKUNDRAO BALAJI. 1949 N.L.J. 471.**

———**Ss. 46 (3), 47 and 48**—*Transfer of occupancy holding—If void.*

Obiter:—There is no prohibition on a transfer of an occupancy holding in the sense that the transfer is void. S. 46 (3) of the Tenancy Act makes such transfers "voidable in the manner and to the extent provided by the two next following sections". Those sections only give certain heirs, and after them the landlord, the right to avoid those transactions and then only by application to a Revenue Officer. 8 N.L.R. 22; 22 N.L.R. 128 and 1937 Nag. 43, referred to. (*Bose, C.J. and Mangalmurti, J.*) **DHARAMSINGH *v.* MAYARAM SADHURAM. I.L.R. (1950) Nag. 97=1950 N.L.J. 528=5 D.L.R. (Nag.) 39.**

———**Ss. 55 and 58-A (Newly added by the amending Act of 1940)**—*Scope and applicability.*

The provisions of Ss. 55 and 58-A of the C. P. Tenancy Act newly added by the amending Act of 1940 are not retrospective and so cannot apply to transactions prior to 1940. (*Shevde, J.*) **LALCHAND NATHURAM *v.* NANDU. A.I.R. 1948 Nag. 139.**

———**S. 58-A and C. P. Tenancy (Amendment) Act XI of 1940, S. 55**—Landlord obtaining rent decree before and executing it after amendment—If a chargeholder. [*See* Q.D. 1941-1945, Vol. I, Col. 689.] **REWA PRASAD *v.* BABU PUNAMCHANDRA. I.L.R. (1946) Nag. 39=A.I.R. 1946 Nag. 119.**

———**S. 58-C**—*Order under—Revision—Right of aggrieved party—C. P. Land Revenue Act, S. 39.*

S. 58-C (3) of the Tenancy Act bars an appeal from an order made under sub-S. (1), and gives the aggrieved party the only remedy of instituting a suit in a civil Court to establish the right which he claims. He cannot therefore establish the right which he claims in a revisional Revenue Court.

This does not mean that a superior Revenue Court cannot exercise revisional authority over a Revenue Officer when that officer exercises powers under S. 58-C of the Tenancy Act. Such powers exist under S. 39 of the Land Revenue Act. But they are, in the obvious circumstances of the case, of very limited range. In any event, they cannot operate to give a decision contrary to the one recorded by the original Court. They can only be of a supervisory nature to see, for instance, whether the original Court was empowered by law to exercise the jurisdiction it did, or whether it exceeded its powers by, for example, imposing a fine or ejecting a tenant. The order passed in revision in such a case would not be an order "setting aside" the decision of the Original Court and giving a different decision, but would be one quashing the entire proceedings as illegal and void. (*Jayaratnam, F.C.*) **DATTATRAYA DEVASTHAN *v.* DAMODAR KRISHNARAO. 1949 N.L.J. 42.**

———**Ss. 58-C and 58-D**—*Requirements of S. 58-C not complied with—Jurisdiction to sell holding.*

Under S. 58-C of the C. P. Tenancy Act, the Revenue Officer must "record a finding" regarding the amount due and "require the tenant to pay the total amount determined" by a specified date. This can only mean that he must either issue a notice to the tenant or, if the tenant is present, at least record in the order sheet that he has informed the tenant clearly regarding the amount to be paid and the time-limit for payment. Even if no question arises regarding interest or costs, the tenant must be clearly told the amount due and be given a specified time in which to pay. A general notice to appear on the date fixed for hearing does not comply with the requirements of the section. A sale of the holding held after service of such notice without jurisdiction under S. 58-D of the Act. (*Ramsden, F.C.*) Raja Chhattar Singh *v.* Mt. Nanhi. 1947 N.L.J. 77.

———S. 58-C—*Tenant informed orally of the* ***amount and date within which he has to pay—Section, if complied with.***

It is sufficient compliance with S. 58-C of the Tenancy Act to inform the tenant orally of the amount which he has to pay and the date before which it has to be paid. (*Jayaratnam.*) Nandgir *v.* Ganpat. 1949 N.L.J. 300.

———S. 58-H—*Recovery of consent money—* ***Application made beyond seven months of date of default—Jurisdiction of Revenue Court.***

The Revenue Court has no jurisdiction to entertain an application under S. 58-H of the Tenancy Act to recover consent money made more than 7 months after the date on which it became payable. (*Jayaratnam.*) Gorjabai *v.* Ram Kalibai. 1949 N.L.J. 392.

———Ss. 74 and 201—***Applicability—Complaint against Malguzar for illegal levies—Need for separate complaint by each tenant.***

A complaint that the Malguzars charge Re. 1 from each cultivator for repairing village "*chandas*", although under the *wajib-ul-arz* the responsibility is theirs, is really one under S. 74 of the Tenancy Act. Under this section, each tenant has to make a separate complaint so that it can be enquired into in detail. The *wajib-ul-arz* has nothing to do with illegal levies by a Lambardar, except to the extent that it can be cited as evidence to prove that the levy was an illegal one and was not authorised by custom. Thus S. 201 of the Act has no application and the Malguzars cannot be taken to task under that section. (*Jayaratnam.*) Rajaram *v.* Punjabrao. 1950 N.L.J. 207.

———S. 88-A—Cases under—Procedure—Cr. P. Code or I. P. Code—If applicable. *See* C.P. Land Revenue Act, S. 201. 1945 N.L.J. 542.

———S. 88-A—Cases under—Revenue Officer, if can start *suo motu*. *See* Central Provinces Land Revenue Act, S. 201. 1945 N.L.J. 542.

———S. 88-A—*Payment by landlord—If must be made at market rate—Payment in kind—Permissibility.*

Unless payment is made in full (*i.e.*) at reasonable or market rates and according to the work performed the landlord is liable to be penalised as provided in S. 88-A of the Tenancy Act, in respect of each day's work or each task which has not been fully paid for. Payment in kind, if accepted as such by the labourer, is legally permissible—provided, of course, that the value thereof is equivalent to the amount of wages due at reasonable, or market rates. (*Ramsden, F.C.*) Ranashah Bapu *v.* Shaligram. 1945 N.L.J. 542.

———S. 95 (1) (old)—*Applicability—Toddy trees.*

A toddy tree is not a fruit tree within the meaning of the old S. 95 (1) of the C. P. Tenancy Act. Toddy juice extracted from the tree is neither fruit nor flower, nor is it in the nature of annual produce appertaining to agriculture. I.L.R. (1943) Nag. 298, relied on. (*Sheode, J.*) Putribai *v.* Sarjubai. I.L.R. (1948) Nag. 882=A.I.R. 1949 Nag. 245=1949 N.L.J. 168.

———S. 95 (1), Proviso (2)—*Scope of—Tenant removing trees hindering cultivation—Landlord's right to price of such trees.*

Sub-S. (2) of S. 95, C. P. Tenancy Act, relates to a case where a tenant other than a sub-tenant wants to purchase the rights in the trees in his holding, which do not belong to him but belong to the *malguzar*. Whenever, however, any trees are to be removed in the interests of proper cultivation, proviso (2) to sub-S. (1) of S. 95, will apply, and the landlord is not entitled to the price of such trees but only to the felled timber. (*Bambawale.*) Yadorao *v.* Purushottam. 1949 N.L.J. 478.

———S. 100—*Applicability—Tenancy right supported by settlement entries.*

The powers conferred by S. 100 of the C. P. Tenancy Act can be rightly used in cases where the tenancy right is supported by settlement entries and possession rests with the tenant, although the entry in the annual papers is equivocal. (*Ramsden, F.C.*) Sadashiv Rao *v.* Gulabia. 1947 N.L.J. 110.

———S. 100—*"Ejectment"—Meaning of—Lessee* ***of tenant refusing to give up possession on expiry of lease—Tenant, if entitled to be reinstated under section.***

The word "ejectment" in S. 100 of the Tenancy Act connotes wrongful and forcible dispossession which must have occurred at some point of time when possession of the land was secured. A voluntary surrender of possession cannot at any subsequent stage evolve into an "ejectment" which attracts the provisions of this secion. If a lambardar who has taken a lease of the occupancy holding from the tenant refused to give up possession on the expiry of lease, his refusal does not amount to an "ejectment" of the tenant from the holding so as to entitle the tenant to be reinstated under S. 100 of the Act. 5 N.L.R. 97, approved. (*Jayaratnam and Sanyal.*) Kesheorao *v.* Gangadhar. 1949 N.L.J. 517.

———S. 100—*"Otherwise than in accordance* ***with this Act"—Meaning of—Tenant putting landlord in possession under unregistered surrender deed.***

Under S. 100, C. P. Tenancy Act, Revenue Courts are given power to interfere summarily when a landlord 'ejects' a tenant from his holding. The words "otherwise than a accordance with this Act" in the section simply mean "wrongfully". If therefore a tenant voluntarily puts the landlord in possession by an unregistered surrender deed, he has no remedy under the Act if he thinks that he has been defrauded or changes his mind for some other reason. (*Jayaratnam, F. C.*) Mihilal Kishori *v.* Seth Nokhelal. 1948 N.L.J. 303.

———S. 100—*Scope of enquiry—Enquiry into title—Function of Revenue Court.*

An order passed under S. 100 of the Tenancy Act is intended to restore the *status* as between the landlord and tenant. It in no sense decides any question of title as between them. It is no part of the functions of a Revenue Court to enquire into such matters. It is enough for the applicability of the section if the applicant establishes *prima facie* that he is the tenant and that he was dispossessed by the landlord otherwise than in accordance with the Act. Where the applicant was in possession of the holding for two consecutive years as an occupancy tenant, recorded as such in the village *jamabardi* without objection by the landlord who summarily ejected him, he is fully entitled to seek redress from a Revenue Court under S. 100 of the Act. (*Jayaratnam, F. C.*) Ramkumar *v.* Dayaram. 1948 N.L.J. 382.

———S. 104 (4)—*Scope—S. 14 of Limitation Act—If applicable to suit under Act.*

S. 104 (4), C. P. Tenancy Act, says that the *remainder* of the Limitation Act (except Ss. 6, 7, 19 and 20) shall apply. Therefore S. 14 of the Limitation Act is applicable to a suit under the C. P. Tenancy Act. I.L.R. (1936) Nag. 5, not foll. (*Bose, C.J.*) Sharifjan *v.* Vishnupriya Devi. I.L.R. (1949) Nag. 743=A.I.R. 1950 Nag. 37=5 D.L.R. (Nag.) 72=1949 N.L.J. 586.

———Ss. 105 (a) and 6—*Sale of share of minor in occupancy holding by one not his guardian -Pre-emption by lambardar—Suit by minor for possession—Jurisdiction of Civil Court.*

The share of a minor in an absolute occupancy field was sold by one who was not his guardian. The lambardar thereupon pre-empted the sale under S. 6 of the C. P. Tenancy Act as it stood before the amendment made by the C. P. Tenancy (Amendment) Act, 1939. In a suit for possession brought by the minor, it was contended by the lambardar that the jurisdiction of the Civil Court was barred under S. 105 (*a*) of the C. P. Tenancy Act.

Held, that S. 105 (a) of the C. P. Tenancy Act did not bar the jurisdiction of the Civil Court in a case like this where there was no legal transfer at all. The Court of special jurisdiction did not carry with it a power to act beyond and outside that jurisdiction, and action which was *ultra vires* of such jurisdiction gave a cause of action in the Civil Court. (*Mangalmurti, J.*) Deokabai *v.* Punjab Rao. I.L.R. (1947) Nag. 812=A.I.R. 1948 Nag. 299=1947 N.L.J. 444.

———Sch. II, Art. 1—*Applicability—Suit by claimant to tenancy for possession of holding on ground of dispossession.*

Art. 1 of Sch. II to the C. P. Tenancy Act does not relate to suit under the special provisions of the Act only. The reference is to an ordinary suit in the Civil Court. A suit by a person claiming to be a tenant for possession based upon dispossession or exclusion from possession of the holding is governed by Art. 1 of Sch. II to the Act. (*Meredith and Ray, JJ.*) Madhuban *v.* Basanta. 25 Pat. 764=A.I.R. 1947 Pat. 424=14 Cut.L.T. 35.

———Sch. II, Art. 1—*Applicability—Suit by co-tenant.*

Art. 1 of Sch. II, C. P. Tenancy Act, applies where there has been exclusion from possession and denial of the title of a co-tenant. (*Bose and Sen, JJ.*) Munna Bai *v.* Sharda Bai. I.L.R. (1946) Nag. 312=1946 N.L.J. 381=A.I.R. 1946 Nag. 235=227 I.C. 499=1947 Nag. (Rul.) 21.

———Sch. II, Art. 1—*Application by landlord for pre-emption—Limitation—Starting point—Transferred holding in possession of third party.*

Under Sch. II, Art. 1 of the C. P. Tenancy Act, the landlord must file his application for pre-emption under S. 6 (4) (*c*) within one year from the date on which possession is lost by the transferring tenant. Where the tenant transfers whatever interest he has in the holding by a registered sale-deed, limitation for pre-emption runs from the date of the deed, although the transferee does not actually obtain physical possession by reason of the holding being in possession of a third party and has to file a suit against him for possession. The wording used in the Article is: "The date on which possession was lost". The wording does not refer to the dates on which any particular person took possession. (*Bambawale.*) Mt. Manjulabai *v.* Ganga Bisen. 1949 N.L.J. 505.

———Sch. II, Art. 1 and Limitation Act, Art. 148—*Suit for redemption of usufructuary mortgage of tenancy lands—Debt discharged by order of Debt Concilation Board—Article applicable—C. P. Debt Conciliation Act, S.* 8 (2).

A suit for redemption of a usufructuary mortgage of tenancy lands on the ground that the mortgage claim was fully satisfied out of the usufruct or must be deemed to have been discharged under S. 8 (2) of the C. P. Debt Conciliation Act, is governed by Art. 148 of the Limitation Act and not by Art. 1 of Sch. II of the C. P. Tenancy Act. The discharge of a debt by the operation of a Statute does not amount to a redemption of the mortgage. By the mere fact of satisfaction of the mortgage debt the possession of the usufructuary mortgagee does not become adverse to the mortgagor and as such it cannot be said that such mortgagee must be deemed to exclude the mortgagor from possession from the date of satisfaction of the mortgage for the purposes of Art. 1 of Sch. II of the C. P. Tenancy Act. 48 A. 145; 44 M. 253 and 1933 Oudh 13, Dist. 1929 All. 305 and 33 A. 97, referred to. (*Mudholkar, J.*) Mulchand *v.*

C. P. & B. TOBACCO ACT (1939), S. 2.

MT. GANGA. I.L.R. (1950) Nag. 68=1949 N.L.J. 539.

CENTRAL PROVINCES (AND BERAR) TOBACCO ACT (VIII OF 1939), S. 2 (o) —*Wholesale dealer—Who is.*

A wholesale dealer is a person who keeps for wholesale sale to traders a commodity for the purpose of trade. (*Hemeon, J.*) MANOHARBHAI *v.* EMPEROR. 224 I.C. 293=I.L.R. (1946) Nag. 422=1946 Nag. (Rul.) 148=1946 N.L.J. 319=47 Cr.L.J. 587=A.I.R. 1946 Nag. 258.

———S. 3—*Applicability—Agent or servant.*

S. 3 of the C. P. and Berar Tobacco Act does not apply to an agent or servant who offers for sale and delivers tobacco to customers on behalf of a wholesale dealer. (*Hemeon, J.*) MANOHARBHAI *v.* EMPEROR. I.L.R. (1946) Nag. 422=224 I.C. 293=1946 Nag. (Rul.) 148=1946 N.L.J. 319=47 Cr.L.J. 587=A.I.R. 1946 Nag. 258.

———**Schedule, Cl. (e), Proviso**—*If* ultra vires.

The proviso to Cl. (*e*) of the schedule to the C. P. and Berar Tobacco Act is not *ultra vires* the Provincial Legislature. (*Hemeon, J.*) MANOHARBHAI *v.* EMPEROR. 224 I.C. 293=I.L.R. (1946) Nag. 422=1946 Nag. (Rul.) 148=1946 N.L.J. 319=47 Cr.L.J. 587=A.I.R. 1946 Nag. 258.

CENTRAL PROVINCES AND BERAR VILLAGE PANCHAYAT ACT, S. 62—*Powers of Deputy Commissioner—Nature of.....*

The action which a Deputy Commissioner takes under S. 62 of the Village Panchayat Act is in the nature of administrative action and not as a Revenue Court. The powers vested in the Deputy Commissioner are neither appellate nor revisional. (*Jayaratnam, F.C.*) BAJRANGLAL *v.* TUKARAM. 1948 N.L.J. 194.

CENTRAL PROVINCES AND BERAR BOARD OF REVENUE ACT. *See* CENTRAL PROVINCES BOARD OF REVENUE ACT.

C. P. AND BERAR MUNICIPALITIES ACT (II OF 1922). *See* C. P. MUNICIPALITIES ACT.

C. P. AND BERAR PUBLIC SAFETY ACT (LXII OF 1948). *See* C. P. PUBLIC SAFETY ACT.

C. P. AND BERAR SALES TAX ACT. *See* C. P. SALES TAX ACT.

CERTIORARI—Writ of.

- **Against whom can issue.**
- **Contents of application.**
- **Grounds for issue of.**
- **Judicial or quasi judicial Act—Test.**
- **Jurisdiction to issue.**
- **Locus standi to apply for issue of.**
- **Nature and conditions of.**
- **Notice to inferior tribunal.**
- **Scope of writ.**
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———***Against whom and when can be issued—If can issue against an unauthorised person purporting to act under the Rajasthan (Administration of Evacuee Property) Ordinance (XIV of 1949).***

CERTIORARI—Writ of.

A writ of *certiorari* or prohibition can be issued only against an inferior Court which includes bodies created by the acts of the Legislature. It can only be issued against such bodies if a duty has been cast upon them of exercising, after hearing evidence, judicial functions in the sense that they have to decide on evidence between a proposal and an opposition.

When a person is neither a custodian nor an Additional Deputy or Assistant Custodian under the Rajasthan (Administration of Evacuee Property) Ordinance, but has been simply acting on behalf of the Deputy Custodian under an alleged authority which is not warranted by law, it cannot be said that he has been acting as an inferior Court because law has cast no duty upon him to decide questions under the Ordinance in a judicial or quasi-judicial manner and so a writ of *certiorari* cannot be issued against him in respect of his acts purporting to be done under the Ordinance. (*Sharma, J.*) SEFUDIN *v.* RAJ. 1950 R.L.W. 186=A.I.R. 1950 Raj. 58.

———*Against whom can issue.*

The High Court has jurisdiction and power to issue writs of *certiorari* against persons or bodies of persons who, though not ordinarily called Courts, yet have legal authority to determine questions affecting the rights of subjects and have a duty to act judicially, and who are therefore subject to the controlling jurisdiction of the Hight Court exercising those rights. (*Bhagwati, J.*) MANIBHAI HATHIBHAI PATEL *v.* C. W. E. ARBUTHNOT. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

———Against whom can issue—Administrative act of the Collector of Madras under the Madras Buildings (Lease and Rent) Control Act of 1946. *See* MADRAS BUILDINGS (LEASE AND RENT) CONTROL ACT (XV OF 1946), S. 3 (1948) 1 M.L.J. 266.

———Against whom can issue—Appellate authority under Madras Buildings (Lease and Rent Control) Act setting aside its own *ex parte* appellate order—Writ if can issue to quash. *See* MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT. (1947) 2 M.L.J. 482.

———Against whom can issue Election Commissioners appointed by Governor of Province to enquiry into election—Status and functions of—If Court or independent tribunal outside the jurisdiction of High Court. *See* GOVERNMENT OF INDIA (PROVINCIAL ELECTION) CORRUPT PRACTICES AND ELECTION PETITIONS ORDER, 1936, PART III, PARA. 4. 49 Bom.L.R. 468.

———Against whom can issue—Election tribunal consisting of Judge of High Court if subordinate to High Court or superior Court —Writ—If can issue to election tribunal. *See* TRAVANCORE LEGISLATIVE BODY ELECTORAL RULES, R. 32 (2). 4 D.L.R. (Trav.) 121 (F.B.).

———***Against whom can issue—Madras Hindu Religious Endowments Board removing trustee of a temple in the mofussil purporting to exercise the powers of an Assistant Commissioner under S. 26 of the Madras Hindu Religious Endowments Act (II of 1927)—Writ if can be issued to quash.***

The High Court has no jurisdiction to issue a writ of *certiorari* to quash the order of the Madras Hindu Religious Endowments Board purporting to exercise the powers of an Assistant Commissioner under S. 26 of the Madras Hindu Religious Endowments Act by which a person was removed from the office of the trustee of a temple in the Salem District. By the mere location of its office in the Presidency Town the Madras Hindu Religious Endowments Board cannot be deemed to be an inhabitant thereof within the meaning of S. 8 of the Letters Patent. Nor can it be said that the subject-matter of dispute was one which can be said to have arisen in the Presidency Town. The subject-matter in dispute in the case is the right to the office of trustee in a mofussil town. [(1943) 2 M.L.J. 254; I.L.R. 1944 Mad. 457 (P.C.), appl; (1948) 1 M.L.J. 322, dist.] (*Rajamannar, C.J. and Viswanatha Sastri J.*) KARUPPA CHETTY GOUNDAN *v.* BOARD OF COMMISSIONERS FOR H. R. E., MADRAS. 4 D.L.R. (Mad.) 133=62 L.W. 150=1949 M.W.N. 127=A.I.R. 1949 Mad. 857=(1949) 1 M.L.J. 187.

———*Against whom can issue—Minister of State acting as such—Writ if can issue against.*

A writ of certionari cannot issue against Ministers of State who act as such in exercise of powers given to them by legislative enactments and statutory rules. (*Krishna Pillai, C. J., Sankaran and Govinda Menon, JJ.*) MUTHUSWAMI IYER *v.* CHIEF MINISTER, U. S. T. C. 5 D.L.R. (T.C.) 131 (F.B.).

———Against whom can issue—Order of authority under Payment of Wages Act on construction of award under Bombay Industrial Relations Act—Writ—Application for—Competency—Order within jurisdiction—Wrong interpretation of award—If ground for quashing order. *See* PAYMENT OF WAGES ACT, Ss. 7 AND 15. 52 Bom.L.R. 389.

———*Against whom can issue—Parties living outside jurisdiction—Jurisdiction to issue.*

The High Court has no jurisdiction to issue the writ of *certiorari* when both the parties to the proceedings are outside the jurisdiction of the High Court, and particularly when the party affected thereby is outside such jurisdiction, although the tribunal against whom the writ is sought has its office within the jurisdiction of the High Court. (*Bhagwati, J.*) AHMEDABAD COTTON MAFG. CO., LTD. *v.* TEXTILE LABOUR ASSOCIATION. I.L.R. (1946) Bom. 360=225 I.C. 402=48 Bom. L.R. 76=A.I.R. 1946 Bom. 309.

———Against whom can issue—Provincial Government calling for the records relating to the rejection of a revision petition to Government under Madras House Rent Control Order. Writ to quash—If can be issued. *See* GOVERNMENT OF INDIA ACT (1935), Ss. 306 (1) AND 223. (1947) 2 M.L.J. 146.

———*Contents of application—Duty to state all material facts—Omission to state or suppression of material facts—Effect on maintainability of application—Amendment.*

In an application for the issue of a writ of *certiorari* or prohibition (which are high prerogative writs) it is incumbent on the applicant to state all material facts, and if the applicant is guilty of suppression or non-statement of material facts, the application is liable to be rejected. But where the suppression or non-statement is not the result of any deliberate intention on the applicant's part to mislead or deceive the Court but is a result of inadvertence or want of appreciation of the true legal position on the part of his legal advisers, the Court will allow the applicant to amend his application. (*Bhagwati, J.*) MANIBHAI HATHIBHAI PATEL *v.* C. W. E. ARGUTHNOT. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

———Grounds for issue of. *See* MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (XV OF 1946), S. 7. (1948) 2 M.L.J 559.

———*Grounds for issue of—Inaccuracy of expression in judgment under revision—Sufficiency to warrant interference by writ.*

An inaccuracy of expression in the judgment sought to be revised would not justify the High Court in interfering with the decision of the subordinate tribunal by a writ of *certiorari* under any jurisdiction. (*Krishna Pillai, C.J., Sankaran and Simon, JJ.*) KUNJU *v.* MYTHEEN KUNJI. 4 D.L.R. (Trav.) 121 (F.B.).

———*Judicial or* quasi-*judicial act—Test of—Bombay Land Requisition Ordinance* (1947), *S.* 3 *—Order of Government under—Nature of—Writ to correct—If competent.*

The true definition of a judicial or *quasi*-judicial act is that in order that the act may be a judicial or *quasi*-judicial act as distinct from an executive order, a duty must be cast by the Legislature upon the person or persons empowered to act to determine or decide some fact or facts. There must also be some *lis* or dispute resulting from there being two sides to the question to be decided. The duty must not only be to determine and decide a question; but there must be a duty to determine or decide the fact judicially, after weighing the pros and cons. What is really required is there should be a proposition and an opposition, and also that the deciding authority should have to weigh facts and law. In the matter of making an order of requisition under S. 3 of the Bombay Land Requisition Ordinance, 1947, the act of the Provincial Government is a *quasi*-judicial act; the Legislature his limited the power of Government and made it exercisable only upon the happening of a particular contingency, namely the existence of a public purpose, and has not empowered Government to affect the rights of the subject and to impose a liability upon him by a mere executive act of Government arrived at purely by subjective reasoning on the part of Government. If the Government acts in excess of its jurisdiction its acts can be controlled and corrected by a writ of *certiorari*. But the writ can only be directed against the Province of Bombay, which alone is empowered under the ordinance to make an order of requisition and cannot lie against any minister of the Province or any Secretary of that Government who might issue the order under the authority of the Governor. I.L.R. 39 Bom. 279=17 Bom.L.R. 100 (P.C.); 48 Bom.L.R. 717, ref. (*Chagla, C.J. and Tendolkar, J.*) P. V.

RAO *v.* KHUSHALDAS S. ADVANI. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

———Judicial or quasi-*judicial act—Test of—Defence of India Rules* (1939), *R.* 17 (1) (a) (ii) (a) *and* (iii)*—Order directing cutting off of telephone connection of premises and requiring surrender of apparatus.*

It is only in cases of judicial or *quasi*-judicial orders that the writ of certiorari can issue. Whether an act is a judicial act or *quasi*-judicial act or a purely executive act, will depend upon the terms of the particular section of an Act or rule, the nature, scope and effect of a particular power, under which or in exercise of which the act may be done. An order under R. 17 (*i*) (*a*), (*ii*) (*a*) and (*iii*) of the Defence of India Rules (1939), directing that the telephone connection of a specified person be cut off for a period of one year and that, that person do forthwith surrender the telephone apparatus installed in his premises and the fittings in connection with it, is not a *quasi*-judicial act and therefore a writ of certiorari cannot issue. It is not every order passed under the Defence of India Rule, that can be *quasi*-judicial unless the authority invested with the power to pass an order had to act judicially, *i.e.*, to weigh a question from two sides and decide on the matter no question of *quasi*-judicial act can arise. The two sides cannot include the authority making the order as he is the deciding authority. (*Kania, J.*) KAIKHUSHRU SORABJI *v.* COMMISSIONER OF POLICE, BOMBAY. I.L.R. (1946) Bom. 1056=48 Bom.L.R. 717=A.I.R. 1947 Bom. 153=231 I.C. 302.

———Jurisdiction of High Court to issue writ to quash award of an Industrial Tribunal under the Industrial Disputes Act after its award had been declared by Government under S. 15 *of the Act to be binding.*

It cannot be said that a writ of *certiorari* cannot be issued to quash the award made by an Industrial Tribunal under the Industrial Disputes Act after the Government had under S. 15 of the Act declared the award to be binding on the employer and employees. (1941) 2 M.L.J. 175: I.L.R. 1941 Mad. 807, relied on. (*Rajamannar, C.J. and Mack, J.*) THE KANDAN TEXTILES, LTD. *v.* THE INDUSTRIAL TRIBUNAL I, MADRAS. **1949 M.W.N. 819=(1949) 2 M.L.J. 789.**

———Jurisdiction to issue—Bombay City Police Act, S. 45*—Inquiry under—Chief Presidency Magistrate—If acts judicially or in executive capacity—Interference—Grounds.*

It is perfectly true that under S. 45 of the Bombay City Police Act it is for the Chief Presidency Magistrate to determine what inquiry he should hold for the purpose of determining the claim put forward by any party, but it cannot be disputed that in holding the inquiry the Chief Presidency Magistrate is discharging *quasi*-judicial functions and not acting in an executive capacity. While the Court will not interfere with the discretion of the Magistrate as to the nature of the inquiry he should hold or as to its scope. If the Magistrate, in holding the inquiry, contravenes any rule or principle of natural justice, the Court has jurisdiction to interfere and to prevent injustice being done to a party If he prevents a party from calling evidence and deprives himself of the opportunity of hearing material evidence, he acts in a manner which is not in conformity with the principles of natural justice. If a judicial officer permits his mind to be affected by certain testimony, it is his duty, if a testimony of an opposite character is sought to be adduced before him, not to reject it, but to hear both the pieces of the evidence and come to an impartial conclusion. If he does not do so, the High Court will interfere by issuing a writ of *certiorari*. (*Chagla, Ag. C.J. and Coyajee, J.*) OSCAR H. BROWN *v.* NATHMAL HIRA CHAND & Co. 49 Cr. L.J. 511=A.I.R. 1948 Bom. 236=49 Bom.L. R. 889.

———Jurisdiction to issue—Order of requisition under Bombay Land Requisition Act, 1948, *S.* 5*—Writ of* certiorari *or prohibition—If can issue.*

There is no warrant for holding that either the proviso to S. 5 (1) or S. 5 (2) constitutes a condition precedent to the act of requisition under the Bombay Land Requisition Act; it cannot therefore be said that by virtue of this proviso or sub-section the power to requisition is subject to a condition precedent which has got to be determined judicially. The act of requisition under S. 5 is therefore not a *quasi*-judicial act and no writ of *certiorari* or prohibition can lie in respect of an order made under S. 5. 51 Bom.L.R. 342, dist. (*Tendolkar, J.*) SAYED MD. ABDULLAH URAIZEE *v.* P. V. RAO. 51 Bom.L.R. 993=A. I.R. 1950 Bom. 158.

———Jurisdiction to issue—Bombay Land Requisition Act, S. 6—Order of requisition under —Writ, if lies—Order, if quasi-*judicial.*

A writ of *certiorari* lies in respect of an order of requisition under S. 6 of the Bombay Land Requisition Act, the order being a *quasi*-judicial order.

The existence of "premises" as defined in the Act is a condition precedent to the exercise of the power to requisition; and that condition, in so far as premises intended to be let are concerned, is not capable of subjective determination; nor is there any indication in the Act that it is left to the subjective determination of the Government. Hence the order of requisition must be held to be a *quasi*-judicial act.

Though it is true that the first proviso to S. 6 (4) of the Act makes a provision for an inquiry only in cases where no intimation of vacancy was given it does not follow therefrom that Government have to determine nothing in relation to premises relating to which an intimation has been received before they proceed to requisition them. Government are bound to satisfy themselves (*a*) that the intimation relates to premises as defined by S. 4 (3), (*b*) that such premises are vacant within the meaning of that term in sub-S. (1) read with the explanation, and (*c*) that the intimation is in fact given *bona fide* by the real landlord. These are objective facts not left to the subjective determination of Government, and, therefore the act of requisition is a *quasi*-judicial act even in cases in which an intimation of vacancy is given by the landlord.

When the proviso to S. 6 (4) enacts that the declaration made by Government shall be "conclusive evidence," it makes the declaration conclusive with regard to all facts involved in the determination of vacancy; but the declaration is not conclusive with regard to the inference to be drawn from, or the legal consequences of such facts since these are not matters of evidence. Notwithstanding the proviso, therefore, the legal concept of vacancy is still left for objective determination, and the act of requisition is therefore a *quasi-judicial* act. 39 I.A. 237, considered. 51 Bom. L.R. 342; 51 Bom.L.R. 438, rel. on. (*Tendolkar, J.*) JAGATCHANDRA N. VORA *v.* PROVINCE OF BOMBAY. 51 Bom.L.R. 997=A.I.R. 1950 Bom. 144.

———Jurisdiction to issue—Bombay Land Requisition Ordinance, 1947, S. 4—Order under—If subject to writ. *See* BOMBAY LAND REQUISITION ORDINANCE, 1947, S. 4 (4). 51 Bom.L.R. 418.

———Jurisdiction to issue—Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, S. 38—Order of review by Collector under on ground not specified—Issue of writ. *See* BOMBAY RENTS, HOTEL RATES AND LODGING HOUSE RATES (CONTROL) ACT, S. 38. 50 Bom.L.R. 146.

———*Jurisdiction to issue—Central Road Traffic Board, Madras—Order of in respect of a transport service in the mofussil—Writ of* certiorari *to call for the records and quash that order, cannot be issued.*

The decision of their Lordships of the Privy Council in the *Parlakimedi case* decides the scope and conditions of the exercise of jurisdiction by the High Court in the matter of prerogative writs and that decision must, therefore, govern all cases where there are applications for the issue of such writs.

Where an application was made for the issue of a writ of *certiorari* to call for the records of the Central Road Traffic Board, Madras, and quash its order purporting to allow an appeal in respect of a transport service operating in the mofussil.

Held, though the respondent Board had its offices in the Presidency Town, the subject-matter was entirely outside the original jurisdiction of the High Court, as it related to a transport service in the mofussil and as such the decision in the *Parlakimedi case* precluded the High Court from issuing the writ of *certiorari* asked for. (*Rajamannar, O.C.J. and Satyanarayana Rao, J.*) THE FRENCH INDIA CENTRAL TRANSPORT, LIMITED, *In re.* 61 L.W. 406=A.I.R. 1948 Mad. 497=1948 M.W.N. 424=(1948) 1 M.L.J. 401.

———*Jurisdiction to issue—Central Traffic Board, Madras, appointed under the Motor Vehicles Act allowing an incompetent appeal—Act without jurisdiction—Quashing by the issue of a writ of* certiorari*—Justifying the order on facts not contained in the order—Not a good return to a rule* nisi *for the issue of a writ of* certiorari*—Motor Vehicles Act, Rules, Rr.* 149 *and* 150—*—Scope of powers under.*

The petitioner had a permit to run buses on a particular route from Madras to Mahabalipuram. He applied to the Regional Transport Officer, Vellore, for permission to divert his buses at an intermediate place along a different route. The Regional Transport Authority notified under S. 57 (3) of the Motor Vehicles Act about the receipt of this application and after waiting till the date fixed for its consideration granted on 28th April, 1947, the permission as prayed for by the petitioner as apparently no representations were received from anybody. The second respondent, another bus service, preferred an appeal to the Central Traffic Board against the granting of the permission to the petitioner, though it had at no time till then objected to the grant of the permission. Without apparently realising that the second respondent was not entitled to appeal under S. 64 of the Motor Vehicles Act, the Central Traffic Board purported to allow it on 25th June, 1947, and cancelled the diversion of the route. The petitioner preferred a petition to the Provincial Government but they declined to interfere with the order passed. The petitioner thereupon applied to the High Court for the issue of a writ of *certiorari* to quash the order of the Central Traffic Board on the ground that the appeal by the second respondent was not competent and that the Board acted without jurisdiction in purporting to allow such an appeal and in cancelling the permission already granted to the petitioner. On behalf of the Central Traffic Board while it was conceded that the appeal was incompetent, it was contended that the High Court has no jurisdiction to issue the writ, and that though the order sought to be quashed could not be justified as an order on a valid appeal nevertheless it was a valid order passed in exercise of the powers conferred on the Central Traffic Board under R. 149 of the rules framed by the Local Government under the Motor Vehicles Act. It was further contended that in effect the petitioner was seeking to obtain the issue of the writ against the Provincial Government which the High Court has no power to issue.

Held: The body whose order was being challenged is located and had passed the order within the limits of the original jurisdiction of the High Court. Further as Madras is a terminus on the bus route, it must be held that the transport business was being carried on at least in part in Madras, though it was also being carried on outside the limits of Madras, and as such it cannot be said that the High Court has no jurisdiction to isue a writ of *certiorari* to quash the order of the Central Traffic Board.

The order sought to be quashed cannot be supported as an order passed in the exercise of powers conferred by R. 149 of the rules framed under the Motor Vehicles Act as it does not empower the Central Board to call for any order passed by the Road Traffic Board and to pass an order setting aside or modifying that order. Further, it did not appear on the face of the record that the Central Traffic Board was purporting to exercise a power conferred by R. 149. It is not a good return to a rule *nisi* for the issue of a writ of *certiorari* to state that the order is justified on facts not contained in the order and the High Court cannot take notice of such facts.

CERTIORARI—Writ of.

The dismissal of the petitioner's petition to Government cannot be said to be an order passed under any of the provisions of the rules validly framed under the Act. The language of R. 150 is both inadequate and inappropriate to confer a right on the Provincial Government to interfere in revision with orders of the Road Traffic Board and the Central Board in respect of which appeals are specifically provided.

The order of the Central Traffic Board was without jurisdiction and must be quashed. (*Rajamannar, O.C.J. and Satyanarayana Rao, J.*) Vedachala Mudaliar *v.* The Central Road Traffic Board, Madras. I.L.R. (1949) Mad. 194=61 L.W. 297=A.I.R. 1948 Mad. 454=1948 M.W.N. 319=(1948) 1 M.L.J. 322.

——*Jurisdiction to issue—Conditions for issue of—Nature and object of.*

A writ of *Certiorari* can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or *quasi*-judicially. It is a high prerogative writ, its purpose being to prevent a judicial or *quasi*-judicial body from acting in excess of its jurisdiction or to see that in exercising its jurisdiction that body acts in conformity with principles of natural justice. Such a writ can never lie to correct administrative or executive orders, though illegal or *ultra vires*, the very basis and foundation of the writ being that the act complained of must be a judicial or a *quasi-judicial act*. (*Chagla, C.J. and Tendolkar, J.*) P. V. Rao *v.* Khushaldas S. Advani. 51 Bom.L.R. 342=A.I.R. 1949 Bom. 277.

——***Jurisdiction of Court to issue—Conditions pre-requisite to—Basis of writ—Administrative order—If subject to correction by*** certiorari.

The very basis of a writ of *certiorari* is that the order challenged must be a judicial or a ***quasi*-judicial order, and the authority which has** passed the order must be discharging judicial functions. Only when the Court, is satisfied that the authority is acting in excess of jurisdiction which is vested in it or is acting with material irregularity in the exercise of its jurisdiction, *e.g.,* violating the principles of natural justice, will the Court issue the prerogative writ of *certiorari*. An administrative order cannot be corrected by a writ of *certiorari*. (*Chagla, C.J., Bavdekar and Shah, JJ.*) Emperor *v.* Jeshingbhai Ishwarilal. A.I.R. 1950 Bom. 363=52 Bom.L.R. 544 (F.B.).

——*Jurisdiction to issue writs of* certiorari *and prohibition—If restricted or affected by S. 45, Specific Relief Act.*

The High Court of Bombay has jurisdiction to issue a writ of prohibition as well as a writ of *certiorari*. The power conferred on the Supreme Court by Cl. 5 of the Charter Act still exists and is not taken away or restricted by the provisions of S. 45 of the Specific Relief Act. The writs of *certiorari* and prohibition are complementary of each other. (*Kania, A.C. J. and Chagla J.*) Dinbai Petit *v.* Nornhia.

CERTIORARI—Writ of.

I.L.R. (1946) Bom. 832=225 I.C. 577=48 Bom.L.R. 255=A.I.R. 1946 Bom. 407.

——*Jurisdiction to issue—Madhya Bharat High Court.*

The Madhya Bharat High Court has got no right to issue a writ of *certiorari* which is only possessed by the chartered High Courts and which were expressly conferred on them by charters and Letters Patent. (*Mehta and Sanghi, JJ.*) Deo *v.* State. 5 D.L.R. (M.B.) 38=A.I.R. 1950 M.B. 28=4 A.I.Cr.D. 195=51 Cr.L.J. 813.

——*Jurisdiction to issue—Nature and extent of powers of High Court—Hyderabad C. P. Code, S. 615—Powers under—Distinction—Erroneous interpretation or decision leading to non-exercise of jurisdiction—Interference by issue of writ—Principles.*

Generally, the writ of *certiorari* is issued to correct error of jurisdiction where no such jurisdiction is vested in the authority whose decision is challenged, or where such authority fails to exercise jurisdiction vested in it or has exercised it illegally or with material irregularity. The power to issue the writ is wider than the power of the High Court under S. 615, Hyderabad C. P. Code. The writ can be invoked against any person or authority exercising judicial or quasi-judicial functions, whereas the operation of S. 615, C. P. Code, is confined to Courts which are subordinate to the High Court. Though the word "Court" in S. 615, C. P. Code, cannot be extended to the authorities who are not proper judicial Courts but whose decisions can be corrected by writ of *certiorari*, yet decisions under S. 615, C. P. Code, may be taken as authorities for ascertaining and holding what amounts to improper refusal or exercise of jurisdiction. If a Court of law by an error of law, *e.g.,* by a wrong interpretation, refuses to exercise jurisdiction, such non-exercise of jurisdiction is a ground for interference by the High Court in revision, and on similar grounds the High Court can issue a writ and interfere with decisions of other authorities exercising judicial or quasi-judicial functions. Where the Appellate authority under the Hyderabad Rent Control Order comes to an incorrect or erroneous decision about the application of the doctrine of *res judicata*, the High Court in the exercise of its extraordinary powers quash that decision by the issue of a writ of *certiorari* on the ground of non-exercise or irregular exercise or wrong assumption of jurisdiction. 76 I.A. 131; (1949) 2 M.L.J. 594, rel. on. (*Naik, C.J. and Ansari, J.*) Secunderabad Commercial and Banking Co. *v.* Indermull. A.I.R. 1950 Hyd. 59.

——***Jurisdiction to issue—Nature and object of writ—Prohibition—Writ of—Distinction—Principles governing issue of writs.***

The power to issue a writ of *certiorari* is exercised by the High Court by virtue of its extraordinary jurisdiction where the act complained of is a judicial or a quasi-judicial act, and the object of the writ is to correct excess of jurisdiction. The right to apply for a writ is a very valuable right which a subject enjoys, and under this a subject can compel a *quasi*-judicial body to act within the four corners of its jurisdiction. A writ, however, will not issue where there is another adequate remedy, provided that remedy is equally beneficial and speedy and is merely one which will at some future time bring relief.

A writ of *certiorari* is invoked before a trial is completed to secure a fairer trial than can be obtained before an inferior Court or to obtain, or to prevent an excess of jurisdiction after trial; it is in fact to quash an order which has been made without jurisdiction or in defiance of the rules of natural justice.

A writ of prohibition, on the other hand, is issued to prevent the commission of a future act and not to undo an act already performed. An application for a writ of prohibition cannot lie to restrain an inferior tribunal after its judgment has been executed. Where the tribunal has nothing further to do in pursuance of its order the question of restraining its action does not arise. This would be so even if the order be void. But the remedy by way of a writ of *certiorari* is open where there is something left for it to operate upon and an application for a writ is never too late, so long as there is something left for it to operate upon.

The two writs are independent writs issued under different circumstances; their object is to compel Courts by issuing writs to keep within the limits laid down by the statute and the Court issuing the writ keeps Courts within those limits.

The Hyderabad High Court has in this respect the same powers as the Indian High Courts. 50 Mad. 130 (F.B.), dist. A.I.R. 1937 P.C. 265; A.I.R. 1946 Bom. 407; (1948) 1 M.L.J. 85; A.I.R. 1946 Bom. 216, rel. on. (*Khaliluzzaman Siddiqi and Srinivasachari, JJ.*) MUNNALAL *v.* NAZIM. A.I.R. 1950 Hyd. 5.

——*Jurisdiction to issue—Nature of writ and conditions precedent to its issue—'Judicial act'—Meaning of—Collector acting under R. 75-A of Defence of India Rules.*

There is no difference in principle between the writ of *certiorari* and the writ of prohibiton except that the latter may be invoked at an earlier stage. The conditions precedent for the High Court exercising its jurisdiction to issue the writs of *certiorari* and prohibition are that there should be a body of persons having legal authority to determine questions affecting rights of subject and having a duty to act judicially and acting in excess of that legal authority. There is no warrant for limiting the Court's jurisdiction to issue these writs only to cases of the body of persons, or to use another expression, the tribunal or officer acting in excess of their legal authority. The absence of any authority whatever to act in a particular manner is certainly much worse than mere excess of legal authority, and it is inconceivable that even though the Courts would have jurisdiction to issue a writ of *certiorari* or a writ of prohibition in cases where the tribunal or officer is acting in excess of the legal authority invested in him, the Courts would be helpless where the tribunal or officer concerned was seeking to exercise an authority or jurisdiction which was not at all vested in him. Hence, the Court would have jurisdiction to issue these writs not only in cases where the tribunal or officer acted in excess of their legal authority but also in those cases where the tribunal or officer acted without authority or jurisdiction at all. The purase "judicial act" must be taken in a very wide sense including many acts that would not ordinarily be judicial. The main processes which go to form an act of a tribunal or a competent authority a "judicial act" is that the tribunal or competent authority should decide on the materials before it between a proposal and an opposition even though the mode in which the materials are collected and placed before it or the process adopted by it in connection with the decision on those materials as between a proposal and an opposition may not strictly conform to what is ordinarily adopted in the regular Courts of Law. The procedure of *certiorari* applies in many cases in which the bodies whose acts are criticised would not ordinarily be called Courts nor the acts ordinarily be termed judicial acts. In order to decide whether an act is a judicial act so as to invoke the jurisdiction of issuing these writs which is vested in the High Court, regard must also be had to the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which an act may be done read with the provisions of the relevant statute. The tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, it should act in exercise of some right or duty to decide. The act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others and it should decide on materials before it as between a proposal and an opposition even though it is not bound to treat it as though it was a trial. The function exercised by the tribunal or competent authority may be exercised in a *quasi*-judicial manner and not a strictly judicial way as a Court of Law would do. It is however, incumbent on the tribunal or competent authority to act in good faith and fairly listen to both sides. Where a Collector acts under the powers vested in him under R. 75-A of the Defence of India Rules, and notification dated 25th April, 1942, by the Government of India Defence Co-ordination Department and requisitions a certain flat in the possession of a person and directs the latter to deliver possession of the said flat to another named officer of the Central Government, the Collector exercises, in the matter of the issue of the requisition order, a judicial function in the sense that he has to decide upon the materials before him as between a proposal and an opposition and therefore he performs what is a "judicial act" within the extended definition of that term. If he acts in excess of his legal authority or without any auhority or jurisdiction at all, it would be competent to the High Court to issue a writ of *certiorari* or a writ of prohibition against him. (*Bhagwati, J.*) JUGGILAL KAMLAPAT *v.* COLLECTOR OF BOMBAY. I.L.R.

(1946) Bom. 636=47 Bom.L.R. 1070=(1945) F.L.J. 300=A.I.R. 1946 Bom. 280.

———*Jurisdiction to issue—Other remedy open—Effect.*

If there is another suitable remedy, as, for instance, a right of appeal, the High Court would be very loath to issue the high prerogative writ of *certiorari* unless it is satisfied that the tribunal or the officer against whom the writ is sought has acted in a manner contrary to the fundamental principles of justice. If the Court finds that there has been a breach of the fundamental principles of justice, the Court will not hesitate to issue the writ. (*Stone, C.J. and Chagla, J.*) Khurshed Mody *v.* Rent Controller, Bombay. I.L.R. (1946) Bom. 940=229 I.C. 212=1947 Bom. (Rul.) 158=A.I.R. 1947 Bom. 46=48 Bom.L.R. 565.

———*Jurisdiction to issue—Other remedy open by way of appeal—If bar to issue of writ.*

Quaere: Whether the High Court would refuse to issue a writ of *certiorari* on the mere ground that the aggrieved party had another adequate remedy by way of appeal, even when the Court or tribunal below had acted in a way contrary to the fundamental principles of justice? (*Bhagwati, J.*) Manibhai Hathibhai Patel *v.* C.W. E. Arbuthnot. 49 Bom.L.R. 454=A.I.R. 1947 Bom. 413.

———*Jurisdiction to issue—Principles—Question of taxation or rating—Adoption of arbitrary mode of assessment in contravention of statute—Power of High Court to issue writ.*

A writ of *certiorari* is a high prerogative writ issued by a superior Court in respect of the exercise of judicial or *quasi*-judicial functions by another authority, when the contention is that the exercising authority had no jurisdiction or had exceeded its jurisdiction. The question whether that authority has jurisdiction or not depends on a decision of a matter which is not the subject of adjudication but on some extensive material. Where an assessment for rating purposes is made without juisdiction, that is to say, when an unauthorised arbitrary method is adopted or jurisdiction is exercised in express contravention of a section of an Act, and the taxation is made on that footing, the High Court has power to issue and will issue a writ of *certiorari*. (*Kania, J.*) Globe Theatres, Ltd *v.* The Chief Judge of Small Causes Court. I.L.R. (1946) Bom. 963=A.I.R. 1947 Bom. 108=48 Bom.L.R. 691.

———*Jurisdiction to issue—Principles—Writ to superior Court—If can issue.*

The High Court, as the Court exercising the highest jurisdiction in the State, has jurisdiction over all persons and bodies exercising judicial functions, as distinct from executive functions, within the state. This power is inherent in the High Court and will be exercised whenever the Court is satisfied that a grave miscarriage of justice has resulted from a wrong or improper exercise of jurisdiction or a failure to exercise a jurisdiction vested in such persons or bodies. A writ of *certiorari* will issue in such cases. But one superior Court will not issue a writ to another superior Court. [1948 T.L.R. 715; 21 T. L.J. 424 (F.B.), foll. 1945 P.C. 83, rel.] (*Krishna Pillai, C.J., Sankaran and Simon, JJ.*) Kunju *v.* Mytheen Kunji. 4 D.L.R. (Trav.) 121 (F.B.).

———*Jurisdiction to issue—Supreme Court in Ceylon—Textile Controller revoking textile licence—If amenable to* certiorari*—Ceylon Courts Ordinance, S. 42—Defence (Control of Textiles) Regulation, 1945, Reg. 62.*

Although the Controller of Textiles for Ceylon is a "person" within the meaning of S. 42 of the Ceylon Courts Ordinance and although there must exist in fact reasonable grounds of belief, known to the Controller, before he can validly exercise the power of revocation of a textile licence under Regulation 62 of the Defence (Control of Textiles) Regulation, 1945, his decision to revoke a licence under that Regulation is not a judicial or quasi-judicial act to which the remedy of *certiorari* can be applied by the Court. 54 C. W.N. 883 (P.C.) foll. (*Lord Radcliffe.*) M. F. De S. Jayaratne *v.* Bapu Miya. 54 C. W.N. 893 (P.C.).

———*Jurisdiction to issue—Supreme Court of Ceylon—Textile Commissioner cancelling textile licence—If amenable to* certiorari*—Ceylon Courts Ordinance, S. 42—Defence (Control of Textiles) Regulations, 1945, Reg. 62.*

The jurisdiction of the Supreme Court to grant and issue mandates in the nature of "writs of mandamus, quo warranto, certiorari, procedendo and prohibition" is derived exclusively from S. 42 of the Ceylon Courts Ordinance. The range of the jurisdiction must be found within the words of the statutory grant. Those words describe the permissible subject of the Court's mandates as being "any District Judge, Commissioner, Magistrate, or other person or tribunal". When S. 42 gives power to issue these mandates "according to law" it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court may be moved for the issue of a prerogative writ. The English Law does not recognise any distinction for this purpose between the regularly constituted judicial tribunals and bodies which, while not existing primarily for the discharge of judicial functions, yet have to act analogously to a Judge in respect of certain of their duties. In truth the only relevant criterion by English Law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, *certiorari* can be granted.

Even assuming that the Controller of Textiles is a "person or tribunal" within the meaning of S. 42 of the Ceylon Courts Ordinance he is not acting in a capacity that would make him amenable to *certiorari* when he cancels a textile licence acting under the powers of Regulation 62 of the Defence (Control of Textiles) Regulations, 1945. The words in Regulation 62 "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" must no doubt be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation. But it does not follow necessarily from this that the Controller must be acting judicially in exercising the power. He can act reasonably without acting judicially. It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the license-holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this Regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of *certiorari.* (*Lord Radcliffe.*) NAKKUDA ALI *v.* M. F. DE. S. JAYARATNE. 54 C.W.N. 883 (P.C.).

———*Locus standi* to apply—Person not aggrieved. [*See* Q.D. 1941-1945, Vol. I, Col. 697.] S. K. SAWDAY *v.* N. SINGHA ROY. I.L.R. (1944) 2 Cal. 464=A.I.R. 1946 Cal. 206.

———*Nature and conditions of—Issue against Ministers of State acting as such—Permissibility.*

The remedy by way of a writ of *certiorari* is available only where it is sought to review a judicial as distinct from a ministerial act of an inferior tribunal. The writ therefore cannot issue against Ministers of State who act as such in exercise of powers given to them by legislative enactments and statutory rules. (*Krishna Pillai, C.J., Sankaran and Govinda Menon, JJ.*) MUTHUSWAMI IYER *v.* CHIEF MINISTER U.S.T.C. 5 D.L.R. (T.C.) 131=A.I.R. 1950 T.C. 97 (F.B.).

———*Nature of—Interim orders—Issue of—Grounds for—Practice.*

The High prerogative writs of *certiorari* and prohibition are exceptional remedies and interim orders, such as an interim injunction, will not be made in petitions for the issue of such *writs* as a matter of course. A strong *prima facie* case has to be made out before that can be done. (*Tendolkar, J.*) SAYED MD. ABDULLAH URAIZEE *v.* P. V. Rao. 51 Bom.L.R. 993=A.I.R. 1950 Bom. 158.

———*Notice to inferior tribunal--Necessity.*

It is absolutely necessary that the tribunal to quash whose order the application for the issue of a writ is taken should be a party, because without notice issuing to the tribunal, the record of the proceedings cannot be brought up to the High Court. Whether the officer or authority concerned should also be required to appear is a matter which may depend on the circumstances of each particular case. (*Rajamannar, O.C.J. and Satya Naryana Rao, J.*) DEVICHAND MOOLCHAND *v.* DHANRAJ KANTILAL. 61 L.W. 267=1948 M.W.N. 264=A.I.R. 1949 Mad. 53=(1948) 1 M.L.J. 276.

———Scope of—Conclusions of statutory tribunals on the merits—If can be gone into in *certiorari* proceedings. *See* INDUSTRIAL DISPUTES ACT (XIV OF 1947), Ss. 7 AND 10. (1950) 2 M.L.J. 479.

———*Scope of writ—jurisdiction of inferior Court or officer challenged by applicant—Writ, if can be issued.*

The writs of prohibition and *certiorari* can be issued to an inferior Court or an officer having some jurisdiction in law, which such Court or officer is attempting to exceed or has exceeded. Therefore, when there is no such jurisdiction vested in law or no legal authority in such Court or officer, or when such jurisdiction or authority of such Court or officer is challenged by the applicant for the writs, there is no scope for such writs to issue. (*Majumdar, J.*) BENGAL IMMUNITY CO., LTD. *v.* S. N. GUHA RAY. I.L.R. (1948) 1 Cal. 310.

———*When can be issued—Availability of the writ to remove or quash an order of the Government of Bombay requiristioning certain premises under S. 3 of the Bombay Land Requisition Ordinance (V of 1947)—Writ, if lies against the Government of a Province.*

The main question for decision was whether a writ of *certiorari* was available to an aggrieved party to remove or quash an order made by the Government of Bombay requisitioning certain premises under S. 3 of the Bombay Land Requisition Ordinance (V of 1947).

Held (*Mahajan and Mukherjea, JJ., contra*).—As the decision of the Provincial Government about the existence of a public purpose in regard to the requisitioning of a property is not a judicial or quasi-judicial decision there was no scope for an application for a writ of *certiorari.*

Per *Kania, C.J.*—Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, a writ of *certiorari* may issue.

It is not correct to say that whenever there is a determination of a fact which affects the rights of parties, the decision is quasi-judicial. The word "quasi-judicial" itself necessarily implies the existence of the judicial element in the process leading to the decision. Because an executive authority has to determine certain objective facts as a preliminary step to the discharge of an executive function, it does not follow that it must determine those facts judicially. Where the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative nature and are not amenable to the writ of *certiorari.* The true position seems to be that when the law under which the Court is making a decision, itself requires a judicial approach, the decision will be quasi-judicial.

There appears nothing in the Bombay Land Requisition Ordinance to show that in arriving at its decision about a public purpose, the Provincial Government has to act judicially. The words of S. 3 of the Ordinance read with the proviso, and the words of S. 4 taken along with the scheme of the whole Ordinance do not import into the decision of the public purpose the judicial element required to make the decision judicial or quasi-judicial. The decision of the Provincial Government about public purpose is therefore an administrative act.

Inconvenience or want of adequate remedy does not create a right to a writ of *certiorari.*

Per *Fazl Ali, J.*—There is nothing in the Bombay Land Requisition Ordinance to suggest that the public purpose is to be determined in a judicial way.

A petition for a writ of *certiorari* can succeed only if two conditions are fulfilled: firstly, the order to be quashed is passed by an inferior Court or a person or authority exercising a judicial or quasi-judicial function and secondly, such Court or quasi-judicial body has acted in excess of its legal authority. Though the second element would seem to be present in this case, that would not be enough for the purpose of granting a writ of *certiorari* to the applicant. Since the requisitioning of the premises under S. 3 of the Ordinance was a purely administrative act and did not involve any duty to decide the existence of a public purpose or any other matter judicially or quasi-judicially, the remedy of the aggrieved party is clearly by action and not by asking for a writ of *certiorari.*

Per *Mahajan, J.*—The Provincial Government of Bombay acting under the Bombay Land Requisition Ordinance is a body of persons having legal authority to determine questions affecting the rights of subjects and its duty is to act judicially. It cannot arrive at its determination on a mental process of its own. The questions that have to be decided under S. 3 of the Ordinance are not questions for the mere determination of the Government subjectively by its own opinion but are matters of determination objectively.

A writ of *certiorari* lies against the Government of Bombay.

Per *Mukherjea, J.*—The Provincial Government when acting under the Bombay Land Requisition Ordinance has to satisfy itself that there is a public purpose before it proceeds to requisition any property. As this is an objective condition which has not been made dependent on the personal opinion of the executive it has got to be determined judicially and whether a public purpose exists or not is itself a mixed question of facts and law which could be determined by an application of well-established principles of law to the circumstances of a particular case. There is undoubtedly a *lis* or point in controversy—or what is called a proposal and an opposition.

The act of requisition being an executive act the determination of the existence of a public purpose upon which the exercise of powers is dependent is either a part of the executive act itself or is something collateral to it. As in the present case it is a thing collateral and preliminary to the exercise of executive authority and not a part of it, the determination of this collateral matter by the executive authority which is a judicial function cannot be regarded as final and if the determination is erroneous, it can be corrected and removed by a writ of *certiorari.*

A writ of *certiorari* will lie against the Provincial Government.

Das, J.—When the Legislature leaves it to the opinion or satisfaction of the executive authority as to whether it is necessary or expedient to requisition a land for a public purpose the executive authority is constituted the sole Judge of the composite matter, that is to say of the existence of the public purpose as well as the necessity or expediency for requisitioning the land for that public purpose, call it a condition precedent or an objective fact or what you will. On a proper construction of S. 3 of the Bombay Land Requisition Ordinance, there can be no doubt that the section left it to the Provincial Government to form its own opinion on the entire matter, namely, whether it was necessary or expedient to requisition any land for a public purpose and to act upon that opinion. So construed, the formation of opinion on the whole matter and the act founded thereon was nothing but a purely administrative (*i.e.*) executive act. If the acts were done in good faith and within the four corners of the Ordinance the Court cannot interfere with it in any proceeding and far less by the prerogative of *certiorari* or prohibition.

Apart from the question of construction and assuming that the matter had not been left to its opinion the determination of the existence of a public purpose or the necessity or expediency for making the order could not be regarded as a quasi-judicial act, because (*a*) there was no *lis* in the sense of dispute between two contesting parties to be decided by the Provincial Government; and (*b*) the Provincial Government was not required by the Ordinance to hold any judicial inquiry or to act judicially and the determination of the existence of a public purpose was only a step in the process of the exercise of the administrative power and, if erroneous, the decision could at best be challenged by an action, but a *certiorari* would be a wholly inappropriate remedy. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan, Mukherjea and Das, JJ.*) PROVINCE OF BOMBAY *v.* KHUSHALDAS S. ADVANI. 1950 S.C.J. 451=1950 M.W.N. 802=A.I.R. 1950 S.C. 222=53 Bom.L.R. 1=86 C.L.J. 330 =(1950) 2 M.L.J. 703 (S.C.).

———When can be issued—Election declared under Calcutta Municipal Act. [*See* Q.D. 1941-1945, Vol. I, Col. 697.] ARUN BHUSAN RAY *v.* HARI SANKAR PAL. I.L.R. (1945) 1 Cal. 240.

———Writ of—If can issue to quash order of Board of Revenue in a stamp matter passed without oral hearing of party. *See* STAMP ACT (II OF 1899). (1950) 2 M.L.J. 399.

———*Writ of—Remedy by way—Applicability of.*

The remedy under a writ of *certiorari* is as a rule only applicable where it is sought to review a judicial, as distinct from a ministerial act of an inferior tribunal. Where the act complained of does not partake of a judicial proceeding, a writ can issue. (*Krishna Pillai, C.J., Sankaran and Govinda Menon, JJ.*) Muthuswamy Iyer *v.* United State of T. and C. A.I.R. 1950 T.C. 97=5 D.L.R. (T.C.) 131 (F.B.).

CEYLON INCOME-TAX ORDINANCE (II OF 1932), S. 90—*Rules framed under R. 1—Business carried on by Ceylon branch—If must be banking business—Question if banking business is carried on—Test—Question of mixed fact and law.*

R. 1 of the Rules framed under S. 90 of the Ceylon Income-tax Ordinance, in defining "Ceylon branch" refers to "the business carried on in Ceylon by any such bank" and does not contain the words "of banking" after business, but these words must be implied.

The proper test for determining whether the Ceylon branch carried on the business of banking at the material time is to consider whether that branch, at that time, could fairly be described as "a company which carries on as its principal business the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order."

The question whether the Ceylon branch carried on the business of banking at the relevant time is a question of mixed fact and law, involving the construction of the Ordinance and Rules. (*Lord Morton of Henryton.*) Bank of Chettinad, Ltd., Colombo *v.* Commissioner of Income-tax, Colombo. 4 D.L.R. (P.C.) 34=A.I.R. 1949 P.C. 48=1949 Comp. C. 20 (P.C.).

CEYLON MONEY-LENDING ORDINANCE (1918), S. 2—*Closed transactions—If may be re-opened—Decision of English Court of appeal—If to be followed.*

Under S. 2, Ceylon Money-Lending Ordinance, a borrower is entitled to relief in respect of money-lending transactions closed before the date of his application for relief. This section has been expressed in language identical with that of S. 1 of the English Money-Lenders Act, and it is the duty of the Courts in Ceylon to follow the decision of the English Court of appeal on the construction of the identical words used in the English enactment, unless local conditions make it inappropriate. (*Sir John Beaumont.*) Nadarajan Chettiar *v.* Chandrasekera. 54 C.W.N. 878 (P.C.).

CEYLON WASTE LANDS ORDINANCE (I OF 1897), S. 20—*Right of appeal—Dismissal of claim as out of time—Appeal.*

An appeal lies to the Supreme Court, Ceylon, from an order dismissing a claim under the Waste Land Ordinance as out of time. (*Lord Du Parcq.*) Vander Poorten *v.* Settlement Officer. 225 I.C. 94=1946 A.I.J. 372=1946 O.A. (P.C.) 166=1946 A.W.R. (P.C.) 166=A.I.R. 1946 P.C. 135 (P.C.).

CHARGE. *See also* T. P. Act, S. 100.

———*Maintenance charged by decree on particular property—Right to proceed against other property.*

Where there is a charge created on a particular property by a decree for the amount decreed as maintenance, it is open to the decree-holder to proceed either as against that property or other property of the judgment-debtor. Whenever any property is charged for any decretal amount the option stands with the plaintiff to proceed either against the property charged or against other property or properties of the judgment-debtor. (*Jhala, J.*) Jamadar Jamalbhai *v.* Johrabibi. 5 D.L.R. (Sau.) 11.

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 3—*Applicability — Muslim trust property—Mussalman Wakf Act, S. 12.*

The Charitable and Religious Trusts Act applies to all trusts created for public purposes of a charitable and religious nature without any distinction of the caste or creed of the author of the trust. This is one of the enactments saved by S. 12 of the Mussalman Wakf Act. The District Judge has, therefore, jurisdiction to entertain and decide an application under S. 3 of the Charitable and Religious Trusts Act for an order calling upon the trustees of a Muslim trust property to furnish accounts. (*Padhye, J.*) Mt. Kulsumbi *v.* Kazi Mohammad Abdul Sattar. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

———S. 3—*Public or private grant—Land granted for upkeep of "Idgah"—Caretakar maintaining himself out of its income—Caretaker wrongfully dealing with it as private property—Effect of.*

A grant does not to cease to be a public grant for charitable and religious purposes as contemplated by Act XIV of 1920, merely because the caretaker maintains himself out of the income of the grant. The maintenance of the caretaker of a charitable or religious institution is a legitimate expenditure in the interest of the institution itself.

A grant of *maufi* land in the interest of the Muslim community for the maintenance of an "*Idgah*" in which 'Id' prayers are held is a public grant, and the mere fact that the *mutawalli* is maintaining himself out of the income of the property granted does not make it a private grant or a conditional grant. The fact that in the settlement papers the *maufi* land is recorded in the name of the caretaker is not in any way inconsistent with the existence of grant for *Idagh*. Such a grant cannot possibly be turned into a private grant merely by the wrongful acts of the caretakers or *mutawallis* in dealing with it as a private property without any protest from the Muslim community. (*Padhye, J.*) Mt. Kulsumbi *v.* Kazi Mohammad Abdul Sattar. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

———S. 5—*Order under—Right of suit—Revision—C. P. Code, 115.*

A decision under the Charitable and Religious Trusts Act is a decision in a summary proceeding which is not a suit and it is not made final by any provision in the Act. It is open for the party aggrieved by the order to file a suit impeaching the order or to raise the question by way of defence in a suit filed by the opposite side. The High Court will be reluctant to interfere with such an order in revision as another remedy is open to the aggrieved party. It cannot however be laid down that in no case a revision from an order passed under the Act interference is permissible. (*Padhye, J.*) Mt. Kulsumbi *v.* Kazi Mahomed Abdul Sattar. I.L.R. (1947) Nag. 538=A.I.R. 1948 Nag. 183=1947 N.L.J. 299.

———S. 7—*Advice of Court not followed by trustee—Power of Court.*

Under S. 7 of the Charitable and Religious Trusts Act a trustee is entitled to seek the opinion, advice or direction of the Court in certain matters and if he follows such advice, opinion or direction he is protected but if he chooses not to follow it he cannot be compelled by the Court to do so, although his failure to act according to such opinion, advice or direction would be at his own risk. (*Majumdar, J.*) Radha Kishen Chamaria *v.* Keshardeo Chamaria. I.L.R. (1949) 1 Cal. 461=52 C.W.N. 899.

———S. 10—*Applicability—Suit coming to an end—Order for costs.*

S. 10 of the Charitable and Religious Trusts Act is a provision which the plaintiff in a suit relating to public trust may avail of during the pendency of the suit. The Court if it is *prima facie* satisfied as to the *bona fides* of the plaintiff's suit may help him with money from the trust estate for the purpose of carrying on the litigation, which was started entirely for the benefit of the public. The section has, however, no application after the suit has ended. If the suit was carried on by the plaintiff somehow or other, and is brought to an end, the proper order to be made at that time is not under the section, but an order for costs to be embodied in the final decree, by which the successful plaintiff may be allowed, not merely the costs as between party and party but as between solicitor and client. (*Mukherjea and Ahmad, JJ.*) Saratchandra Bhattacharjya *v.* Sri Tarakeswar Ship Thakur. I.L.R. (1948) 1 Cal. 315=52 C.W.N. 40.

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929), S. 6—Applicability—Persons liable under. [*See* Q.D. 1941-1945, Vol. I, Col. 701.] Bhagwat Sarup *v.* Emperor. 47 Cr.L.J. 43=1946 All. (Rul.) 48.

———**(as amended by Act XIX of 1938), Ss. 8 and 9**—*Scope—Jurisdiction of First Class Magistrate—Limitation of one year—If affected by Repealing Act of* 1942.

Though under S. 8 of the Child Marriage Restraint Act as it stood originally, only a District Magistrate had jurisdiction, jurisdiction having been extended by the Amending Act (XIX of 1938) to First Class Magistrates, the latter continue to have jurisdiction under the Act, notwithstanding the repeal of the Amending Act by the Repealing Act of 1942. S. 4 of the Repealing Act (XXV of 1942) embodies a saving clause which saves the incorporation of the words "Magistrate of the First Class" in S. 8, which was effected by the repealed Act. Likewise, the limitation of one year incorporated by S. 9 of the repealed Act of 1938, also remains in spite of the Repealing Act of 1942. (*Bose, J.*) Amritrao *v.* Chandrabhan. I.L.R. (1947) Nag. 80=A.I.R. 1947 Nag. 79=1946 N.L.J. 460=1946 Nag. (Rul.) 201=47 Cr.L.J. 794=225 I.C. 624.

———(as amended in 1938), S. 9—Scope—If repealed by Repealing Act of 1942—Limitation for complaint. *See* Child Marriage Restraint Act, Ss. 8 and 9. 225 I.C. 624.

CHILD WITNESS. *See* Oaths Act, S. 13.

CHOTA NAGPUR TENANCY ACT (VI OF 1908), S. 14 (1) (a)—*Applicability.*

S. 14 (1) (*a*) of the Chota Nagpur Tenancy Act says *inter alia* that upon the resumption of a resumbale tenure, no annulment can be made of a lease of land whereon a tank has been made. In order that it may apply it must be proved that the tank in question was made by the lessee. (*Manohar Lall and Sinha, JJ.*) Kamakshya Narain Singh *v.* Tara Prasad Bakshi. 222 I.C. 57=1946 Pat. (Rul.) 82=12 B.R. 234=A.I.R. 1946 Pat. 77.

———S. 20 (3)—*Settlement of khast land with right to irrigate it from tank on another land—Occupancy right in land covered by tank—If can accrue.*

Where settlement was made only of the khast land and along with it the right to irrigate it from a tank on another piece of land, no occupancy right can accrue in the land covered by the tank. *Manohar Lall and Sinha, JJ.*) Kamakshya Narain Singh *v.* Tara Prasad Bakshi. 222 I.C. 57=1946 Pat. (Rul.) 82=12 B.R. 234=A.I.R. 1946 Pat. 77.

———(as amended in 1947), S. 21—*Earth dug out of land of holding by tenant for improving land—Right to manufacture bricks out of same and to sell to strangers.*

A raiyat has no right under S. 21, Chota Nagpur Tenancy Act, as amended by Act XXV of 1947, to manufacture, out of the earth dug out of the land of his holding, bricks which are not required for the domestic or agricultural purposes of the raiyat and his family, nor to sell them to strangers, even if the digging be for the purpose of improving the holding. 20 Pat. 96; 23 Pat. 662, rel. (*Manohar Lal and Mahabir Prasad, JJ.*) Jagadish Chandra Deo *v.* Kanai Lal Nandi. 4 D.L.R. (Pat.) 150.

———(as amended by Act XXV of 1947), S. 21-A—*Scope*—Pala *trees growing on land in holding—Right of* raiyat *to cultivate lac—Right of landlord—Burden of proof.*

The right to trees standing on the holding would, in the absence of a specific entry in the record of rights or proof of a custom to the contrary, go along with the land in possession of the *raiyat* and the landlord seeking to deprive the tenant of his right to grow lac on the *pala* trees on the holding must establish that he at the time of the original settlement with the *raiyat* reserved his right to go upon the land and put lac on the trees that might grow upon the land later on. 1 P.L.J. 275, dist.; 24 C.L.J. 21, foll.; 8 Pat. 266, rel. on. (*Manohar Lall and Ramaswami, JJ.*) Nanda Majhi *v.* Gokul Kamini. 5 D.L.R. (Pat.) 45.

———S. 43—*Acquisition of occupancy rights—When barred.*

Under S. 49 of the Chota Nagpur Tenancy Act, in order to bar the acquisition of occupancy rights it is necessary to show (1) that the lands are landlord's privileged lands within the meaning of S. 118 (*a*); (2) either that they are held on a registered lease for a term exceeding one year; or (3) that they are held on a lease, written or oral, for a period of one year or less. (*Agarwala, C.J. and Meredith, J.*) Kamakshya Narain Singh *v.* Harkhu Singh. 27 Pat. 1179=A.I.R. 1949 Pat. 265.

———S. 46—*Sale of occupancy holding by illegitimate son of Bania born of an aboriginal Ghasi woman—Validity.*

An illegitimate son of a Bania born of an aboriginal Ghasi woman, belongs to a separate class higher than Ghasi and lower than Bania. A transfer of an occupancy holding by him is, therefore, not within the mischief of S. 46, Chota Nagpur Tenancy Act, and is valid. 12 M. 72, rel. on. (*Manohar Lall and Mahabir Prasad, JJ.*) Parmeshwar Sahu *v.* Teju Sahu. 28 Pat. 355=A.I.R. 1949 Pat. 473.

———S. 46 (4) (a)—*Applicability—Denial of right as resident—Pleading and proof.*

Before the provisions of S. 46 (4) (*a*) of the Chota Nagpur Tenancy Act can be applied, it must be found as a fact that the person in question was not a resident within the local limits of the police station area within which the lands in suit are situate. There must be a specific issue raised on the point at the instance of the party who takes the plea relying on the section. The party challenging the right of a person as a resident must specifically plead the facts which negative the right claimed as a resident and lead evidence on the point. (*Imam, J.*) Jaishri Sahu *v.* Dema. (1946) P.W.N. 63=A.I.R. 1946 Pat. 423=228 I.C. 468=1947 Pat. (Rul.) 132=13 B.R. 220.

———S. 46 (4) (a)—*"Resident"—Meaning of*

The expression "resident" in S. 46 (4) (*a*) of the Chota Nagpur Tenancy Act cannot be read as contemplating permanent residents. (*Imam, J.*) Jaishri Sahu *v.* Dema. (1946) P.W.N. 63=A.I.R. 1946 Pat. 423=228 I.C. 468=1947 Pat. (Rul.) 132=13 B.R. 220.

———S. 47—*Applicability—Raiyati land which has lost its raiyati character.*

The protection given by S. 47 of the Chota Nagpur Tenancy Act cannot be extended to land which was once part of a raiyati holding but has altogether lost its nature of raiyati character. (*Manohar Lall and Reuben, JJ.*) Dindeyal Ram *v.* Ramzan Mistri. 12 B.R. 420=223 I.C. 457=1946 Pat. (Rul.) 208=A.I.R. 1946 Pat. 466=27 P.L.T. 497.

———S. 48—Scope—Bherinhari Pahrai lands—Alienation before 1908—If void—Suit to avoid—Limitation. [*See* Q.D. 1941-1945, Vol. I, Col. 706.] Sajib Mian *v.* Langouraon. 225 I.C. 156=1946 Pat. (Rul.) 303=A.I.R. 1946 Pat. 207.

———S. 60, **Proviso**—Tenure purchased by landlord in execution of money-decree—Arrears of rent prior to sale not mentioned in proclamation—If wiped out—Liability of landlord purchaser. [*See* Q.D. 1941-1945, Vol. I, Col. 707.] Kalyani Prasad Singh *v.* Surendra Nath. 12 B.R. 157=221 I.C. 529= 1946 Pat. (Rul.) 38.

———Ss. 64 (3) and 67—Applicability and scope—Mundari Khuntkattidari tenancy—Landlord consenting to conversion of land into karkar by person not Mundari Khuntkattidar—Effect—Acquisition of right of occupancy [*See* Q.D. 1941-1945, Vol. I, Col. 709.] Thakur Mritunjay Singh *v.* Juga Uraon. 225 I.C. 632=12 B.R. 643=A.I.R. 1946 Pat. 105.

———Ss. 67 and 77—*Occupancy right—Acquisition by person converting land into korkar—Custom of—Acquisition in ghatwali tenure lands—If barred.*

S. 67, Chota Nagpur Tenancy Act, recognises the customary right of a person who converts the land into Korkar to acquire an occupancy right. S. 77 does not bar the acquisition of such occupancy rights by korkar. There is nothing inconsistent in such right being acquired by custom which offends against the provisions of S. 77. No incident of a ghatwali tenure is affected. The right of occupancy in korkar is almost an inevitable corollary to a customary right to convert land into korkar. 11 Pat. 464; 13 P.L.T. 781, foll. 1 C.L.J. 138; 6 P.L.T. 534, dist. 7 Pat. 556, not foll. (*Manohar Lall and Mahabir Prasad, JJ.*) Chaitan Mahto *v.* Sarat Chandra Mahanti. 4 D.L.R. (Pat.) 174=A.I.R. 1949 Pat. 457=30 P.L.T. 302.

———S. 118 (1) (b)—*Land described in record of rights as* Manjhihas—*Occupancy or non-occupancy rights therein—Whether can be acquired.*

The term *Zirat* is a general term including all kinds of proprietors' privileged lands; whereas the term *Manjhihas* has a special significance, with particular reference to S. 118 (1) (*b*), Chota Nagpur Tenancy Act. Land described in the Record of Rights as *Manjhihas* falls under S. 118 (1) (*b*) of the Act and is absolutely privileged and occupancy or non-occupancy rights cannot be acquired therein in any circumstances. (*Sinha, J.*) Tribeni Pd. Bhagat *v.* Sohrai Uraon. A.I.R. 1948 Pat. 357.

———Ss. 139 and 139-A—*Relative scope—jurisdiction of Civil Court—Bar of—Extent of.*

The scope of Ss. 139 and 139-A of the Chota Nagpur Tenancy Act, in relation to the jurisdiction conferred upon the Deputy Commissioner by S. 46 (4) before it was amended in 1938, are the same apart from the remedial distinction between "a suit" and "an application." The "matter" excluded by way of suit from the jurisdiction of the Civil Court under S. 139-A is the same as what is excluded therefrom by way of an application under S. 139. In relation to the old S. 46 (4), what is excluded from the jurisdiction of the Civil Court is the application in respect of which jurisdiction is thereby conferred upon the Deputy Commissioner, that is to say, the jurisdiction *at any time within three years after the* expiration of the period for which a raiyat has, under the section, transferred his right in his holding or any portion thereof, to put the raiyat in possession. The legislature cannot be taken to have intended to deprive the raiyat of the rights already conferred upon him by the old S. 46 (1). S.

139-A must be held to be restricted in its application to cases in which an application is cognizable by the Deputy Commissioner at the date of the suit. (*Bennett and Beevor, JJ.*) Luthra Uraon *v.* Samua Uraon. 26 Pat. 377=A.I.R. 1948 Pat. 49.

———S. 198—Applicability—Decree for arrears of rent. *See* Chota Nagpur Tenancy Act, Ss. 210 (2), 208 and 198. A.I.R. 1946 Pat. 358 (F.B.).

———Ss. 208, 211 and 214—*Jurisdiction of revenue Court—Sale of holding by revenue Court—Conditions of validity—Tenure-holder dying before execution is taken out—Sale without impleading heirs—Suit to set aside—Jurisdiction of civil Court—If barred.*

It is settled law that unless a tenure is fully represented in the suit or in the execution proceedings, a sale of the entire tenure, held by a revenue Court, under S. 208, Chota Nagpur Tenancy Act, is void. To invest the revenue Court with jurisdiction to sell a tenure or holding, the execution must be levied against the entire tenure or holding and as against the entire body of tenure-holders or raiyats, as the case may be. Where some of the tenure-holders had died before the execution started, and their heirs and legal representatives had not been brought on record, S. 211 of the Act does not apply and the revenue Court has no jurisdiction to order a sale. In such a case S. 214 does not preclude the civil Court from entertaining a suit to set aside the sale. 23 Pat. 528; 26 Pat. 340, dist.; 12 Pat. 626, foll.; 55 I.A. 227; 25 Pat. 470, ref.; 20 P.L.T. 346, rel. (*Sinha and Rai, JJ.*) Nitya Gopal Goswami *v.* Gangamani Devi. A.I.R. 1950 Pat. 384.

———Ss. 210 (2), 208 and 198—*Applicability—Decree for arrears of rent—One of persons interested in tenure not impleaded in suit—Right, title and interest of judgment-debtors in tenure—Whether saleable—Power of Deputy Commissioner.*

When a decree for arrears of rent has been passed by the Deputy Commissioner in a suit from which a person holding an interest in the tenure has been omitted, the right, title and interest of the judgment-debtors in the tenure is not saleable under S. 210 (2) of the Chota Nagpur Tenancy Act, as that section relates to property belonging to the judgment-debtor other than the tenure, or any interest he may have in it. The Deputy Commissioner has however power to execute the decree by sale of the right, title and interest of the judgment-debtors under S. 208 of the Act. S. 198 of the Act does not apply to a decree for arrears of rent. 1941 P.W.N. 553, overruled. (*Agarwala, Ag. C.J., Shearer and Imam, JJ.*) Pratap Udai Nath Sahi Deo *v.* Baraik Mohan Sahu. 25 Pat. 470=226 I.C. 374 =1946 Pat. (Rul.) 383=1946 P.W.N. 300=12 B.R. 738=A.I.R. 1946 Pat. 358 (F.B.).

———S. 211—Applicability—Sale of holding—All tenure-holders not represented—Effect. *See* Chota Nagpur Tenancy Act, Ss. 208, 211 and 214. A.I.R. 1950 Pat. 384.

———S. 214—Jurisdiction—Civil Court—Sale of holding by revenue Court—All tenure-holders

not represented—Effect—Civil suit to set aside sale—Bar of. *See* Chota Nagpur Tenancy Act, Ss. 208, 211 and 214. A.I.R. 1950 Pat. 384.

———S. 258—*Scope—Application under S. 46 (4) as it stood before amendment of 1938—Dismissal as having been made beyond three years—Subsequent civil suit for declaration of title and ejectment of transferee—If barred.*

Where the Deputy Commissioner, on an application under S. 46 (4) of the Chota Nagpur Tenancy Act, as it stood before it was amended in 1938, refuses to order the ejectment of the transferee on the ground that the application has been made to him after the period of three years mentioned in that sub-section, his decision will not, under S. 258 of the Act, bar a subsequent suit in the Civil Court for a declaration of the raiyat's title and ejectment of the transferee. The substance and scope of his decision is quite different from that demanded from the Civil Court, and the decision of the Civil Court will not, therefore, vary, modify or set aside the Deputy Commissioner's decision. Nor would the jurisdiction of the Court be ousted by Ss. 139 and 139-A of the Act, when at the date of the suit it was not open to the plaintiff to have recourse to the Deputy Commissioner under the old section 46 (4). S. 46 (4) has no application to invalid transfers, but applies only to such transfers as are authorised by the section. (*Bennett and Beevor, JJ.*) Luthra Uraon *v.* Samua Uraon. 26 Pat. 377=A.I.R. 1948 Pat. 49.

CHRISTIAN MARRIAGE ACT (XV OF 1872), Ss. 19 and 42 (c)—Construction—Guardian for giving consent to marriage of minor—Appointment of—Permissibility—Power of Court. [*See* Q.D. 1941-1945, Vol. I, Col. 714.] Badruddin Abdulla *v.* Registrar of Marriages. A.I.R. 1946 Bom. 129.

———S. 88—*Scope—Marriage of Roman Catholic male and Jewish female—If prohibited—Right of wife to order for maintenance under S. 488, Cr. P. Code.*

A marriage between a Roman Catholic male and a Jewish female is not prohibited or invalid under S. 88 of the Christian Marriage Act, so as to disentitle the Jewish female to maintenance under S. 488, Cr. P. Code, on the ground that the parties are not husband and wife.

The prohibition referred to in S. 88 of the Christian Marriage Act must be an absolute impediment or a total incapacity according to the personal law of the parties and not an impediment or incapacity which is dependent upon the fact that the marriage is a sacrament or on the form of the marriage. As such a marriage between a Roman Catholic husband and a Jewish wife is not prohibited according to the personal law of the parties, there is no bar to an order for maintenance being made under S. 488, Cr. P. Code, in favour of the wife against the husband. 54 Bom. 288; 12 Cal. 706; A.I.R. 1945 Mad. 516, ref. (*Roxburgh and K. C. Chunder, JJ.*) A. C. Smyth *v.* Mrs. H. Smyth. 4 D.L.R. (Cal.) 271.

———S. 88—*Marriage between Roman Catholic and Jew—Validity.*

The expression "personal law" in S. 88 of the Christian Marriage Act includes any personal law which forbids either of the parties to enter into a contract of marriage with one another. As the personal law of the Roman Catholic forbids marriage between Catholics and persons who have not been baptised, a marriage between a Roman Catholic woman and a Jew, who is a non-baptised person, under the provisions of the Act, is not valid and is null and void. [12 C. 706 and 54 B. 288, rel.] (*Lodge, J.*) CLAUDIA JUDE v. LANCELOT JUDE. I.L.R. (1945) 2 Cal. 462=A.I.R. 1949 Cal. 563.

———S. 88—Scope—"Personal law"—Marriage of Roman Catholic with Protestant wife in Protestant Church without dispensation solemnised by Protestant Pastor—If void—Release by wife in favour of husband according to custom—If dissolves marriage with Protestant wife—"Bigamy"—Offence. [*See* Q.D. 1941-1945, Vol. I, Col. 714.] GNANASOUNDARI v. NALLATHAMBI. I.L.R. (1946) Mad. 367=222 I.C. 328=1946 Mad. (Rul.) 83=47 Cr.L.J. 421.

CIVIC GUARDS ORDINANCE (VIII OF 1940), S. 5 (1)—*Civic guard called out under S. 4—If public servant—Penal Code, S. 21.*

It is plain from S. 5 (1) of the Civic Guards Ordinance that no member of the Civic Guard force can enjoy the powers, privileges and protection of an officer of Police unless he has been called out in accordance with S. 4 of the Ordinance. A civic guard who has been so called out, is a public servant within the definition contained in S. 21, I. P. Code. (*Khundkar and Roxburgh, JJ.*) LEGAL REMEMBRANCER, BENGAL v. GOPI BALLAV DATTA. I.L.R. (1947) 1 Cal. 409.

———S. 5 (2)—*Applicability—Abetment of extortion by Civic Guards—Prosecution—Sanction—Necessity.*

No sanction is needed for a prosecution of members of the civic guard for an offence of abetment of extortion. The section gives them no protection in respect of such a charge. (*Roxburgh and Ormond, JJ.*) SADAR ALI v. EMPEROR. I.L.R. (1945) 2 Cal. 478=230 I.C. 271=A.I.R. 1948 Cal. 47=48 Cr.L.J. 587=1947 Cal. (Rul.) 203.

———S. 5 (2)—*Civic guard committing acts of violence while controlling crowd in discharge of duty—Prosecution without sanction—Legality.*

The protection afforded by S. 5 (2) of the Civic Guards Ordinance is available to members of the civic guards only after they have been called out in the manner indicated in S. 4. Under S. 5 (2), no prosecution can be launched against a civic guard without the sanction referred to for anything done in the discharge of his duty for the time being. Where the prosecution case rested upon the allegation that a civic guard committed acts of violence while he was controlling a crowd in the discharge of his duty, his trial and conviction without the sanction required by S. 5 (2) of the Ordinance is illegal and must be set aside. (*Khundkar and Roxburgh, JJ.*) KRISHNA PRASAD BANERJI v. EMPEROR. I.L.R. (1947) 1 Cal. 302.

CIVIL COURT—*Jurisdiction to question decisions of statutory quasi-judicial tribunals—Principles governing.*

If a body is constituted by statute to exercise certain functions, then a Civil Court cannot either interfere with those functions or treat an act done by that body as a nullity unless the Civil Court has some special supervising power, for example, by way of appeal, or unless the body has acted in doing the act, outside its powers. I.L.R. 17 Cal. 590 and A.I.R. 1924 P.C. 175, rel. on. But even if the jurisdiction of the Civil Court is excluded, the Civil Court has jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of natural justice. A.I.R. 1940 P.C. 105, rel. on. (*Dixit and Rege, JJ.*) CHANDMAL v. CHHAGAN LAL. 5 D.L.R. (M.B.) 27.

CIVIL PROCEDURE CODE (V OF 1908), Ss. 2 (2) and 96—*Appeal—Maintainability—Test—Suit for dissolution of partnership and accounts—Several preliminary decrees—Whether can be passed—Court giving findings on points in controversy—Decision whether amounts to 'decree'.*

Where in a suit for the taking of partnership accounts the Court has adjudicated on the substantive rights of the parties with regard to the several matters in controversy in the suit and the determinationn of those matters is clearly intended to be final and conclusive so far as that Court is concerned, the decision operates as a preliminary decree and is appealable. The mere fact that the Court which passed the decree took the view that only findings and directions had been given and that no final disposal was made will not affect the question of applicability. The question whether an adjudication is a decree or not must be determined with reference to S. 2 (2) of the Code of Civil Procedure and not with reference to implications, true or supposed, arising from the general provisions relating to judgments and decrees or to disposals of suits. Nor can any considerations of policy as to the expeditious administration of justice or the avoidance of expense and delay be imported into the determination of the question.

There is nothing in the Code which can be construed as a prohibition against the Court in a proper case passing more than one preliminary decree. On the other hand, there are indications that the Code contemplates more than one preliminary decree and one final executable decree in a suit. (*Patanjali Sastri and Tyagarajan, JJ.*) KASI v. RAMANATHAN CHETTIAR. 1947 M.W.N. 723=(1947) 2 M.L.J. 523.

———S. 2 (2)—*Appeal—Order holding that application does not lie under O. 20. R. 12, C. P. Code—Appealability.*

An order under O. 20, R. 12, C. P. Code, is not appealable. An order that no application lies under O. 20 R. 12, is not a decree within the meaning of S. 2 (2), C. P. Code, and hence no appeal lies from such an order. (*Tyabji, C.*

J. and Meher, J.) MAHOMED HUSSAIN KHAN *v.* RASOOLBAKSH. I.L.R. (1947) Kar. 194=A. I R. 1948 Sind 124.

———**Ss. 2 (2) and 47**—Appeal—Orissa Money-Lenders Act, Ss. 11 and 13—Order on application under—If final order—Appeal. *See* ORISSA MONEY-LENDERS ACT, Ss. 11 AND 13. 12 Cut.L.T. 85.

———**Ss. 2 (2) and 96 and O. 43, R. 1 (u)** —*Appellate decision in suit for contribution determining the liability of parties and sending the case to trial Court for passing final decree after working out the arithmetical results—If "decree" or "order" for purposes of appeal.*

An appellate decision in a suit for contribution sending the case back to the trial Court for the purpose of passing a final decree in the light of the findings of the appellate Court (the liability having been decided and the working of the arithmetical result being only a consequence of the liability) is a "decree" within the meaning of S. 2 (2) of the C. P. Code, and as such appealable under S. 96, C. P. Code, and not under O. 43, R. 1 (*u*). (*Yahya Ali, J.*) NARASIMHAIAH CHETTY *v.* SIVARAMIAH CHETTY. 1947 M.W.N. 741=60 L.W. 806=(1947) 2 M.L.J. 532.

———**Ss. 2 (2) and 151**—*Applicability—Memorandum of appeal—Rejection for failure to furnish copy of judgment appealed from—Remedy—Application under S. 151—Competency—Power of Court to restore appeal.*

An order rejecting memorandum of appeal for failure to furnish a copy of the judgment appealed from is not a decree as defined by S. 2 (2), and hence is not appealable, nor is it covered by O. 7, R. 11, C. P. Code. Hence an application for restoration of the application under S. 151, C. P. Code, is competent and the Court in its inherent powers can restore the appeal for sufficient cause. 17 Pat. 687; 6 P.L.J. 625, dist.; 17 Pat. 245, foll.; 19 Pat. 159, rel. (*Ramaswami and Sarjoo Prasad, JJ.*) RAJBALLAM SINGH *v.* MADHUSUDAN PRASAD SINGH. A.I.R. 1950 Pat. 443.

———**Ss. 2 (2) and 96**—*Decree—Compromise in suit for specific performance—Provision for payment of amount within fixed time and in default suit to stand dismissed with costs—Default—Effect of—Decision holding that condition was not complied with—"Decree"—Appeal.*

Where in a suit for specific performance of a contract of sale, a compromise decree is passed to the effect that on the plaintiff depositing into Court a certain sum of money within a certain period, the defendant should execute and register a deed of sale within a week, and that in case the amount is not deposited within the time fixed, the plaintiff's suit would stand dismissed with costs, it is essential that the plaintiff should deposit the amount within the time limited in order to entitle him to the relief awarded. If he fails to deposit the amount or tender it on that day, it is fatal. The action is no longer open after the specified date, as by operation of the default clause the suit would automatically stand dismissed after the expiry of the time, by reason of the failure to deposit or tender. A decision by the Court that the plaintiff has failed to comply with the clause in the decree operates as a dismissal of the suit and is a decree as defined by S. 2 (2), C. P. Code, and is therefore appealable under S. 96. (*Misra, J.*) SADASHEO *v.* PUTAN SINGH. 22 Luck. 196=228 I.C. 350 =1947 Oudh (Rul.) 34=1947 O.W.N. 146= 1947 O.A. (C.C.) 52=1947 A.W.R. (C.C.) 52=A.I.R. 1947 Oudh 146.

———**S. 2 (2)**—"Decree"—"Final determination" —Decision ascertaining amount of mesne profits in final decree—Direction not to draw up decree till payment of Court-fee—If postpones date of decree or decision. *See* LIMITATION ACT, ART. 182. A. I.R. 1950 Pat. 524.

———**S. 2 (2) and O. 34, R. 3**—"Decree" —Order dismissing application for final decree as premature—Appeal—Revision. [*See* Q.D. 1941-1945, Vol. I, Col. 717.] GOVINDRAO *v.* NARAYAN. 222 I.C. 350=1946 Nag. (Rul.) 63.

———**Ss. 2 (2), 96 and 115**—*"Decree"—Order dismissing suit for non-payment of adjournment costs—Appeal—Revision.*

An order dismissing a suit for non-payment of adjournment costs is not appealable either as a decree or as an order. A petition for revision against such an order, however, lies and it is open to the High Court to set aside the order where in the exercise of its revisional jurisdiction it finds that interference is called for or justified. (*Thadani, C.J. and Ram Labhaya, J.*) GAUHATI BANK, LTD. *v.* BALIRAM DUTTA. A.I.R. 1950 Assam 169.

———**S. 2 (2)**—"Decree"—Order of ejectment in proceedings under Ch. VII, Presidency Small Causes Courts Act. *See* LIMITATION ACT, ART. 11-A. 50 Bom.L.R. 747.

———**S. 2 (2)**—Decree—Order on application for stay of execution. *See* C. P. CODE (V OF 1908), Ss. 47 AND 2 (2). (1948) 1 M.L.J. 425.

———**S. 2 (2)**—*"Decree"—Order of remand under S. 151—Appeal.*

An order of remand under S. 151, C. P. Code, which merely sets aside the decree of the Trial Court on the ground that the rights of the parties cannot be decided until some more material is brought on the record and which does not determine the rights of the parties with regard to any of the matters in controversy in the suit, cannot amount to a decree within the meaning of S. 2 (2), C. P. Code and is not, therefore, appealable. (*Mahomed Ibrahim, J.C. and Ram Labhaya, J.*) N.-W.F.P. GOVERNMENT *v.* RADHA DEVI. A.I.R. 1947 Pesh. 55.

———**S. 2 (2) and O. 34, R. 3**—*"Decree"—Order rejecting application for final foreclosure decree on ground of abatement of suit—Appeal—Revision.*

An order rejecting an application for making a preliminary decree for foreclosure final on the ground that the whole suit had abated and the preliminary decree was a nullity having been passed after the death of one of the plaintiffs without bringing his legal representatives on record, amounts to a decree and is appealable as such, and there can, therefore, be no application for revision. The course which the plaintiffs should adopt is to apply to the lower Court to draw up a final decree. If the Court refuses to draw up a decree, on an application made by the party aggrieved, the matter may be set right in revision. 42 M. 52, A.I.R. 1921 Cal. 551 and A.I.R. 1932 Lah. 214, rel. on. (*Sen, J.*) Raddulal Bhurmal *v.* Mahabir Prasad. 1950 N.L.J. 516.

———S. 2 (2)—*"Decree"—Order rejecting plaint as insufficiently stamped—Whether decree—Memo. of appeal also rejected for non-payment of deficit court-fees—Second appeal—If lies.*

An order of rejection of the plaint by the trial Court on the ground that it was insufficiently stamped has the force of a decree and therefore, a second appeal lies under S. 2 (2), C. P. Code, notwithstanding the rejection of the memorandum of appeal by the lower appellate Court for non-payment of deficit court-fees. (*Das, J.*) Sudhir Kumar Chatterjee *v.* Mohadeb Chakrabarty. I.L.R. (1948) 2 Cal. 149=83 C.L.J. 247=52 C.W.N. 684.

———S. 2 (2)—*Decree—Order rejecting plaint under S. 22 (4), Punjab Pre-emption Act—Appeal.*

The definition of the term "decree" given in the Civil Procedure Code, includes all rejection of plaints either under the Code or otherwise. The rejection of a plaint under S. 22 (4) of the Punjab Pre-emption Act is a rejection within the meaning of that definition and is, therefore, appealable as a decree. (*Abdur Rahman, J.*) Ram Lal *v.* Roshan Lal. A.I.R. 1947 Lah. 302.

———S. 2 (2)—Decree—Order under S. 151, C. P. Code, allowing amendment of execution application. *See* C. P. Code (V of 1908)—Ss. 151 and 2 (2). 5 D.L.R. (All.) 275 (F.B.).

———Ss. 2 (2) and 96—Partition suit—Orders between preliminary and final decree—If decrees and appealable. [*See* Q. D. 1941-1945, Vol. I, Col. 718.] Kedar Nath *v.* Puttu Lal. 20 Luck. 557=222 I.C. 34=1946 Oudh (Rul.) 39.

———S. 2 (2) (b)—*"Default"—Meaning of—If includes all kinds of default.*

The word "default" in S. 2 (2) (*b*) of the C. P. Code is not qualified by any adjective and there is no reason why any words should be imported in the section so as to confine its operation to dismissals for default in appearance only. It would include other defaults as well, like default of prosecution. (*Seth J.*) Tafazzul *v.* Shah Mahomed. I.L.R. (1949) A. 391=1948 A.W.R. (H.C.) 329=A.I.R. 1949 All. 261.

———S. 2 (3) and O. 27, R. 8—*Decree-holder—Who is included in—Right of Government to execute order for costs awarded in a case where Government undertook the defence of its Officer under O. 27, r. 8.*

It is clear from the definition of 'decree-holder' in S. 2 (3) of the C. P. Code, that a person in whose favour an order capable of execution has been made is also a decree-holder and that a decree-holder need not be a party to the suit. He may be any person. It is enough if the decree

confers some right enforceable under the decree upon some person mentioned in it. Hence, where the Government undertakes the defence in pursuance of r. 8 of O. 27, C. P. Code, of a Tahsildar who is sued for damages for an alleged illegal arrest and the suit is dismissed with costs and the order provides for the realisation of the costs by Government, the latter is entitled to file an execution applicaion for its realisation (*Verma and Bind Basni Prasad JJ.*) Ajudhia Prasad *v.* The U. P. Government. I.L.R. (1947) A. 191=1947 A.L.W. 201=1947 A.W.R. (H.C.) 89=1947 A.L.J. 79=A.I.R. 1947 A. 390.

———S. 2 (4)—*District Court—Chief Court of Sind, if a District Court.*

The Chief Court of Sind is not a 'District Court' within the meaning of S. 2 (4) of the C. P. Code. (*Thadani, J.*) *In the matter of* Md. Osman Sumro. I.L.R. (1947) Kar. 164=A.I.R. 1948 Sind 89.

———S. 2 (10) and Limitation Act (IX of 1908), Art. 166—*Mortgage suit—Title paramount set up by one of the defendants—Question left open in preliminary decree—Final decree passed against all defendants—No reservation of the question of title paramount—Sale and confirmation of sale of hypotheca—Delivery of property—Aggrieved defendant—Necessity to apply to set aside sale—Limitation.*

In a suit on a mortgage to recover the mortgage amount by sale of the hypotheca, one of the defendants, the 6th defendant, set up her own title to one of the properties as a defence to the mortgagee's suit. A preliminary decree in favour of the mortgagee was passed, but the question of title of that defendant was left open specifically. Subsequently a final decree was passed against all the defendants in which the clause about the reservation of the question of the 6th defendant's title to that item of property was not repeated. The hypotheca was brought to sale and the sale confirmed in favour of the decree-holder and delivery also was effected. Long after the 30 days after the date of sale, the 6th defendant filed an application to set aside the order of delivery and to direct re-delivery of the property to her.

Held, that the 6th defendant was a judgment-debtor within the meaning of section 2 (10) of the Code of Civil Procedure as a final decree capable of execution had been passed against her. Even if the sale is a nullity and the judgment-debtor has no saleable interest, article 166 of the Limitation Act applies and the judgment-debtor must have it set aside within 30 days of the date of sale and as the application of the judgment-debtor was filed long after the 30 days allowed, it was barred by limitation. (*Yahya Ali, J.*) Ammani Ammal *v.* Sabapathi Pillai. 61 L. W. 373=1948 M.W.N. 469=A.I.R. 1948 Mad. 301=(1948) 1 M.L.J. 422.

———S. 2 (11)—Legal representative of judgment-debtor—If judgment-debtor. *See* C. P. Code, O. 21, R. 12. 4 D.L.R. (All.) 208.

———S. 2 (11)—*Legal representative—Hindu widow entitled to an interest in her husband's estate under the Hindu Women's Rights to Pro-*

perty Act (XVIII of 1937)—If a "legal representative" entitled to be brought on record.

A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act, would be his "legal representative" within the meaning of S. 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband who was a defendant in a suit. (*Yahya Ali, J.*) VENKATASUBBA RAO *v.* JAGANNADHA RAO. 225 I.C. 335=59 L.W. 189=1946 M.W.N. 301=A.I.R. 1946 Mad. 283=(1946) 1 M.L.J. 159.

———S. 2 (11)—*"Legal representative"—If includes a universal legatee of a deceased party.*

The definition of "legal representative" includes a universal legatee to whom the whole assets of the deceased party have been bequeathed. It cannot be said that he does not represent the estate of that deceased person. (*Chandra Reddi, J.*) SUBBA NAIDU *v.* KANNIAH NAIDU. A.I.R. 1950 Mad. 482=(1950) 1 M.L.J. 276.

———S. 2 (11)—Legal representatives—Intermeddler—Conditions. *See* EXECUTION—MERGER OF INTERESTS. (1948) 1 M.L.J. 82.

———S. 2 (11)—*Legal representatives—Interpretation—Suit between husband and wife—Death of husband—Reversioners of husband.*

The words 'Legal representatives' must be interpreted in the wide sense so as to include a person whose rights would be affected or might be affected if he survived the widow who had sued her deceased husband. (*Malik, C.J. and Bhargava, J.*) GULZARI LAL *v.* SARJU BAI. I L.R. (1950) A. 120=1949 A.L.J. 191=A.I.R. 1949 All. 604=1949 A.W.R. 303

———S. 2 (11)—*"Legal representative"—Persons or class of persons indicated by the expression—Legatees of part of the estate—If legal representatives.*

The persons or class of persons indicated by the expression "legal repesentative" would depend on the context. Subject to that qualification it includes properly appointed executors and administrators; it includes persons who have taken on themselves duties and responsibilities, which belong to the office of executor or administrator even though only in respect of part of the estate; it includes heirs-at-law, whether they take by succession or by survivorship; it includes reversioners where the action has been brought by or against the widow representing her husband's estate; it includes a universal legatee; it may perhaps in some cases and for some purposes include persons in *de facto* possession of the entire estate of the deceased; but it does not include trespassers; it does not include creditors who have received payments of the debts due from the estate of the deceased; it does not include persons dealing in the ordinary course of business with goods of the deceased received from another; it does not include persons who intervene merely for the purposes of preserving the goods of the deceased or providing for his funeral or for immediate necessities of his family; it does not include legatees of a part of the estate and it does not include those taking possession of the property of the deceased from the legatees of a part of the estate. (*Horwill and Balakrishna Ayyar, JJ.*) NATESA SASTRIGAL *v.* ALAMELU ACHI. 63 L.W. 388=1950 M.W.N. 311=A.I.R. 1950 Mad. 541=(1950) 1 M.L.J. 476.

———S. 2 (12)—*"Mesne profits"—Meaning and nature of—Computation and assessment—Principles—Expenses of collection—When refused.*

The term "mesne profits" denotes damages or compensation recoverable from a person who has been in wrongful possession; it means that which the plaintiff has lost by reason of the wrongful act of the defendant. It is not the profit actually made by the defendant, but that which the plaintiff has lost, and might reasonably be expected to have made had his possession not been wrongfully disturbed. Where the wrongful possession is of an aggravated character, the Court may, in computing the mesne profits, refuse to take into account even the collection charges incurred by the wrong-doer. The Court may mould the damages according to the justice of the case. 27 I.A. 110; 23 All. 242, ref. (*Ramaswami and Narayan, JJ.*) BALMATI KUARI *v.* JAGBANDHAM NATH. 5 D.L.R. (Pat.) 219=A.I.R. 1950 Pat. 497.

———S. 2 (12)—Suit for mesne profits—Burden of proof. *See* EVIDENCE ACT, S. 106. A.I.R. 1950 Cal. 87.

———S. 2 (17)—Public Officer—Test. *See* C. P. CODE, S. 80. 5 D.L.R. (Pat.) 193.

———S. 2 (17)—'Public officer'—Municipal Chairman. *See* C. P. CODE, O. 21, R. 52. 13 B.R. 143.

———S. 2 (17) (c)—'Public Officer'—Members of court-martial convened under Army Act—If 'Public Officers.' *See* C. P. CODE, Ss. 80 AND 2 (17) (*c*). A.I.R. 1946 Lah. 247 (S.B.).

———S. 2 (17) (h)—*'Public Officer'—Government officer on deputation.*

An officer of Government who is on deputation to an institution and receives his pay from that institution, does not cease to be in the service of the Government by reason of his deputation, and he is, therefore, a 'public officer' as defined in S. 2 (17) (*h*), C. P. Code. (*Mudholker, J.*) VISHNU *v.* SMITH PEARSE. I.L.R. (1949) Nag. 232=A.I.R. 1949 Nag. 362=4 D.L R. (Nag.) 91.

———S. 2 (17) (h)—*Public officer—Manager of Court of Wards.*

A manager of Court of Wards can very well be said to be in the service of the Crown and must be regarded as a public officer within the meaning of S. 2 (17) (*h*), C. P. Code. (*G. N. Das, J.*) CHARU CHANDRA HAIT *v.* SNIGDHENDU PROSAD. I.L.R. (1948) 2 Cal. 77=52 C.W.N. 212=A.I.R. 1948 Cal. 150=2 D.L.R. 407.

———S. 9—*Applicability—Civil right—Suit by choudhary of community to recover property as such from dismissed treasurer—Maintainability—Jurisdiction of Court to try.*

Where a plaintiff alleges a certain right in himself, *e.g.*, that he is the *choudhary* of a community, and seeks to recover possession of property on the basis of that right, namely, for recovery of articles belonging to the community, from the defendant, on the allegation that he was once treasurer but had been dismissed and had failed to render accounts or to deliver the articles to his successor, the dispute is of a civil nature and the civil Court has jurisdiction to entertain and try the suit. It has nothing to do with social or caste customs affecting the autonomy of the caste to be decided by the caste but relates to a right which the law recognises and can be enforced in a Court of law. The fact that there exist two factions in the community would not be a bar to any suit between them in a civil Court. 5 Bom. 83, dist. 1926 Bom. 69, ref. (*Raghubar Dayal and Agarwala, JJ.*) KALLU *v.* PUTAIN. 4 D.L.R. (All.) 244.

———S. 9—*Applicability—Suit of a civil nature—Right to carry* vyasantol *in procession through streets—Suit to enforce—Maintainability.*

The right to take out a procession as a religious procession through the public streets is a civil right, and a suit will lie to enforce such a right in a Civil Court, and is not barred under S. 9, C. P. Code. But the carrying of the emblem *vyasantol* in procession along the streets is not the taking out of a religious procession; a suit to enforce a right to carrying it is barred under S. 9, C. P. Code. (*Kania, A.C.J. and Gajendragadkar, J.*) SANGABASAVASWAMI *v* BABURAO GANESH. I.L.R. (1946) Bom. 437=226 I.C. 102=1946 Bom. (Rul.) 278=48 Bom. L.R. 100=A.I.R. 1946 Bom. 353.

———S. 9—*Cognizability by Civil Court—Suit* in regard to the right to regulate the conduct of services in temples. *See* HINDU LAW—RELIGIOUS ENDOWMENTS—TEMPLE. (1947) 1 M.L.J. 159 (P.C.).

———S. 9—Creation of Special Tribunals—Jurisdiction of Civil Court—If and when ousted—Punjab Municipal Act, S. 240—Rules under—Rejection of election petition by Deputy Commissioner on erroneous ground of want of jurisdiction—Jurisdiction of Civil Court to entertain suit. [*See* Q.D. 1941-1945, Vol. I, Col. 722.] SAT NARAIN GURWALA *v.* HANUMAN PARSHAD. 224 I.C. 322=1946 Lah. (Rul.) 352=A.I.R. 1946 Lah. 85.

———S. 9—*Creation of special tribunals—Jurisdiction of Civil Court—Ouster, if dependant on functioning of Special Tribunal—Theory of conditional ouster.*

Per *Munir, Ag. C.J.*: While determining the question whether on a true construction of a statute the jurisdiction of the Civil Court is impliedly barred, the distinction between a right which is purely the creation of a statute and a right at common law becomes important because where a civil right did not exist before a statute was passed and was entirely created by that statute, it is reasonable to infer that the Legislature inended that right to be enforced only in the manner that the statute prescribes. The ouster of Civil Court's jurisdiction in such cases rests on the construction of the statute creating the right and a special tribunal for its enforcement and if as a matter of construction of the relevant statute the Court arrives at the conclusion that the Legislature intended that the right created by the statute should only be exercised or enforced in the manner provided by that statute then it is difficult to accept the view if the special tribunal is not constituted or having been constituted it does not function, the Civil Court's jurisdiction to adjudicate on that right is not affected. In such cases, either there is or there is no ouster but where there is ouster, it must be held to be absolute and not dependent on the functioning of the special tribunal. The theory of conditional ouster is, therefore, not at all applicable to such rights. It is, however, otherwise where a right is not created by a statute but existed before disputes relating to it or to some aspect of it were entrusted by statute to a special tribunal. Such pre-existing rights having originally been within the cognizance of the Civil Courts, the ouster is dependent on the functioning of the special tribunal.

The theory of conditional ouster is based on the assumption that the Legislature creating the right could never intend that the right should come into existence but that there should be no machinery for its enforcement. If the statute contains no provision for the machinery to enforce the right, there is of course no ouster, and Civil Courts under S. 9, C. P. Code, will in that case undoubtedly have jurisdiction. The implied ouster depends on the intention to be inferred from the fact that the statute does contain a provision for the constitution of a tribunal to which the enforcement of such rights is entrusted. If there be such a provision, then it is wholly immaterial whether the statute itself creates the tribunal or delegates to some other authority the power to constitute it and that authority does not act or the authority having acted, the tribunal does not act.

As the jurisdiction of the Civil Court is excluded only to the extent that the power of adjudication is given to the special tribunal, while such Courts cannot assume to themselves the functions of the special tribunal, they would be perfectly competent to entertain and determine all actions the object of which may be to seek the determination of the right in the manner in which the statute intended it to be determined. (*Munir, Ag. C.J., Cornelius and Khurshid Zaman, JJ.*) SULTAN ALI *v.* NUR HUSSAINI. Pak.L.R. (1949) Lah. 215=50 Cr.L.J. 598=A.I.R. 1949 Lah. 131 (F.B.).

———S. 9—*Jurisdiction of Civil Court—Action of executive authority* ultra vires.

The Civil Court has power to entertain a suit in which the question is whether the executive authority has acted *ultra vires*. (*Lord Simonds.*) MAHOMED DIN *v.* IMAM DIN. 74 I.A. 319=I.L.R. (1947) Lah. 741=61 L.W. 148=1948 M.W.N. 124=A.I.R. 1948 P.C. 33=2 D.L.R. 314=50 P.L.R. 26=(1948) 1 M.L.J. 206.

———S. 9—*Jurisdiction of Civil Court—Appointment of managing agent of company terminated by ordinary resolution contrary to Articles of Association—Decree declaring resolution invalid—If can be granted.*

An Article of Association of a company which requires an extraordinary resolution for the termination of the appointment of the managing agents, is obviously intended as a protection to a minority who are not to have the appointment terminated against their will unless a particular majority votes in favour of it. If a company terminates the appointment of the managing agents by an ordinary resolution contrary to the Articles of Association, the matter is not one merely concerning the internal management of the company, and the civil Court can grant a declaration to the effect that the resolution is invalid. (*Lord Greene.*) RAM KISSENDAS *v.* SATYA CHARAN. 77 I.A. 128 =52 Bom.L.R. 501=A.I.R. 1950 P.C. 81= 1950 Comp. C. 133 (P.C.).

———S. 9—*Jurisdiction of Court—Declaratory* ***suit—Suit by railway employee for declaration that he is entitled to promotion to upper grade.***

A suit by a railway guard who has not been selected by the Selection Board for promotion from grade II to grade III for a declaration that he is entitled to all the privileges, rights and emoluments of grade III and that the act of the Railway Department in not appointing him to the rank of grade III is against law and departmental rules and *ultra vires,* is not maintainable. It is not for the Courts to make appointments. The function of the Courts is circumscribed to adjudicate on the rights of the parties and in a case of this kind it would not be within the jurisdiction of the Court to give any such declaration. The promotions from one grade to another are to be made by superior officers by selection either on the ground of seniority or on the ground of seniority plus fitness and the sole judges are officers themselves and if the plaintiff has any grievance, it is open to him to appeal to the authorities higher than the Selection Board if there is any. A.I.R. 1949 F.C. 50, applied. (*Kapur and Soni, JJ.*) BAKHSHI RAM *v.* GOVERNOR-GENERAL IN COUNCIL. 5 D.L.R. (Simla) 214.

———S. 9—*Jurisdiction—Public utility company* ***—Dismissal of clerks by managing agents without consent of Board of Directors—Suit by latter for declaration of illegality.***

Where the managing agents of a public utility company (limited) dismiss certain clerks without the consent of the Board of Directors, a suit by the latter for a declaration that the powers of the managing agents to dismiss clerks were subject to the control of the Board of Directors and that the dismissal was illegal and improper is a suit of a civil nature cognizable by the civil Courts. (*O' Sullivan, J.*) NAWABSHAH ELECTRIC SUPPLY CO., LTD. *v.* HARIRAM S. AHUJA. 227 I.C. 33=1946 Comp. C. 204=1946 Sind (Rul.) 243=A.I.R. 1947 Sind 31.

———S. 9—Jurisdiction of Civil Courts—Suit for restitution of conjugal rights—Christian parties. *See* DIVORCE ACT, Ss. 4 AND 32. A.I.R. 1947 Pesh. 53.

———S. 9—*Jurisdiction—Suit on contract—Plea* ***of arbitration agreement—Sustainability.***

The Courts have jurisdiction to decide all suits of a civil nature; it is, however, competent to a party to contend that no right of action exists by setting up an agreement to have the matter decided by a tribual of their choice. Such an agreement can be set up by a party for the purpose of asking the Court to stay its hands and to refuse to exercise its jurisdiction until the dispute between the parties had been heard by a forum of their own choice. (*Abdul Rashid, Ag. C.J. and Abdur Rahman, J.*) GOVERNOR- GENERAL IN COUNCIL *v.* SIMLA BANKING AND INDUSTRIAL CO., LTD. 226 I.C. 444=1946 Lah. (Rul.) 460= A.I.R. 1947 Lah. 215.

———S. 9—Suit by auction-purchaser to recover purchase-money after auction sale is set aside—Maintainability. *See* C. P. CODE (V OF 1908), O. 21, RR. 92 (3), 93 AND S. 9. A.I.R. 1950 All. 461.

———S. 9—*Tax imposed by Municipal Committee in exercise of statutory power—Power of Civil Court to interfere.*

Where a tax is imposed by a Municipal Committee acting in the exercise of its statutory powers, and it cannot be said that they have acted in bad faith or in excess of or abuse of the powers vested in them, the civil Court is not entitled to interfere. (*Kapur, J.*) UMRAO SINGH *v.* MUNICIPAL COMMITTEE, BAHADARGARH. 5 D.L.R. (Simla) 293=A.I.R. 1950 E. P. 324.

———S. 10—Applicability—Commutation proceedings under Tenancy Act pending in Revenue Court—If ground for stay of suit in Civil Court for rent. *See* C. P. CODE, S. 151. 5 D.L.R. (Pat.) 192.

———S. 10—*Applicability—"Matter in issue"—* ***Meaning of.***

The words "matter in issue" in S. 10, C. P. Code, mean "the entire matter in controversy" and not merely one of several issues in the suit. A Court has, therefore, no power under this section to stay a suit on account of some of the issues which it involves being also issues in another pending suit. (*Cornelius, J.*) MAHOMED AFZAL *v.* MT. SARDAR BEGUM. Pak. L.R. (1948) Lah. 79=A.I.R. 1949 Lah. 69.

———S. 10—*Applicability—Stay—Conditions for* ***—Complete identity of subject-matter—If essential —Inherent power to stay.***

It is well-settled that in order to attract the application of S. 10, C. P. Code, there must be a complete identity of the entire subject-matter of the two suits. Every matter in dispute should necessarily be directly and substantially in issue in the two suits. But in a case not covered by S. 10, an order for stay may be made under S. 151, C. P. Code if the Court considers that it is necessary in the interest of justice and in order to avoid unnecessary harassment to any of the parties. (*Achhru Ram, J.*) DWARKA DAS *v.* GOVERNOR-GENERAL OF INDIA. 224 I.C. 532=A.I.R. 1947 Lah. 28= 1946 Lah. (Rul.) 375.

———S. 10—*Applicability—Stay—Conditions for* ***—Complete identity of subject-matter—If essential —Substantial identity—Sufficiency.***

It is doubtful if for the application of S. 10, C. P. Code, there should be a complete identity of parties or a complete identity of the subject-matter. It is enough if the identity is substantial. (*Padhye, J.*) LAXMI BANK, LTD., AKOLA *v.* HARIKISAN BALABAKAS. I.L.R. (1948) Nag. 403=1948 N.L.J. 250=A.I.R. 1948 Nag. 297=3 D.L.R. (Nag.) 12.

———S. 10—*Applicability—Stay—Conditions for—Test.*

For the application of S. 10, C. P. Code, it is not enough that one or other of the issues in the later suit will be determined by the decision of the first suit; all the issues in the second suit must be determined by the decision in the first suit before S. 10, C. P. Code, can come into operation. The test is whether, if the first suit is determined, the matters raised in the second suit will be *res judicata* by reason of the decision in the prior suit. (*Blagden, J.*) SANKALCHAND SHAH & CO. *v.* PRAKASH & CO. 48 Bom.L.R. 633=A.I.R. 1947 Bom. 84=229 I.C. 346=1947 Bom. (Rul.) 192.

———S. 10—*Proceedings under S. 83 of T. P. Act—Whether may be stayed.*

Jurisdiction is given by S. 10, C. P. Code, to stay suits. As a proceeding under S. 83 of the T. P. Act is not a suit, there is no power under S. 10. C. P. Code, to stay such proceedings. (*Harries, C.J.*) ANUKUL CHANDRA MANNA *v.* DEBENDRA NATH DUTTA. A.I.R 1947 Cal. 386.

———Ss. 10 and 151—*Stay of suit—Matter involved in suit pending before special tribunal—Jurisdiction of Civil Court to determine—Duty of Court to stay suit pending decision by tribunal—Indore Rent Control Order.*

Where a special tribunal is created for the determination of a particular matter, the jurisdiction of the Civil Courts must be deemed to have been taken away *pro tanto* while such tribunal exist. Under the Indore Rent Control Order, the Rent Controller has jurisdiction to determine the fair rent, though the remedy for recovery of unpaid rent has to be sought in the civil Court. When the quantum of rent is in dispute and when an application under S. 5 of the Rent Control Order is pending before the controller, no decree can be passed by the civil Court in the suit for rent. The suit has to be stayed until the final determination of the fair rent, under S. 151, C. P. Code, though not under S. 10, C. P. Code. 1931 P.C. 263; 1929 Lah. 12; 1930 Lah. 526; 1929 Oudh 341, ref. (*Rege, J.*) DULHANMAL *v.* ABDUL KADER. 4 D.L.R. (M.B.) 7.

———S. 10—Stay of suit—Test. [*See* Q.D. 1941-1945, Vol. I, Col. 727.] LILADHAR *v.* FIRM RADHAKISHAN RAMSHAHAYA. A.I.R. 1946 Nag. 5.

———S. 10—*Stay of suit—Test.*

S. 10, C. P. Code, makes no reference to the subject-matter or the cause of action and the test of its applicability to a particular case is whether on a final decision being reached in the previous suit such decision would operate as *res judicata* in the subsequent suit. (*Puranik, J.*) KRISHNARAO *v.* SHRIDHAR. I.L.R. (1947) Nag. 141=229 I.C. 219=1947 Nag. (Rul.) 87=1947 N.L.J. 31 =A.I.R. 1947 Nag. 154.

———S. 10 and U. P. Tenancy Act, (XVII of 1939), Ss. 59 and 180—*Two suits in respect of same holding and same parties, one under S. 59 and the other under S. 180—Procedure to be followed.*

Where there are two suits in respect of the same holding and as between same parties the earlier filed under S. 180 of the U. P. Tenancy Act and the later one filed under S. 59 of the Tenancy, Act, normally the earlier suit should be decided first; the other one should remain in abeyance until the previous one is decided. If, however, parties are agreed to the disposal of both of them together, then it would be necessary for the trial Court to give specific findings on the issues framed in the suits. (*Lal, J.M. I and Faiyaz Ali, J. M. II.*) GULZARI LAL *v.* RAM DEVI. 1949 R.D. 360.

———S. 11, Res judicata.

Applicability.
Co-defendants.
Consent decree.
Decision on erroneous view of law.
Directly and substantially in issue.
Evidence.
Execution proceedings.
Heard and decided.
Litigating under same title.
Might and Ought. *See* C. P. CODE, S. 11, EXPL. IV.
Parties under whom they claim.
Question of law.
Rent suit.
Representative capacity. *See* C. P. CODE, S. 11, EXPL. IV.
Revenue Proceedings
Expl. IV. Might and ought.
Expl. VI. Representative capacity.

———S. 11—*Adjudication against Hindu widow—Estate, when bound.*

Even though S. 11, Civil Procedure Code, is not strictly applicable to the case, an adjudication against a Hindu widow will, in certain circumstances, bind the estate. Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding upon the reversionary heir and this rule is not limited to decrees obtained against the widow as a result of suits contested to the end. (*Viswanatha Sastri, J.*) NATARAJA PILLAI *v.* APPASAMI NAIDU. 62 L.W. 328=1949 M.W.N. 304=A.I.R. 1949 Mad. 804=4 D.L.R. (Mad.) 222=(1949) 1 M.L.J. 523.

———S. 11—*Adjudication against Hindu widow—Similarity between the positions of a Hindu widow and Talukdar's widow in Oudh.*

If a litigation is fought out *bona fide* between a Hindu widow and a person who threatens the estate, the decision in that litigation operates as *res judicata* in a subsequent litigation between a third party and the reversioner. The position would be the same where a Talukdar's widow in Oudh is the party to such a litigation. Neither under the Hindu Law nor under the Talukdari law does the reversioner claim under the widow. The decision must be one which is fairly and properly obtained against her in regard to the estate. (*Kaul and Kidwai, JJ.*) Baldeo Singh *v.* Achal Singh. 23 Luck. 150=A.I.R. 1948 Oudh 165.

———S. 11—Adjudication of claim on admission—Effect. *See* Madras Proprietay Estates Village Service Act, Ss. 17 and 27 (3). (1946) 2 M.L.J. 53.

———S. 11—*Adverse finding against successful party*—Res judicata.

An adverse finding contained in the appellate judgment against the appellant who has succeeded in the appeal, does not operate as *res judicata* against him, as he could not have preferred any further appeal for challenging that finding. 48 C. 460 (P.C.) and I.L.R. (1944) Nag. 465, applied. 1924 M. 626; 1929 Cal. 449 and 1941 Nag. 346, Dist. (*Bose, Ag. C.J. and Mudholkar, J.*) Wariskhan *v.* Ahmadullakhan. I.L.R. (1949) Nag. 313=1949 N.L.J. 620.

———S. 11—*Adverse finding though decision in favour of defendant—If operates as* res judicata.

Where a decision in a prior suit was in favour of the defendant so that he could not appeal against it, a finding against him in that suit would not operate as *res judicata* in a subsequent suit. 1948 R.D. 403, foll. (*Prasad, J.M. II and Zaidi, J.M. I.*) Bhagelu *v.* Kunnu. 1950 R.D. 1.

———S. 11—*Appeal in earlier suit—Decision in later suit becoming final—Effect.*

Where during the pendency of an earlier suit, the decision in a subsequent suit on the same point and between the same parties has become final by not being appealed against, it will operate as *res judicata*. 1947 R.D. 215. Rel. on. (*Haider, J.M. II and Lal, J.M. I.*) Sikhdar Singh *v.* Niwaz. 1949 R.D. 153.

———S. 11—*Applicability—Appeals.*

S. 11, C. P. Code, in terms does not apply to appeals. Though the word "suit" is often used as including an appeal it cannot be so interpreted in S. 11. As the section does not in terms apply to appeals, the question whether an appeal is barred by *res judicata* must be considered in the light of general principles. (*Grille, C.J. and Padhye, J.*) Manohar Vinayak *v.* Laxman Anandrao. I.L.R. (1947) Nag. 691=1948 N.L.J. 155=A.I.R. 1947 Nag. 248=2 D.L.R. 167.

———S. 11—*Applicability—Compromise decree*—Res judicata—*Estoppel.*

Though a compromise decree cannot operate as *res judicata* in a subsequent proceeding inasmuch as S. 11, C. P. Code, applies in terms to what has been heard and decided by a Court, nevertheless a judgment by consent would raise an estoppel between the parties as well as their representatives in interest. 1941 All. 18; 1946 R.D. 234, fol. (*Lal, J.M. I and Haidar J. M. II.*) Sukha *v.* Kalyan Das. 1949 R.D. 53.

———S. 11—*Applicability—Consent decree.*

A consent decree has to all intents and purposes the same effect as *res judicata*, and it raises an estoppel as much as a decree passed *in invitum*. 36 B. 283 and 1930 Lah. 487, ref. (*Teja Singh and Khosla, JJ.*) Laxmi Narain Gododia *v.* Mahomed Shafi Babi. A.I.R. 1949 East Punjab 141.

———S. 11—*Applicability—Decision against mortgagee—If binding as against mortgagor.*

The position of a mortgagee is subordinate to that of the mortgagor and therefore the latter cannot be said to be claiming under the former. It follows that a decision against a mortgagee cannot operate as *res judicata* against the mortgagor. (*Lal, J.M.*) Bal Krishna *v.* Narain Das. 1948 R.D. 298=1948 A.W.R. (Rev.) 311.

———S. 11—*Applicability—Decision of District Judge under S. 84 (2), Madras Hindu Religious Endowments Act—If operates as* res judicata *in subsequent suit.*

The doctrine of *res judicata* is not confined to a decision in a suit, but applies even to decisions in proceedings other than suits. If substantial rights of parties are determined in a decision rendered in proceedings other than a suit, such decision will operate as *res judicata*, even though the decision may not be open to appeal. The decision of a District Judge under S. 84 (2) of the Madras Hindu Religious Endowments Act following on the decision of the Hindu Religious Endowments Board under S. 84 (1) of the Act, is not a summary decision, but one which determines substantial rights of parties, and will therefore operate as *res judicata* in a subsequent suit between the parties. (*Somayya and Yahya Ali, JJ.*) Balakotayya *v.* Nagayya. I.L.R. (1946) Mad. 566=59 L.W. 67=228 I.C. 286=1947 Mad. (Rul.) 63=A.I.R. 1946 Mad. 509=1946 M.W.N. 27=(1946) 1 M.L.J. 200.

———S. 11—*Applicability—Declaratory decree in regard to a grove against one brother only who was recorded as groveholder in his representative capacity—Subsequent claim by other brothers for a share in the grove—Prior declaration, if operates as* res judicata.

Where a declaratory decree in regard to a grove has been obtained against one brother only who was recorded as the groveholder in his representative capacity it would operate as *res judicata* in subsequent proceedings where the other brothers claim a share in the grove on the ground that their brother's name was entered only in a representative capacity. (*Pedley, S.M. and Bates, J.M.*) Pran Dei *v.* Ram Pher. 1947 R.D. 198.

———S. 11—*Applicability—Decree in terms of award—Regular appeal and revision petition to High Court—Dismissal—Decree final and matters covered by it cannot be re-agitated by fresh proceedings.*

A decree in terms of a compromise was passed in a suit, the compromise providing a reference to arbitration in the event of a dispute. A dispute having arisen there was a reference to arbitration and a decree was passed in terms of the award. A regular appeal and a revision petition were filed against the decree both of which were dismissed by the High Court on the grounds that no regular appeal lay and that there was no error in jurisdiction. An Original Petition was then filed in the lower Court seeking to re-agitate the matters.

Held, (*i*) that there was a final determination of the points raised which precluded the appellant from filing the Original Petition.

(*ii*) Where despite objection a wrong procedure is followed, or a jurisdiction is wrongly assumed the only remedy ordinarily available is to prefer an appeal against the decree, or, if no appeal lies, to prefer a revision petition, and the aggrieved party having done so and failed, the decree is final and binding on him. (*Horwill and Bell, JJ.*) BAWA MOHIDEEN ROWTHER *v.* GANI AMMAL, 60 L.W. 219=1947 M.W.N. 205=A.I.R. 1947 Mad. 410=(1947) 1 M.L.J. 233.

———S. 11—Applicability—Earlier suit decreed in second appeal against a defendant who remained *ex parte* in trial Court after the co-defendant had been exonerated—Subsequent suit by such defendant who was compelled to pay decree amount,, for indemnity against exonerated co-defendants—Not barred. *See* CONTRACT ACT, S. 124—INDEMNITY IMPLIED BY LAW. (1946) 1 M.L.J. 383.

———S. 11—*Applicability of principle—Extent of—If confined to actual decision—Rule.*

The doctrine of *res judicata* applies not only to the actual decision in the case but also to the facts and grounds for the judgment pleaded by the parties. Anything which is admitted and which would be fundamental to the decision of the earlier suit is also part of the *res judicata* created by the judgment. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment but also to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. (*Hidayatullah, J.*) ZINGU DEORAO *v.* MAHADEO. I.L.R. (1948) Nag. 747=3 D.L.R. Nag. 41=A.I.R. 1948 Nag. 358.

———S. 11—Applicability—Finding as to validity of will in proceedings under S. 44 of the Madras Hindu Religious Endowments Act—If operates as *res judicata* in subsequent suit involving the declaration of the invalidity of will. [*See* Q.D. 1941-1945, Vol. I, Col. 761.] AMIRTHALINGA PADAYACHI *v.* CHANDRASEKHARA PADAYACHI. I.L.R. (1946) Mad. 36.

———S. 11—*Applicability—Finding in prior suit as to title to land on the question of ownership of the trees standing on it—If* res judicata *in subsequent suit on question of title to the land.*

Where in a prior representative suit the *chamars* of the locality who resisted the removal of certain tress on a plot sold by the defendant it was found that the *chamars* had no title to the land which belonged to the defendants and had no right to obstruct, the finding will operate as *res judicata* in a subsequent suit between the *chamars* and the descendants of the defendant in the earlier suit on the question of title to the land. (*Achhru Ram, J.*) ABDULGHANI *v.* SUNDAR. 225 I.C. 297=A.I.R. 1947 Lah. 33.

———S. 11—Applicability—Finding is suit for restitution of conjugal rights against cruelty alleged by wife—Same plea in subsequent suit by wife for dissolution of marriage—Bar of. *See* DISSOLUTION OF MUSLIM MARRIAGES ACT. 225 I.C. 179.

———S. 11—*Applicability—Findings of trial Court, when appellate Court bases its decision on one particular finding—If operates* as res judicata *in subsequent suit.*

Where some of the findings in a suit are not maintained by the appellate Court and the latter bases its decision upon a particular finding, the rest of the findings of the trial Court cannot operate as *res judicata* in subsequent suit between the same parties. (*Allsop and Bennett, JJ.*) SHEO PRASAD SAHU *v.* RAMCHANDER PRASAD. 226 I.C. 58=1946 All. (Rul.) 453=1946 A.W.R. (H.C.) 132=1946 A.L.W. 56=1946 O.W.N. (H.C.) 56=A.I.R. 1946 All. 362.

———S. 11—*Applicability—If exhaustive.*

S. 11, C. P. Code, though largely modified and improved is still not exhaustive of the law on the subject and the principles of *res judicata* apply to matters to which the section does not in terms apply. (*Grille, C.J and Padhye, J.*) MANOHAR VINAYAK *v.* LAXMAN ANANDRAO. I.L.R. (1947) Nag. 691=1948 N.L.J. 155=A.I.R. 1947 Nag. 248=2 D.L.R. 167.

———S. 11—*Applicability—Implied finding—If operates as* res judicata.

Even if a point is decided by necessary implication, it operates as *res judicata* in subsequent proceedings. (*Grille, C.J. and Hemeon, J.*) RAJAH CHATTAR SINGH *v.* DIWAN ROSHAN SINGH. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

———S. 11—*Applicability—Judgment obtained by collusion.*

Where the plaintiff and the defendant are striving to achieve the same result, there is no real fight, and therefore, no judgment which can operate as *res judicata.* (*Abdul Rashid and Ram Lall, JJ.*) MAHOMED AFZAL *v.* DIN MAHOMED. I.L.R. (1946) Lah. 300=A.I.R. 1947 Lah. 117 =231 I.C. 421.

———S. 11—*Applicability—Litigating under the same title—Claim to attached property by Mahomedan widow claiming lien for dower—Order allowing—Subsequent gift by widow—Attachment of property in hands of donees—* Res judicata.

An order raising the attachment and allowing the claim of a Mahomedan widow on the ground that as she was in possession of her husband's property in lieu of her dower debt, she could resist the claim of a creditor of her husband and hold the property until her dower debt was discharged will not operate as *res judicata* against the decree-holder in subsequent proceedings between him and donees from the widow who subsequent to the order allowing her claim makes a gift of the property purporting to convey absolute property to the donees and surrender her possession to them. The *res* adjudicated in the earlier case being different from that in the latter case, the rule of *res judicata* will not apply. 52 I.A. 145, ref. (*Imam and Das, JJ.*) Aminuddin *v.* Ramkhelawan. 27 Pat. 218=A.I.R. 1949 Pat. 427.

———S. 11—*Applicability—Observation on matter not directly and substantially in issue—If* res judicata.

An observation in a suit on a matter not directly and substantially in issue cannot be binding as *res judicata* in a later suit, especially when the parties to the later suit do not claim through those in the earlier suit. (*Harries, C.J. and Chakravartti, J.*) Mst. Muneswari *v.* Jugal Mohini. 4 D.L.R. (Cal.) 1.

———S. 11—*Applicability—Partition suit—Decree effecting partition remaining unexecuted and getting time barred—Second suit for partition—Bar of* res judicata.

The principle of *res judicata* applies just as much to partition suits as to any other suit; and if a decree in a suit for partition is time barred, it cannot be enforced in a subsequent partition suit. It may be that some act subsequent to the decree which has remained un-executed may give rise to a fresh cause of action, but no second suit can lie for partition of the properties involved in the prior suit between the same parties on the identical cause of action. A person cannot sue for partition of a property already finally partitioned by a decree in a regular suit. (*Davies, C.J. and Thadani, J.*) Abdul Jabar Shah *v.* Ahmad Shah. I.L.R. (1946) Kar. 140=224 I.C. 316=1946 Sind (Rul.) 185=A.I.R. 1946 Sind 158.

———S. 11—*Applicability*—Pro forma *Defendant—If bound—Person impleaded as formal party—Plaintiff assuring him that no relief would be claimed against him—Effect.*

A pro-forma defendant is in no better position than any other defendant as regards the application of the doctrine of *res judicata*. At the same time, in order that a former judgment *inter partes* may be *res judicata* in a subsequent suit, there must be reciprocity. Where a person is made a party to a suit only as a formal party, but before the plaint is filed the plaintiff's solicitor writes to him, (sending a copy of the plaint) that no relief would be claimed against him and that he is joined as a formal party only, the doctrine of *res judicata* would not apply and the decision in the suit could not be pleaded in bar of a subsequent suit as against either party. (*Stone, C.J. and Chagla, J.*) Official Assignee Bombay *v.* Madholal Sindhu. I.L.R. (1948) Bom. 1=48 Bom.L.R. 828=A.I.R. 1947 Bom. 217.

———S. 11—Applicability — Suit dismissed against one defendant or claim withdrawn against him—Liberty for fresh suit not obtained—Bar of fresh suit—*Res judicata. See* C. P. Code, O. 23, R. 1 (3). 48 Bom.L.R. 795.

———S. 11—*Applicability—Suit to enforce mortgage by two of the sons of the mortgagee impleading third son as defendant—Decree for plaintiffs' two-third share reserving third son's remedy—Subsequent suit by third son as regards his share—Not barred by* res judicata.

For part of the consideration for the sale of immovable properties the vendee executed a mortgage over some properties in favour of the vendor and his sons. Later the vendor had another son. After his death two of the sons filed a suit on the mortgage for the whole amount due impleading the third son and the mortgagor as defendants. The Court however passed a decree only for the two-third share due to the plaintiffs and the third son was left with his remedy to recover his one-third share by separate suit. The mortgagor sold the properties and the vendee paid off the decree amount. The third son filed a suit to recover his share under the mortgage and it was contended by the purchaser from the mortgagor that the suit was not maintainable.

Held, that the suit was maintainable. Far from the plaintiff being barred by *res judicata,* it was the mortgagor and his representative who were bound by the former judgment. That the decree in the former suit was not correct in form was no ground for not decreeing the present suit. (*Wadsworth and Govindarajachari, JJ.*) Gopalaswamy Ayyar *v.* Nataraja Chettiar. I.L.R. (1948) Mad. 190=A.I.R. 1948 Mad. 172=1947 M.W.N. 266=60 L.W. 249 (2)=(1947) 1 M.L.J. 279.

———S. 11—*Bar of* res judicata—*Ejectment suit against trespasser.*

In the case of a trespasser the rightful owner has recurring cause of action and in the case of trespass an earlier suit filed for ejectment will not bar a subsequent suit if the earlier one was dismissed under O. 9, R. 8, C. P. Code. (*Chandiramani, J.*) Hing Raj Singh *v.* Raja Bhagwati Bux Singh. 5 D.L.R. (All.) 364.

———S. 11—*Civil and Revenue Courts—Civil Court finding on tenancy right based on Revenue Court's finding—If operates as* res judicata *in a subsequent suit in the Revenue Court.*

Where on an issue of tenancy right being raised the Civil Court gives its finding based on that of a Revenue Court, such finding would operate as *res judicata* in a subsequent suit in the Revenue Court between the same parties. (*Lal, J.M. I.*) Raghubir Singh *v.* Raghubir Saran. 1949 R. D. 13.

———S. 11—*Civil and Revenue Courts—Decision of Revenue Court on question of tenancy accepted by Civil Court and decree passed thereon—Binding nature of decree in subsequent proceedings in Revenue Court.*

Where on an issue being referred to a Revenue Court a decision on a question of tenancy in regard to a particular plot is given and on the basis of that a decree is passed by the Civil Court, then that decree will be binding on the parties and their representatives in subsequent proceedings in the Revenue Court. (*Faiyaz Ali, J.M. II and Lal, J.M. I.*) Ram Prasad *v.* Johri. 1949 R. D. 362.

———S. 11—*Co-defendants—Decision between—Decision in suit on mortgage where subsequent mortgagee has also been impleaded as defendant—Subsequent mortgage found to be binding on mortgagor's sons and the amount due on it also determined—Decree under O. 34, R. 4 (4) also drawn up—Subsequent suit by the subsequent mortgagee for the sale of the hypotheca—Deci-*

sion in prior suit, if operates as res judicata.

In a suit on a mortgage, the mortgagor and his sons as also a subsequent mortgagee were impleaded as parties. The subsequent mortgagee impugned the validity of the prior mortgage. There was an issue as to the validity and binding nature of the subsequent mortgage. It was found that the mortgage was supported by consideration and that it was binding on the mortgagor's sons. The amount due was also determined and in accordance with that finding a decree was drawn up in the manner required by O. 34, R. 4 (4) of the C. P. Code. In a suit by the subsequent mortgagee for the sale of the hypotheca, on a question whether the decision in the prior suit between the co-defendants operates as *res judicata* in the present litigation.

Held, it is clearly the object of the Legislature in sub-R. (4) of R. 4 of O. 34, C. P. Code, that not only the rights of the prior mortgagee, but also those of the subsequent mortgagees should be worked out in order to finally determine the claims on the property which is the subject-matter of the suit. The determination of the amount due to the subsequent mortgagee "was necessary in order to give the plaintiff the relief which he claimed". It was equally necessary in view of the provisions of O. 34, Rr. 1 to 4 to determine also the question whether the mortgage was binding on the sons of the mortgagor. The fact that the sons remained *ex parte* in the former suit cannot affect the question of *res judicata*. (*Horwill and Satyanarayana Rao, JJ.*) VENKATA JAGANNADHA RAO *v.* VENKATACHALAMAYYA SASTRY. 1948 M.W.N. 9=A.I.R. 1948 Mad. 336=61 L.W. 16=(1948) 1 M.L.J.

———S. 11—*Co-defendants—Finding as between plaintiff and a defendant—When* res judicata *between co-defendants.*

Though a finding between a plaintiff and a defendant need not always be binding and operate as *res judicata* between the co-defendants in the suit, yet when the validity of a will in which all the defendants who were beneficiaries, are interested is in question and each one of them takes up attitudes most beneficial to them and a finding is given, it would operate as *res judicata* against all the defendants. (*Allsop and Malik, JJ.*) MAHOMED HASAN *v.* MEHDI HASAN. I.L.R. (1946) All. 325=1946 A.W.R. (H.C.) 53 =1946 A.L.J. 97=1946 A.L.W. 6=1946 O.W.N. (H.C.) 6=A.I.R. 1946 All. 399.

———S. 11—*Co-defendants—Finding on issue not incorporated in decree*—Res judicata—*Conditions.*

It is well settled that under certain circumstances decision of issues between co-defendants even though not incorporated in the decree, may operate as *res judicata*. The conditions necessary for a finding to operate as *res judicata* between co-defendants are that there should be a conflict of interest between co-defendants and that it should be necessary to resolve the conflict in order to give relief to the plaintiff. The conflict or the issue must have been finally decided and the co-defendants must have been either necessary or at least proper parties in the former suit. (*Thadani, Ag.C.J. and Ram Labhaya, J.*) BHUBINDRA NARAYAN *v* TARUPRIYA DEBYA. A.I.R. 1950 Assam 119.

———S. 11—*Co-defendants* — Res judicata *between—Conditions—Party not entering appearance in previous suit—When bound.*

The conditions for the application of the doctrine of *res judicata* as between parties who have been co-defendants in a previous suit are:—There must be (1) a conflict of interest between the co-defendants, (2) the necessity to decide that conflict in order to give the plaintiff the appropriate relief, and (3) a decision of that question between the co-defendants. The doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided. 55 I.A. 158, referred to. (*Lord Simonds.*) CHANDU LAL *v.* KHALILUR RAHAMAN. 77 I.A. 27=1950 A.L.J. 132=1950 M.W.N. 166=52 Bom.L.R. 469=1950 P.W.R. 206=63 L.W. 108=A.I.R. 1950 P.C. 17=54 C.W.N. 211=(1950) 1 M.L.J. 241 (P.C.).

———S. 11—*Co-defendants*—Res judicata *between—Suit for partition and possession—Benami character of purchase raised and found against—Subsequent suit by representatives of real owners against benamidar—Question of title whether can be gone into.*

The general rule is that a party to a suit cannot in a subsequent proceeding be heard to allege that a decree obtained against him in a former litigation was obtained as a result of collusion between himself and the plaintiff. In a suit for partition and possession it was alleged that a certain purchase made by a defendant was benami for others who were also made parties as defendants and the suit was decreed. In the final decree proceedings, the alleged real owners unsuccessfully attempted to establish their title to the property as against the alleged benamidar. In a subsequent suit by them to establish their title to the property,

Held, that they were barred by the rule of *res judicata* from raising the contention as to benami purchase as their title had been found against in the earlier final decree proceedings. (*Wadsworth and Rajamannar, JJ.*) RAMARAYUDU *v.* MANIKYA RAO. 226 I.C. 175=1946 Mad. (Rul.) 242=59 L.W. 220=1946 M.W.N. 237=A.I.R. 1946 Mad. 372=(1946) 1 M.L.J. 282.

———S. 11—*Co-defendants—Suit for partition—Defendant applying for his share—Alienees being co-defendants—Finality of decision.*

In a partition action the sharers are both the plaintiffs and the defendants, and each defendant sharer is also in the position of a plaintiff. Where one of the defendants in fact applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as *res* *judicata* and cannot again be re-opened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee defendants. (*Somayya, J.*) Ramamani *v.* Basavayya. 59 L.W. 612=A.I.R. 1947 Mad. 170=1946 M.W.N. 687=(1946) 2 M.L.J. 321.

———S. 11—*Common Judgment—Appeal in one case barred—Appeal in the other, if barred.*

Where the same issues arise between different parties to different suits and the evidence is also the same and the parties have agreed to abide by a common judgment, if an appeal against the decree in one suit is barred, the same result will attach to the appeal in the other suit or suits as in the circumstances two contradictory judgments cannot be allowed to stand. (*Lal, J.M. I.*) Chunni Kuer *v.* Daya Shankar. 1948 R.D. 433.

———S. 11—*Common Judgment in appeal against two different Judgments—Dismissal of second appeal against decree in one appeal—If bars appeal against decree in the other.*

Where in a suit against two different parties in respect of different lands disposed of by two judgments the appeals are disposed of by a common judgment for purposes of convenience the dismissal of a second appeal against the appellate decree in one of the appeals would not operate as a bar against the second appeal against the decree in the other appeal. (*Lal, J.M. I and Haider, J.M. II.*) Mata Prasad *v.* Rama Shankar. 1948 R.D. 435=1948 A.W.R. (Rev.) 327.

———S. 11 and O. 41, R. 4—*Common judgment in different suits between different parties—No proper consolidation—Appeal is some suits only—Effect.*

Where different suits between different parties are disposed of by a common judgment without any proper consolidation and an appeal is preferred in some of the suits only the decision in those suits not appealed against cannot operate as *res judicata.* (*Lal, J.M.I.*) Maluka *v.* Rati Ram. 1949 R.D. 231.

———S. 11—*Common judgment in similar suits—Appeal filed in one suit alone—Other case becoming final, if bars hearing of the appeal.*

Where the trial Court disposed of two similar suits by a common judgment and two appeals preferred to the Commissioner are dismissed by one common judgment and one appeal only is filed before the Board, the other case having become final would operate as *res judicata* and bar the hearing of the appeal before the Board. (*Sultan Ahmad, S.J.M.*) Chandrika Singh *v.* Amli Singh. 1947 A.W.R. (Rev.) 7=1948 R.D. 372.

———S. 11—*Common judgment—Parties and properties different—Point at issue not common—Dismissal of one appeal—If affects others.*

Where though several suits are dealt with by a common judgment, if the parties, properties and points at issue are different, the dismissal of one appeal against such judgment cannot affect the others which raise different points. But each case has to be decided on its own facts. 1949 A.W.R. (Rev.) 8, Rel. on. (*Lal, J.M. I.*) Bhagwan Sahai *v.* Ramji Lal. 1949 A.W.R. (Rev.) 4=1949 R.D. 93.

———S. 11—*Common judgment—Plaintiffs and one set of defendants common in two suits—Different Zamindar defendants—Appeal in one suit only*—Res judicata.

Where the plaintiffs and one set of defendants are common to two suits but the other set of Zamindar defendants are different in the two suits and the pleadings, issues and evidence are the same in the two suits, if the decision in one of the suits is allowed to become final by not being appealed against, the appeal in the other would be barred by *res judicata.* (*Faiyaz Ali, J.M. II. and Lal, J.M. I.*) Bindeshari Tewari *v.* Tetra. 1949 R.D. 265.

———S. 11—*Common judgment—Same plaintiff but different defendants—Appeal in one suit alone—Effect.*

Where different suits by same plaintiff against different defendants is disposed by a common judgment and there is an appeal only in one of the suits, it cannot be said that the absence of appeals in the other suits is a bar to the hearing of the appeal in one of the suits. (*Haider, J.M. II.*) Channeli *v.* Ijhar Khatoon. 1949 R.D. 156.

———S. 11—Competent Court—Bihar Tenancy Act, S. 112-A—Rent Reduction Officer—Decision as to basic rent of holding—If *res judicata. See* Bihar Tenancy Act, S. 112-A. 27 Pat. 325.

———S. 11—Competent Court—Decision by Insolvency Court that properties of Hindu insolvent are self-acquired—Direction that sons claiming them as joint family properties may file separate suit—Subsequent suit claiming properties as joint family properties—*Res judicata.* [*See* Q.D. 1941-1945, Vol. I, Col. 733.] Sinna Subba Goundan *v.* Rangai Goundan. 224 I.C. 16=1946 Mad. (Rul.) 129=A.I.R. 1946 Mad. 141.

———S. 11—*Competent Court—Settlement Officer—Decision in proceedings under S. 105, B. T. Act—If* res judicata *in subsequent rent suit in Civil Court.*

The decision of a settlement officer in proceedings under S. 105. Bengal Tenancy Act, cannot operate as *res judicata* in a rent suit in the Civil Court, the nature of the suit being such that the settlement officer could never try it. (*Harries, C.J.*) Udoy Chand Mahtab *v.* Bhola Nath. 4 D.L.R. (Cal.) 49=A.I.R. 1949 Cal. 609.

———S. 11—*Connected reliefs—Decrees declaring title to and for possession of properties—Both reliefs depending on same facts—Appeal against decree declaring title—Failure to appeal against decree for possession*—Res judicata.

Where a decree in a suit awards two reliefs, namely, declaration of title of immovable property and possession thereof, the right to both reliefs depending on the same facts, but the unsuccessful party appeals only against the decree declaring title but not against the decree for possession, the appeal against the decree for possession would not be maintainable. So long as the decree for possession remains in tact, it would operate as *res judicata* to prevent the appellant from challenging the decree for declaration of title. (*Varma and Beevor, JJ.*) NARENDRA NATH SEN *v.* MAHASOY GANESH PRASAD ROY. 227 I.C. 172=13 B.R. 20=12 Cut.L.T. 10=A.I.R. 1946 Pat. 408.

———S. 11—*Connected suits—Single judgment—Appeal against decree in one suit only—Failure to appeal from decrees in others*—Res judicata.

The respondent instituted 225 rent suits against various persons, his claim for rent being based on his right as an *ijaradar* under an *ijarapatta* in his favour. The subject-matter of the suits was different and the principle defendants in the suits were also different. Besides the principal defendants, the respondent also impleaded the appellant as a *pro forma* defendant in all the suits, and the issue between the appellant and the respondent was common to all the suits, *viz.*, whether the appellant as sale executor of the estate under a will was entitled to recover the arrears of rent to the exclusion of the respondent. The plaintiff (respondent) obtained a decree in each of the suits, all of which were disposed of by one common judgment. The appellant preferred an appeal against the decree in one of the suits. but did not appeal against the decrees in the others.

Held, that the appeal was barred by *res judicata,* the decree in the order suits having become final. (*Ray, J.*) RAGHUNDAN SINGH *v.* SOUBHAGYA SUNDARI DEVI. 1946 P.W.N. 158=A.I.R. 1947 Pat. 125=231 I.C. 123=13 B.R. 499.

———S. 11—*Connected cases—Single Judgment on question of title—Appeal in one case only—Question of title, if can be re-opened in appellate Court.*

In a number of rent suits in respect of different holdings the plaintiff claimed only an eight annas share and added a co-sharer landlord as defendant entitled to the other eight annas share who however claimed to be the sole landlord. The first Court negatived this claim of sole title and decreed the plaintiff's claim. The defendant co-sharer landlord filed an appeal in one of the suits only reiterating this claim to be sole landlord.

Held, the matter was *res judicata* and it was not open to the appellate Court to investigate the matter once again. (*Agarwala, Ag.C.J. and Manohar Lall, J.*) RAGHUNANDAN SINGH *v.* SOWBAGYA SUNDARI. A.I.R. 1948 Pat. 191.

———S. 11—Consent decree—How far *res judicata*. [*See* Q.D. 1941-1945, Vol. I, Col. 739.] BAKARAM *v.* KASHI RAO. I.L.R. (1945) Nag. 1005.

———S. 11—Consent decree—Implied finding in compromise decree—If may operate as *res judicata*. [*See* Q.D. 1941-1945, Vol. I, Col. 752.] NAND SINGH *v.* RAHMAT DIN. 223 I.C. 458=1946 Lah. (Rul.) 282=A.I R. 1946 Lah. 73.

———S. 11—*Consent decree—Decree challenged on ground of fraud and collusion—If operates as* res judicata.

A consent decree which is impugned in a subsequent suit as having been brought about by fraud and collusion of the parties other than the plaintiff in that suit cannot operate as *res judicata* in that suit. (*Das, J.*) GOPAL JEW *v.* BALDEO NARAIN SINGH. 51 C.W.N. 383.

———S. 11—*Consent decrees—Operation as estoppel—Limits.*

A decision operates as *re judicata* only in respect of matters that it decides. S. 11 of the C. P. Code, is not strictly applicable to consent decrees because it applies in terms only to what has been heard and finally decided by a Court. But a judgment by consent raises an estoppel between the parties as much as a judgment in a decided case. An estoppel by a consent decree can only arise when the question raised in the subsequent suit was present to the minds of the parties and was actually dealt with by the decree. In order to effect an estoppel it is also necessary that it should appear on record that the question had been put in issue. (*Kaul, J.*) GOKUL PRASAD *v.* HARI SARAN DAS. 22 Luck. 270=1946 A.W.R. (C.C.) 254=1946 O.A. (C.C.) 254=229 I.C. 112=1947 Oudh (Rul.) 51=1947 O.W.N. 30=A.I.R. 1947 Oudh 98.

———S. 11—*Consent decree against minor*—Res judicata.

A consent decree so long as it stands binds the parties as effectively and in the same way as any other decree. There is no difference between a consent decree in which all the parties are adults and one where a minor is concerned. A decree passed against a minor properly represented is binding upon him to the same extent as a decree passed against an adult, tohugh a minor is entitled to impeach a decree passed against him if the next friend or guardian for the suit is guilty of fraud or gross negligence. If the decree has not been set aside and the suit is not one constituted for that purpose, it is binding upon the minor and operates as *res judicata* against him. (*Bose and padhye, JJ.*) RAMRAO SHAMRAO *v.* DATTADAYAL. I.L.R. (1947) Nag. 889=A.I.R. 1948 Nag. 304=1947 N.L.J. 556.

———S. 11—*Consolidated suit—Appeal in one suit—If barred by decree in other suits.*

In order that a decision should operate as *res judicata* it should be quite independent of the proceedings to which it is pleaded as a bar. The principle of *res judicata* cannot apply in the same proceeding in which the decisions is given and by parity of reasoning it cannot apply to the consolidated proceedings. Where two suits having a common issue are, by consent of parties or by order of the Court, tried together and decided in one finding, there is in substance one judgment and one decree though in form the Court may have written two formal judgments and drawn up two decrees. An appeal filed against the decree passed in one of the suits is not barred by *res judicata* by reason of the non-filing of an appeal against the decree passed in the other suit. (*Grille, C.J. and Padhye, J.*) MANOHAR VINAYAK *v.* LAXMAN ANANDRAO. I.L.R. (1947) Nag. 691=1948 N.L.J. 155=A.I.R. 1947 Nag. 248=2 D.L.R. 167.

———S. 11—*Consolidated suits—Common judgment in trial and appellate Courts—Failure of defendant in one suit alone to file second appeal—If bars second appeals of their defendants against decrees in the other appeals—Different defendants and different plots the subject matter of suit.*

It cannot be stated as a general rule that where there are several appeals dealt with by a common judgment and one of them happens to be dismissed for any reason, the other appeals are of necessity barred by the principle of *res judicata*. Each case has to be decided on its own merits and the general principles of *res judicata* hold good in the case of consolidated suits and appeals as well as they do in the case of suits and appeals dealt with individually.

Where in the case of consolidated suits, the defendants are different, the subject-matter is different and the evidence is also discussed separately in the common judgment and the appeals therefrom are also disposed of by a common judgment, the failure of one of the defendants in one of the suits to file a second appeal would not bar the second appeals filed by the defendants in the other suits. Case-law discussed. (*Lal, J.M. I and Haider, J.M. II.*) DHONDA PATHAK *v.* RAMNATH PANDE. 1948 R. D. 458=1949 A.W.R. (Rev.) 81.

———S. 11—Consolidated suits—One judgment but separate decree—Appeal against one decree—Omission to appeal against other—When operates as *res* judicata. [*See* Q.D. 1941-1945, Vol, I, Col. 738.] MT. ZOHRA *v.* RAZA KHAN. 224 I. C. 581.

———S. 11—Consolidated suits—One judgment by two decrees—Appeal against one—Matter decided by the other, if *res judicata* in the appeal filed. [*See* Q.D. 1941-1945, Vol. I, Col. 738.] SHANKAR SAHAI *v.* BHAGWAT SAHAI. A.I.R. 1946 Oudh 33 (F.B.).

———S. 11—*Consolidated suits—"Same parties"—Meaning for purposes of applying principles of* res judicata—*Common judgment—Appeal in some suits alone—Effect.*

When substantially the same parties in different suits expressly agree to have their suits decided on one and the same evidence and by one common judgment on a matter in issue identical in all such suits, such parties are to be treated as same parties for the purpose of applying the principle of *res judicata* to proceedings between them in continuation of the same suits.

Where in the case of such a common judgment an appeal is filed only in some of the suits, the decisions in the others which have become final operate as *res judicata*. 1949 R.D. 156, Diss. (*Lal, J.M. I and Faiyaz Ali, J.M. II.*) SURAJ NARAIN *v.* JOKHU. 1949 R.D. 367.

———S. 11—*Consolidated cases—Suits for ejectment against different defendants in respect of different plots—Common Judgment—Failure of one defendant alone to appeal—If bars hearing of other appeals by the other defendants.*

It is impossible to lay down a fixed principle of law for consolidated cases where the omission to file appeal in some suits resulting in the order becoming final can operate as *res judicata* against the appeal which had been filed. Each case will have to be decided on its own merits.

Where a number of suits for ejectment filed against different defendants in respect of different plots is consolidated and disposed of by a common judgment, the failure of one of the defendants along to appeal against the judgment would not bar the hearing of the other appeals by the other defendants. (*Lal, J.M. I and Haider, J.M. II.*) NIAMAT *v.* SHOHRAB ALI KHAN. 1948 A.W.R. (Rev.) 315=1949 R. D. 45.

———S. 11 — *Co-plaintiffs*—Res judicata—*Conditions of.*

The rule of *res judicata* will not apply as between co-plaintiffs unless there is a conflict of interest among the co-plaintiffs and a judgment defining the real rights and obligations of the plaintiffs, *inter se*; further the adjudication *inter se* between the co-plaintiffs should be necessary to give appropriate relief to the defendants. 11 Bom. 216; 30 Cal. 556 (P.C.); A.I.R. 1921 Pat. 218, appl. 5 I.A. 87; 58 I.A. 158; 59 I.A. 247; 62 I.A. 224; 36 Bom. 207, foll. (*Manohar Lall and Ramaswami, JJ.*) BHUDEO PANDEY *v.* GUPTESWAR MISSIR. 28 Pat. 814=4 D.L.R. (Pat.) 232.

———S. 11—*Co-plaintiffs*—Res judicata *between—Conditions.*

As between parties arrayed on the same side in the previous litigation, whether as co-plaintiffs or as co-defendants, a matter can be *res judicata* only if in the previous suit there was a matter directly and substantially in issue between the co-plaintiffs or the co-defendants and an adjudication upon that matter was necessary to the determination of the suit. It is well settled that unless there is an active contest between the parties arrayed on the same side in the previous suit, a decision with regard to which contest is necessary for the final determination of the matter in controversy in the suit, any decision given in the previous suit cannot operate as *res judicata* between them or between parties claiming through or under them in any subsequent suit. (*Bhandari and Achhru Ram, JJ.*) BACHINT KAUR *v.* KARAM CHAND. A.I.R. 1948 Lah. 195.

———S. 11—*Cross suits—Same parties and same subject-matter—Common judgment—Decision in one suit becoming final—Effect on appeals in other suits.*

Where cross suits between the same parties and regarding the same subject-matter are disposed of by a common judgment in the trial and appellate Courts and the decision in one becomes final further appeals in the other suit would be barred by *res judicata*, if the decisions on them would result in the passing of two contradictory decisions. (*Lal, J.M. I.*) SHEO NANDAN SINGH *v.* SURESH CHANDRA NANDI. 1949 R.D. 283.

———S. 11—*Decision based on erroneous view of law*—Res judicata.

A decision in a previous suit is binding on the parties even though it proceeded on an erroneous view of law. (*Pollock and Sen, JJ.*) NARAYAN *v.* GOKUL DAS. I.L.R. (1946) Nag. 568=A.I.R. 1947 Nag. 48=1946 N.L.J. 544.

———S. 11—*Decision of Munsiff in a declaratory suit based on a will that it was a forgery—Confirmation in second appeal by High Court—Application to High Court for grant of Letters of Administration with copy of will annexed—Decision in prior suit as to forgery of will if operates as* res judicata.

The decision of a Munsiff in a declaratory suit based on a will that it was a forgery was confirmed by the High Court in second appeal. Then the plaintiffs in that suit filed an application in the High Court for the grant of Letters of Administration with copy of the will annexed. On a question whether the prior decision of the Munsiff that the will was a forgery was conclusive in the High Court as a Court of Probate.

Held: The Munsiff's Court not being a Court of competent jurisdiction to try the subsequent petition, the case does not come within the scope of S. 11, C. P. Code and the question as to the genuineness of the will can be re-agitated in the High Court. (*Mootham and Sapru, JJ.*) OUDH NARAIN LAL *v.* MST. SUKH DULARI. 1950 A.W. 274=1950 A.L.J. 233=A.I.R. 1950 A. 402.

———S. 11—*Decision of tribunal under special Act—If* res judicata *in subsequent civil litigation.*

Where in an application under S. 4 of the U.P.E.E. Act, a claim is filed in respect of a *guzara* which was being paid to her by the applicant and the Special Judge gives the claimant a decree for the amount due up to the date of the application and the decision is not appealed against and a suit is filed by the claimant for arrears of *guzara* subsequent to that, the decision of the Special Judge in allowing the claim cannot be pleaded as barring the adjudication of the question as to the enforceability of the claim to the *guzara*. (*Kaul and Chandiramoni, JJ.*) NANHI SAHERA *v.* DEPUTY COMMISSIONER, KHERI. 1950 A.L.J. 168.

———S. 11—*Decision on question of law.*

A previous decision on a question of law is *res judicata* in a subsequent suit. (*Grille, C.J. and Hemeon, J.*) RAJAH CHATTAR SINGH *v.* DIWAN ROSHAN SINGH. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

———S. 11—*Decision in rent suit by Revenue Court without jurisdiction—Confirmation on appeal—Plea of absence of jurisdiction in later rent suit—If barred by rule of* res judicata.

Where it is subsequently held that a Revenue Court had no jurisdiction to entertain certain rent suits, decrees passed therein must be treated as nullities and cannot operate as *res judicata* in subsequent rent suits. The fact that such decrees were confirmed on appeal cannot affect the question because an appellate decree confirming a decree passed without jurisdiction can have no more validity than the decree of the first Court. Nor would the fact that such a decree was *ex parte* make any difference. (*Leach, C. J. and Lakshmana Rao, J.*) MADHAVARAO BAHADUR *v.* PAPAYYA RAO. I.L.R. (1946) Mad. 760=1946 M.W.N. 155=227 I.C. 544=1947 Mad. (Rul.) 30=A.I.R. 1946 Mad. 431=(1946) 1 M.L.J. 287.

———S. 11—*Decree in suit by presumptive reversioner—When binding against actual reversioner.*

The true principle applicable to decrees to which presumptive reversioners are parties, when the question of their character as against actual reversioners comes up for consideration is the one embodied in Expl. 6 to S. 11 of the Code. Where in a prior suit the presumptive reversioner was a minor represented by a next friend it is not so much a question of negligence or gross negligence that arises for consideration, as a case of *bona fides,* or want of *bona fides* in the conduct of the litigation. Gross negligence as a head of attack against decree, is available only in the case of minors against whom decrees have been passed, but not in the case of persons who may be representing other people's interests in the previous litigation such as presumptive reversioners, prior trustees, previous ejmans or kartas, etc. (1949) 2 M.L.J. 413, followed. (*Raghava Rao, J.*) VALLIAMMAI AMMAL *v.* SANKARA AYYAR. A.I.R. 1950 Mad. 562=(1950) 1 M.L.J. 727.

———S. 11—*Decree without jurisdiction—What will amount to—Jurisdiction of Court if affected by Court acting illegally and with material irregularity in the exercise of its jurisdiction.*

A decree without jurisdiction under S. 11, C. P. Code, must be a decree in a suit which the Court had no jurisdiction to entertain. The mere fact that the Court acted illegally or with material irregularity in the exercise of its jurisdiction will not affect the jurisdiction of the Court under the provisions of S. 11, C. P. Code. (*Agarvala, J.*) BABOO *v.* KIRPA DEI. 1950 A.W.R. 575=A.I.R. 1950 All. 488.

———S. 11—Different decision in later suit on point forming basis of decision in the earlier suit—Rights under earlier decree which had become final if affected. [*See* Q.D. 1941-1945, Vol. I, Col. 767.] MAHOMED OBEDULLAH KHAN *v.* MAHOMED JALIL KHAN. 1945 A.W.R. (H.C.) 414=222 I.C. 196=1946 A. (Rul.) 135.

———S. 11—*Directly and substantially in issue—Collateral and incidental issue—Decision not necessary for suit—Decision arrived at in spite of finding on issue*—Res judicata—*Heard and finally decided—Finding on unnecessary issue.*

A matter can never be said to be directly and substantially in issue which calls for a decision only collaterally or incidentally, and it cannot be said to be heard and finally decided if the finding on any particular issue is not necessary for the decision of the suit, where an issue is not substantially raised, and the decision of the Court is not based upon the finding on that issue, but on the contrary the decision is come to in spite of the finding, and further it is not necessary to decide the issue for the purpose of deciding the cases, there can be no *res judicata*. (*Stone, C.J. and Chagla, J.*) OFFICIAL ASSIGNEE, BOMBAY *v.* MADHOLAL SINDHU. I.L.R. (1948) Bom. 1=48 Bom.L.R. 828=A.I.R. 1947 Bom. 217.

———S. 11—*Directly and substantially in issue—Decision on question collateral to suit—Decision as to legal representative of deceased plaintiff under O. 22, R. 5—Effect of*—Res judicata.

A decision of a question under O. 22, R. 5, C. P. Code, as to whether a person is or is not the legal representative of a deceased plaintiff is not a decision on an issue arising in the suit itself; it is really a matter collateral to the suit. The appointment of a legal representative is not the determination of any issue which is properly raised in the suit itself and cannot therefore operate as *res judicata* in a subsequent suit between the same persons regarding succession to the property of the deceased. 48 All. 422, diss. 28 All. 109; 58 All. 734; 27 Bom. 162; 20 I.C. 950; 154 I.C. 985; 166 I.C. 393, foll. (*Manohar Lall and Ramaswami, JJ.*) Bhudeo Pandey *v.* Gupteswar Missir. 28 Pat. 814=4 D.L.R. (Pat.) 232.

———S. 11—*Directly and substantially in issue—Finding on unnecessary issue adverse to successful party*—Res judicata.

Where a suit is dismissed on one issue, but the finding on another issue is against the defendants, the successful defendants cannot appeal against the finding on that issue. Hence the adverse finding cannot operate as *res judicata* against the defendants in a subsequent suit in respect of the same matter. (*Shearer and Sinha, JJ.*) Markanda *v.* V. K. R. Naidu. 26 Pat. 717=A.I.R. 1949 Pat. 197.

———S. 11—*"Directly and substantially in issue"—Incidennal decision—Value.*

Though it is doubtful whether a decision on a point which is only incidental to the main decision in the case would operate as *res judicata* in a subsequent litigation, the finding would be of definite evidentiary value in the later proceedings. (*Bates, J.M.*) Ajit Pratap Singh *v.* Ganesh. 1946 R.D. 257=1946 A.W.R. (Rev.) 50.

———S. 11—*Directly and substantially in issue"—Issue same, but cause of action and subject-matter different—Decision, if* res judicata.

A decision arrived at in a previous suit is *res judicata* in a subsequent suit if the matter in issue is the same on both the previous and subsequent suits and have arisen out of the same title, even if the subject-matter and cause of action are different. (*Din Mahomed and Mahomed Sharif, JJ.*) Seth Ganga Sagar *v.* Inam Ilahi 224 I.C. 117=1946 Lah (Rul.) 325=48 P.L.R. 195=A.I.R. 1946 Lah. 387.

———S. 11—*Directly and substantially in issue"—Meaning and test—Finding on unnecessary issue—Effect of.*

A question which is foreign to the decision and unnecessary for decision does not invite decision and cannot be held to be matter directly and substantially in issue so as to operate as *res judicata* in a later suit. A question which is relevant to the issue in a suit will not necessarily be a matter directly and substantially in issue and a finding on that question will not be *res judicata* unless it is so connected with the question in issue that the decision upon one must necessarily determine the decision upon the other. (*Meredith and Ray, JJ.*) Ramcharitar Sao *v.* Bawan Prasad Singh. 222 I.C. 439=12 B.R. 268=1946 Pat. (Rul.) 105=A.I.R. 1946 Pat. 225.

———S. 11—*Directly and substantially in issue—Mortgage suit—Finding that possession of mortgagee was not as mortgagee—If* res judicata *in subsequent suit under Bengal Money-Lenders Act.*

A decision in a mortgage suit, that the mortgagee is in possession not *qua mortgagee* but in satisfaction of his dues in respect of another loan due by the mortgagor, which is necessary to sustain the decree in the suit, operates as *res judicata* against the mortgagor in respect of that point in later proceedings under the Bengal Money-Lenders Act, when that question is directly and substantially in issue between the parties. 47 C.W.N. 643, dist.; 50 C.W.N. 703, foll. (*G. N. Das and B. K. Guha, JJ.*) Asgar Ali *v.* Dinanath Kumar. 5 D.L.R. (Cal.) 14=A.I.R. 1950 Cal. 135.

———S. 11—*Directly and substantially in issue Question of genuineness of document—Document incidentally tendered—No decision as to execution of same or genuineness thereof*—Res judicata.

Where a document was only incidentally tendered in evidence in a prior suit between the parties, and there had been no decision on its execution or genuineness nor on the rights of the parties therein, it cannot be said that the question of the genuineness of the document was directly and substantially in issue in the prior suit, and therefore consideration of the same cannot be held to be *res judicata* in a later suit between the same parties. (*Rege, J.*) Narayan Bhaggu *v.* Badrilal. 4 D.L.R. (M.B.) 31.

———S. 11—*Directly and substantially in issue—Rent suit—If* res judicata *on question of title—Rule.*

The decision in a rent suit is not *res judicata* on the question of title, unless the question of title which had to be decided was expressly raised, and was expressly decided between the parties; in each case it is necessary to examine carefully the decision in the rent suit before any opinion can be formed as to whether it operates as *res judicata* on the question of title or not. Ordinarily the decision would be *res judicata* only with regard to the existence of the relationship of landlord and tenant; in other words the decision of the Rent Court would undoubtedly be *res judicata* on the question as to whether the particular tenancy which was asserted did or did not exist in fact. 33 C.L.J. 334; 1924 Cal. 460, cons. 12 I.A. 23; 15 I.A. 97; 18 C.L.J. 553, foll. 1934 Pat. 282, ref. (*Manohar Lal and Meredith, JJ.*) Pardip Singh *v.* Ram Sundar Singh. 4 D.L.R. (Pat.) 154=A.I.R. 1949 Pat. 510=30 P.L.T. 434.

———S. 11—*Directly and substantially in issue—Rent suit—Question of title—Decision*—Res judicata *in later suit on title.*

There is no invariable rule that the decision of an issue as to title in a rent suit cannot have the effect of *res judicata* in a subsequent title suit between the same parties. If the question is directly and substantially in issue in the rent suit, and the Court trying the rent suit is competent to try the subsequent rent suit, and the issue is decided then the decision in the rent suit on title would operate as *res judicata* in the subsequent title suit. 12 I.A. 23, expl. 3 Cal. 145; 5 Cal. 832, rel. on. 48 I.A. 49; 37 C.W.N. 924; 21 C.L.J. 157; 33 C.L.J. 186, ref. (*Sen, J.*)

Jitendranath Sarkar *v.* Biswanath Bagchi. 4 D.L.R. (Cal.) 238.

———S. 11—*Dismissal for default—Operation as* res judicata.

Where the prior suit has been dismised for default, there has been no decision on the merits of the case and no matter in issue between the parties has been heard and finally decided in the suit within the meaning of S. 11, C. P. Code, so as to operate as a bar to the same question being raised in a subsequent suit. (*Lal, J.M. I.*) Chhabila Koeri *v.* Ram Adhar Koeri. 1949 R.D. 66.

———S. 11—*Doctrine of* res judicata—*Applicability to facts and grounds of earlier decision.*

The doctrine of *res judicata* applies not only to the actual decision in the case but also to the facts and grounds for that judgment pleaded by the parties. Anything which is admitted and which is fundamental to the decision of the earlier suit is also part of the *res judicata* created by the judgment. (*Hidayaullah, J.*) Jhingoo *v.* Mahadeo. I.L.R. (1948) Nag. 747=A.I.R. 1948 Nag. 358.

———S. 11—Erroneous judgment—*Res judicata*—Decision overruled by Full Bench—Effect of. *See* Decree—Validity. 3 D.L.R. (All.) 27.

———S. 11—*Evidence—Judgment operating as* res judicata *pending appeal—Duty of appellate Court to take note of and to admit same in evidence.*

If before an appeal is disposed of there is another decision which has become final and which operates as *res judicata* on the question at issue in the pending appeal, the appellate Court ought not to refuse to allow the judgment in that decision to be filed. Once it is brought to the notice of the appellate Court that there is such a judgment, it is its duty to allow it to be filed in order to avoid conflicting judgments and further complications. (*Somayya and Yahya Ali, JJ.*) Balakotayya *v.* Nagayya. I.L.R. (1946) Mad. 566=(1946) M.W.N. 27=59 L.W. 67=A.I.R. 1946 Mad. 509=228 I.C. 286=1947 Mad. (Rul.) 63=(1946) 1 M.L.J. 200.

———S. 11—*Execution proceedings—Constructive* res judicata—*Applicability—Non-saleability of property in execution—Objection as to—Failure to raise—Effect.*

It is well-settled that the doctrine of constructive *res judicata* is applicable to execution proceedings; where a judgment-debtor fails to raise all his objections to the execution which he might and ought to raise, and execution is ordered to proceed, all those objections will be deemed to have been impliedly decided against him, and he will be precluded from raising such objections at a later stage of the same execution proceeding or in a subsequent application for execution of the same decree.

In cases where the property sought to be sold is admittedly non-saleable, the executing Court cannot sell the property, and the failure to raise the objections in time would not create any estoppel or *res judicata*, because there is no estoppel against a statute. But where the facts themselves have to be determined which may lead to the inference that the property is not saleable, those facts must be pleaded and proved like any other question for determination by the Court itself; and if those questions are not raised at a proper stage, the bar of *res judicata* would apply. It is not open to a judgment-debtor to raise his objections piecemeal, especially where they relate to a plea in bar to the execution case itself. 17 P.L.T. 380, appl.; 7 Pat. 178; 14 Pat. 52, dist.; A.I.R. 1941 Pat. 240, expl.; I.L.R. (1942) Lah. 559; A.I.R. 1940 Pat. 251; A.I.R. 1942 Pat. 477, foll. 2 I.A. 219; A.I.R. 1938 Pat. 427, rel. (*Ramaswami and Sarjoo Prasad, JJ.*) Sham Sunder Singh *v.* Dhirendra Nath. 29 Pat. 732=5 D.L.R. (Pat.) 205=A.I.R. 1950 Pat. 465.

———S. 11—*Execution proceedings—Constructive* res judicata—*Order for sale—Fresh objections to saleability of property—Whether can be subsequently raised.*

Although the provisions of S. 11, C. P. Code, have no application to execution proceedings, the rule of *res judicata* on general principle governs the proceedings in execution and on the same principle the rule of constructive *res judicata* has application to cases where a certain decision could not have been given by the executing Court if the matter sought to be raised later would have been raised at an earlier stage of the proceedings. A judgment-debtor objecting to the sale of property is bound to raise all questions that affect the saleability of the property before an order of sale is made, and if he fails to do so, he is barred by the rule of constructive *res judicata* from reagistating them after that order has been made. If no order for sale has been made in the earlier proceedings, then the matter would be different as the rule of constructive *res judicata* cannot apply to such a case. I.L.R. (1942) Lah. 559 (F.B.), applied. (*Mahajan, Bhandari and Achhru Ram, JJ.*) Pirji Safdar Ali *v.* Ideal Bank, Ltd. A.I.R. 1949 East Punjab 94 (F.B.).

———S. 11—*Execution proceedings—Decision as to liability of property to attachment—Not* res judicata *in later proceeding in execution of another decree.*

In the execution of a decree the question arose "whether the property in dispute was the property of the first defendant or whether it was property in which the third defendant had a share which could be attached and sold in execution of the decree against him." The same question was decided in a former execution proceeding in execution of another decree.

Held, that the earlier decision does not operate as *res judicata,* as a decision in a claim suit as well as in the claim petition has no application beyond the execution of the decree which has given rise to those proceedings and has relationship only to the particular decree that was being executed. (*Horwill, J.*) Angathevan *v.* Natarajan Chettiar. 60 L.W. 529=A.I.R. 1948 Mad. 118 (2)=1947 M.W.N. 493=(1947) 2 M.L.J. 189.

———S. 11—*Execution proceedings—Decision in execution of decree in prior suit—If operates as* res judicata *in execution of decree in subsequent suit.*

As execution proceeding is a continuation of the suit, the decision in one execution case should be deemed to be a decision in that suit which should operate as *res judicata* in execution proceedings taken in execution of a decree in a subsequent suit, if the parties are the same and the issues are identical. (*Sinha and Mukharji, JJ.*) SHYAMSUNDER KUER *v.* MATHURA PRASAD. A.I.R. 1948 Pat. 192.

———S. 11—*Execution proceedings—Decision on objection by one of several judgment-debtors—If* res judicata *against others—Notice issued only to decree-holder.*

A decision in an execution proceeding on an objection taken by one of several judgment-debtors on notice to the decree-holder only, does not operate as *res judicata* against the other judgment-debtors who are parties to the execution proceeding but are not parties to the objection or to the miscellaneous case which arises out of it. (*Edgley and Clough, JJ.*) ABDUL KARIM MONDAL *v.* TARA PRASAD SUKUL. 51 C.W.N. 452.

———S. 11—*Execution proceedings—Decree against father—Execution against sons—Objection—Dismissal for default—Application for restoration also dismissed—Subsequent execution application—Objections by sons again—If barred—*Res judicata.

Where an objection to an execution petition preferred by the sons of the judgment-debtor (who had died) was dismissed for default in the presence of the decree-holder, and an application for restoration was also dismissed for default, they must be held barred by *res judicata* so far as the objections preferred are concerned and they cannot be permitted to prefer the same objections to another execution application. (*Meredith and Beevor, JJ.*) RAMNARAIN *v.* BASUDEO. 25 Pat. 595=A.I.R. 1947 Pat. 298.

———S. 11—*Execution proceedings—Decree for arrears of rent—Application for arrest—Plea that decree is rent decree and incapable of execution by arrest—Order holding decree to be rent decree and refusing arrest—Subsequent application on footing of decree not being rent decree—Competency*—Res judicata.

Where, in an application for the arrest of a lessee in execution of a decree for arrears of rent due under a lease, the judgment-debtor pleads that he is not liable to arrest because the decree is a rent decree under S. 177-A of the Bihar Tenancy Act and cannot therefore be executed by his arrest, and the Court upholds the objection and refuses to pass an order for arrest such order holding the decree to be a rent decree operates as *res judicata* in a subsequent application by the decree-holder for execution of the same decree. The decree-holder cannot in the second application reopen the question whether the decree was a decree and is debarred from pleading that the decree is not a rent decree and that he can execute it by attaching the lessee's propery. The fact that the decree-holder in the prior execution conceded that the decree was a rent decree or that the view that the decree was a rent decree was wrong in law, would make no difference. The order holding the decree to be a rent decree having become final, the matter becomes *res judicata* and the Court must treat the decree as a rent decree and the matter cannot be agitated afresh. (*Fazl Ali, C.J. and Agarwala, J.*) PROVINCE OF BIHAR *v.* DARBARI MISSER. 223 I.C. 131=1946 Pat. (Rul.) 151=1946 P.W.N. 248=12 B.R. 325=A.I.R. 1946 Pat. 441=27 P.L.T. 405.

———S. 11—*Execution proceedings—Dismissal for non-prosecution of execution application without deciding objection to sale raised by judgment-debtor—Same objections if can be raised in a subsequent execution application.*

Where an execution application is dismissed for non-prosecution without deciding the objections to sale raised by the judgment-debtor, it cannot operate as a bar to the same objections being raised in a subsequent execution application. (*Sinha and Mukharji, JJ.*) SHYAMSUNDER KUER *v.* MATHURA PRASAD. A.I.R. 1948 Pat. 192.

———S. 11—*Execution proceedings—Failure to raise plea of limitation—Constructive* res judicata*—Implied decision—What amounts to.*

The principle of constructive *res judicata* applies to execution proceedings; if a judgment-debtor fails to raise his objections (whether on the score of limitation or otherwise) to the application for execution which he might and ought to raise, and the application is ordered to proceed, all his objections would be deemed to have been impliedly decided against him and he is precluded from raising the same objections in a later execution of the same decree.

The principle must however be applied with reference to the particular facts of each case. If a plea in bar of execution is not taken, or is not pressed though taken, or is overruled, and execution is ordered to proceed then in those circumstances the judgment-debtor cannot and should not be allowed to raise the same plea again later. Where there is no such decision, either express or by necessary implication, it cannot be said that the rule of constructive *res judicata* applies. (*Sinha and Das, JJ.*) SITARAM DAS *v.* SASAMOLO. 14 Cut.L.T. 53.

———S. 11—*Execution proceedings—Finding by Court that clause in consent decree is not penal—Appeal not filed* —Res judicata.

Where a Court in execution has decided that a clause in a consent decree does not fall under S. 74 of the Contract Act and is not a penal clause, and no appeal is filed against that finding, the question cannot be again raised for decision in a subsequent application, although the subsequent application is one under S. 47, C. P. Code, and not under S. 74 of the Contract Act. (*Davis, C.J.*) AHMED *v.* AMIN MUHAMMAD. I.L.R. (1946) Kar. 132=222 I.C. 628=1946 Sind (Rul.) 130=A.I.R. 1946 Sind 150.

———S. 11—*Execution proceedings—Implied adjudication—Order for execution after notice under O. 21, R. 22—Execution case dismissed for default—Bar of limitation—If may be raised in subsequent execution case—Order directing sale pro-*

clamation to issue—Implied adjudication as to executability of decree—Absence of attachment—If material.

An order in an execution case passed after a notice under O. 21, R. 22, C. P. Code, had been served on the judgment-debtor directing the decree-holder to take further steps in execution of the decree, necessarily implies an adjudication that the decree at the time was capable of execution. The fact that the execution case was dismissed for default at a later stage does not matter, and the judgment-debor is precluded by the order from raising the bar of limitation in the subsequent execution case on the ground that the previous execution case was filed beyond time.

An order in the subsequent execution case directing sale proclamation to issue also proceeds on an implied adjudication that the decree was executable and precludes the judgment-debtor from raising the bar of limitation in the subsequent execution case. The absence of attachment is not material in determining the question whether or not the order previously made directing execution to proceed, involved an adjudication that the decree was executable. *(Das, J.)* Aswini Kumar Das *v.* Karamat Alikha. 82 C.L.J. 278 =A.I.R. 1948 Cal. 165.

———S. 11—*Execution proceedings—Incidental decision—*Res judicata.

If in a previous execution proceeding the question whether the execution is to be taken against the entire tenure or could be limited only to the shares of the persons against whom the decree was being executed was not in issue, a decision in that proceeding that the execution is to be against the entire tenure is only an incidental decision and therefore cannot operate as *res judicata* in a subsequent execution proceeding directed against the shares of some of the judgment-debtors. *(Blank and K. C. Chunder, JJ.)* Ramdas Mukhopadhyay *v.* Uday Chand Mahatab. A.I.R. 1949 Cal. 228.

———S. 11—Execution proceedings—Maintenance decree against husband—Execution—Plea of resumption of cohabitation in bar—If barred by failure to raise in earlier execution petition. *See* C. P. Code, S. 11, Expl. IV--Might and Ought —Maintenance decree. (1946) 1 M.L.J. 277.

———S. 11—*Execution proceedings—Notice under O. 21, R. 22, not contested by judgment debtor—Constructive* res judicata.

Quaere.—Whether the principle of constructive *res judicata* applies to execution proceedings so as to bar a plea of limitation being raised in a later application for execution when the judgment-debtor on service of notice under O. 21, R. 22, C. P. Code, did not appear and plead limitation, in an earlier application? 37 C.W.N. 752; 47 Mad. 641, ref. *(Ramaswami and Sarjoo Prasad, JJ.)* Sheonath Prasad *v.* Bindeshwari Prasad. 29 Pat. 686=A.I.R. 1950 Pat. 518.

———S. 11—*Execution proceedings—Notice under O. 21, R. 22, served on judgment-debtor—Latter, if precluded from raising issue of limitation at time of sale—Limitation Act, S. 3.*

A judgment-debtor who did not appear to contest a notice under O. 21, R. 22, C. P. Code, whether or not it was served on him, is not precluded from raising the issue of limitation when his property is sold.

The judgment-debtor is not hit by *res judicata* or any principle analogous thereto, as under S. 3 of the Limitation Act which applies to execution proceedings the Court is bound to take the point of limitation itself and dismiss the application if it is not in time. 23 C.L.J. 641, ref. to. *(Harries, C.J. and Banerjee, J.)* Karali Prosad Roy *v.* Probodh Chandra Mitra. 54 C.W.N. 900=A.I.R. 1950 Cal. 513.

———S. 11—Execution proceedings—Notice under O. 21, R. 22, served on judgment-debtor—No objection as to limitation taken by him—Execution case dismissed on part satisfaction with costs—Subsequent application by decree-holder for execution—Judgment-debtor if precluded from raising plea of limitation. [*See* Q.D. 1941-1945, Vol. I, Col. 749.] Pramatha Nath Dawn *v.* Charu Chandra. I.L.R. (1945) 1 Cal. 596.

———S. 11—*Execution proceedings—Notice under O. 21, R. 66—Judgment-debtor failing to appear in answer—Order for proclamation and sale—Plea by judgment-debtor of status of agriculturist and prayer for instalments—Constructive* res judicata.

Where a judgment-debtor fails to appear in answer to a notice under O. 21, R. 66, C. P. Code, and the Court orders a proclamation to issue and fixes the date for sale, it is not open to the judgment-debtor to appear on the date of sale and plead his status as an agriculturist and to request for instalments on that ground. By failing to appear in answer to the notice under O. 21, R. 66, C. P. Code, he brings into operation the principle of constructive *res judicata,* and his plea raised subsequently is therefore barred. *(Chagla, C.J.)* Shankar Ramkrishna *v.* Daga Tanaji. I.L.R. (1948) Bom. 517=A.I.R. 1949 Bom. 79=50 Bom.L.R. 610.

———S. 11—*Execution proceedings—Objection as to general executability of decree—Failure to raise in application to transmit decree for execution to another Court—Constructive* res judicata.

In an application to transmit a decree for execution to another Court, the judgment-debtor must raise any objections he might have to the general executability of the decree. Objection as to the non-maintainability of the application for want of leave of the Insolvency Court and an objection that the liability under the decree had become extinguished by reason of the order of discharge of the Insolvency Court are objections that could and should have been taken in an application for transmission of the decree to another Court for execution and if not raised would preclude the judgment-debtors from raising them in a subsequent application for execution of the decree. But it is not so with regard to an objection as to the executability of the decree against a particular item of property. *(Horwill and Kuppuswami Ayyar, JJ.)* Alagappa Chettiar *v.* Muthukaruppan Chettiar. 1947 M.W.N. 131 =60 L.W. 83=A.I.R. 1947 Mad. 305=(1947) 1 M.L.J. 110.

———S. 11—*Execution proceedings—Order directing execution to issue—Plea of limitation in subsequent proceedings—Permissibility.*

Where after all the heirs of a deceased judgment-debtor have been placed on the record, the Court makes an order directing execution to issue and thereafter transfers the case for execution to another Court, it is not open to the heirs of the judgment-debtor who have not taken any steps to have the order set aside to raise the plea of limitation in subsequent proceedings before the transferee Court. An order directing execution to issue is an order deciding as between the parties that the execution is not barred by limitation. Such an order operates as *res judicata* and cannot be challenged in subsequent proceedings. A.I.R. 1923 Pat. 180, rel. on. 49 C.W.N. 260 and 558, ref. to. (*Das and Guha, JJ.*) Akshay Kumari Debi *v.* Nalini Ranjan Mukherjee. 54 C.W.N. 815=A.I.R. 1950 Cal. 493.

———S. 11—Execution proceedings—Order made after notice to judgment-debtor under O. 21, Rr. 22 and 66—*Res judicata*. [*See* Q.D. 1941-1945, Vol. I, Col. 750.] Satya Narayan Banerji *v.* Kalyani Prasad Singh. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

———S. 11—*Execution proceeding—Order passed without jurisdiction.*

An order passed without jurisdiction in an earlier execution proceeding or at an earlier stage of the same proceeding would not operate as *res judicata* in a subsequent proceeding or at a later stage of the same proceeding. (*Horwill, J.*) Sundaresan *v.* Venkatesiah. 1948 M.W.N. 777=61 L.W. 795=A.I.R. 1949 Mad. 196=(1948) 2 M.L.J. 421.

———S. 11—*Execution proceedings—Question of limitation or jurisdiction not raised at early stage—If can be raised later—Question once raised and decided—If can be re-agitated.*

The principle of *res judicata* applies as much in execution proceedings as in a suit. The same objection cannot be raised again and again in execution applications; if it is once raised and decided and there is no appeal, or if it is not raised at the earliest stage when it could and should have been raised, it cannot be raised again and be the subject of a decision at a later stage in the same execution proceedings, whether it be a question of limitation or a question of jurisdiction of the executing Court to execute the decree under execution. (*Davis, C.J.*) Shivalomal *v.* Bholashah. I.L.R. (1945) Kar. 445=225 I.C. 472=A.I.R. 1946 Sind 103.

———S. 11—*Execution Proceedings*—Res judicata—*Application to substitute legal representatives of deceased judgment-debtor—Notice—Failure of heirs to appear and object—Order*—Res judicata.

Where notice of an application to bring on record the legal representatives of a deceased judgment-debtor is served on them, but they fail to appear or to raise any objection and an order for substitution is made such order is conclusive between the parties and operates as *res judicata* in subsequent proceedings in execution. (*O' Sullivan, J.*) Hassomal Chatomal *v.* Lalchand Shewaram. I.L.R. (1946) Kar. 371=A.I.R. 1947 Sind 149.

———S. 11—*Execution proceedings*—Res judicata—*Conditions for applicability.*

The application of the principle of *res judicata* to execution proceedings depends upon the existence of a decree or order and has no relation to the gathering of the fruits of such a decree or order. It cannot be said that the realization of money or partial satisfaction of the decree is a condition precedent to the application of the principle of *res judicata* to orders in execution. (*Braund and Pathak, JJ.*) Nizam-ud-din *v.* Ikramul Haq. I.L.R. (1946) A. 843=1947 A.L.W. 70=1947 A.W.R. (H.C.) 85=1947 A.L.J. 31=A.I.R. 1947 A. 143.

———S. 11—*Execution proceedings*—Res judicata—*Limits.*

Although S. 11, C. P. Code, does not, in terms, extend to execution proceedings, the general principles of the rule of *res judicata* including the rules of constructive *res judicata* do apply to orders and decisions passed in execution cases. Like the statutory rule of *res judicata*, these rules are also subject to certain factors that limit their application, that is to say, the subject-matter of the proceeding in which any particular decision is given must be the same as in a subsequent proceeding in order to make the former decision *res judicata* between the parties. Similarily the issue decided in the previous decision must have directly and substantially arisen for decision. (*Meredith and Ray, JJ.*) Shyam Sunder Prasad *v.* Ramdas Singh. 25 Pat. 397=12 B.R. 466=224 I.C. 37=1946 Pat. (Rul.) 248=A.I.R. 1946 Pat. 392.

———S. 11—Execution proceedings—Suit by prior mortgagee impleading subsequent mortgagee—Decree and sale in favour of prior mortgagee—Subsequent suit by subsequent mortgagee impleading prior mortgagee—Decree passed without objection by prior mortgagee—Latter, if precluded from relying on his mortgage in execution proceedings. *See* Mortgage—Prior and subsequent. A.I.R. 1948 P.C. 89=(1949) 1 M.L.J. 101 (P.C.).

———S. 11—Ex parte *decree—If can operate as* res judicata.

An *ex parte* decree will operate as *res judicata* when it has not been set aside and has thereby become final. 1941 R.D. 321, Not followed. (*Lal, J.M. I.*) Bhagauti Upadhya *v.* Ram Lakhan. 1949 R.D. 149.

———S. 11—*Heard and finally decided—Application by judgment-debtor under O. 21, R. 2, to certify payment out of Court—Dismissal—Order not showing clearly whether decision was on merits or on limitation—Subsequent suit for damages to recover amount of uncertified payment*—Res judicata.

The dismissal of an application under O. 21, R. 2, C. P. Code, for certifying a payment made by the judgment-debtor to the decree-holder out of Court, on the ground of limitation and on the ground of absence of proof of payment, will not operate as *res judicata* so as to bar a suit by the judgment-debtor against the decree-holder for damages after he was made to pay over again the amount uncertified in execution, when the order of dismissal of the application does not show clearly, whether the dismissal of the same was on the score of limitation or on the merits. (*Meredith and Ramaswami, JJ.*) Jagat Kishore Prasad *v.* Parmeshwar Singh. 5 D.L.R. (Pat.) 33.

———S. 11—*Heard and finally decided—Application to set aside* ex parte *decree under O. 9, R. 13 withdrawn—Subsequent suit on ground of fraud—Maintainability.*

Where the application of the plaintiff for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, is allowed to be withdrawn without any adjudication, a subsequent suit brought by him to set aside the *ex parte* decree on the ground of fraud independent of, and not merely confined to the service of summons in the suit, is not barred on the principle of *res judicata.* Even if the Court before which the application under O. 9, R. 13 has been filed decides the application on the merits, that decision cannot operate as *res judicata* on the more radical question of fraud because such a question is beyond the scope and purview of an application under O. 9, R. 13. (*Das, J.*) Bisesar Pathak *v.* Phaguni Mahton. A.I.R. 1948 Pat. 33.

———S. 11—*Heard and finally decided—Decision not appealable—If* res judicata.

The question whether a decision operates as *res judicata* does not depend upon the appealability of the decision. (*Somayya and Yahya Ali, JJ.*) Balakotayya *v.* Nagayya. I.L.R. (1946) Mad. 566=(1946) M.W.N. 27=59 L.W. 67=A.I.R. 1946 Mad. 509=228 I.C. 286=1947 Mad. (Rul.) 63=(1946) 1 M.L.J. 200.

———S. 11—*Heard and finally decided—Defence ought to have been raised but not raised—Suit for declaration that A was owner of suit property and that B had no interest in it whatever—Decree in favour of A—Subsequent suit by B that he was owner and that A was only a mortgagee*—Res judicata—*Test.*

On 22—8—1927, the plaintiff passed a sale deed in favour of the defendant for Rs. 3,000, conveying to him the suit property. Certain creditors of the plaintiff obtained decrees against him and attached the suit property in execution as belonging to the plaintiff, alleging that the transaction of 22—8—1927, was a mortgage and not a sale. The defendant preferred a claim, but failed and then brought a suit for a declaration that he was the owner of the suit property and that the plaintiff had no interest in the property whatsoever and that the property was not liable to be sold in execution of decrees passed against the plaintiff. It was finally held that the transaction was a sale and that the plaintiff had no interest in the suit property on the date of the attachment. The plaintiff subsequently filed a suit for accounts under S. 15-D of the Dekkhan Agriculturists Relief Act, alleging that the transaction of 1927 was only a mortgage and that the consideration was only Rs. 1,700. The defendant raised the plea of *res judicata,* relying on the decision in the prior suit. *Held*: that the decision in the prior suit operated as res judicata in bar of the present suit; it having been held in the prior suit that there was no saleable interest of the defendant in the property, any contention raised now which would be inconsistent with that decision must be held to have been raised and decided in the earlier suit. The real test was that if the decree in the previous suit was inconsistent with the defence which ought to have been raised, then that defence must be deemed to have been raised and finally decided, and would be barred by *res judicata.* 35 Bom. 507; 46 Bom. 803, dist. (*Jahagirdar, J.*) Rajaram Maniram *v.* Jagannath Rawathmal. I.L.R. (1949) Bom. 256=51 Bom.L.R. 234=A. I. R. 1949 Bom. 274.

———S. 11—*Heard and finally decided—Dismissal of appliction for amendment of plaint without hearing parties—If bars subsequent application.*

Where an application for amendment of plaint has been dismissed without hearing the parties, a subsequent application for amendment is not barred by the principle of *res judicata.* (*Sinha, J.*) Thakur Mahto *v.* Jago Kuer. 12 B.R. 383=223 I.C. 294=1946 Pat. (Rul.) 175=A. I. R. 1946 Pat. 429.

———S. 11—*Heard and finally decided—Division Bench expressing opinion on abstract question of law—Decision of subordinate Court applying that opinion to facts of case—If* res judicata.

Where on a reference a Division Bench expresses its opinion on an abstract question of law detached from the facts of the case and leaves that opinion to be applied by the trying Judge, who happens to be a subordinate Judge, the decision of the latter applying the opinion to the facts of the case cannot be held to be final or to constitute *res judicata* between the parties so as to debar another Division Bench from considering its correctness on appeal from that decision. The opinion of the Division Bench on the question of law cannot be held to be *res judicata* as it is not its final decision on the facts of the case. (*Abdur Rahman and Mahajan, JJ.*) Kanta Devi *v.* Kalawati. 48 P.L.R. 205=223 I.C. 417=1946 Lah. (Rul.) 278=A.I.R. 1946 Lah. 419.

———S. 11—*"Heard and finally decided"*—Ex parte *decree—Summary suit on promissory note—Leave to defend—Failure of defendant to make deposit—Decree* ex parte—*Subsequent suit by defendant to declare promissory note as one without consideration*—Res judicata.

An *ex parte* decree is none the less a decree on the merits and can operate as *res judicata.* The Court passing such a decree hears the case on the merits, finally decides it and passes the decree. Where in a summary suit on a promissory note, the defendant, who is given leave to defend on condition of making a deposit, fails to make the deposit as ordered by the High Court and an *ex parte* decree is passed in the plaintiff's favour, that decree would operate as *res judicata* and bar a subsequent suit by the defendant to have the promissory note declared as being without consideration. (*Chagla and Dixit, JJ.*) Baldevdas Karsondas *v.* Mohanlal Bapalal. I. L. R. (1948) Bom. 145=49 Bom.L.R. 902=A.I.R. 1948 Bom. 232.

——S. 11—*Heard and finally decided—Finding on unnecessary issue—Issue raised without objection*—Res judicata.

Where on the pleadings of the parties issues are raised without any objection from the parties, and they are tried and decided, the findings on such issues operate as *res judicata* though the issues might be unnecessary and the points in question might not be directly and substantially in issue. 17 All. 174; (1948) All. 340; 44 Bom. 321; 51 Cal. 631; I.L.R. (1938) Nag. 496; (1932) P. C. 50; (1942) Oudh 309, rel. (*Padhye, J.*) PRABHUDAYAL *v.* CHHOTELAL. I.L.R. (1949) Nag. 147=A.I.R. 1949 Nag. 311=1949 N.L.J. 535=4 D.L.R. (Nag.) 52.

——S. 11—*Heard and finally decided—Finding on unnecessary issues—Suit not maintainable for non-compliance with S. 80—Findings on merits—If* res judicata.

If a suit does not lie by reason of the failure to comply with S. 80, C. P. Code, the Court is bound to dismiss the suit under O. 7, R. 11, C. P. Code, and the findings of the Court on the merits are *obiter* and cannot support a plea of *res judicata.* (*Sir John Beaumont.*) SHANKARLAL PATWARI *v.* HIRALAL. A.I.R. 1950 P.C. 80.

——S. 11—*Heard and finally decided—First suit for redemption removed from pending file—Second suit, if barred.*

The removal of a suit for redemption of a mortgage from the pending file at the stage of peremptory hearing on failure of the plaintiff to produce his witnesses, does not amount to a dismissal of the suit either on merits or on default, and is not a final decision of the suit within the meaning of S. 11, O. 9, R. 8 and O. 17, R. 3, C. P. Code, and a second suit for redemption is not therefore barred on the principle of res judicata. (*Trivedi, J.C.*) SAIYAD ABDUL NABISHA *v.* JIWAN SUNDARJI. A.I.R. 1950 Kut. 1.

——S. 11—*Heard and decided—Meaning of—*Ex parte *decree.*

If a date was fixed for the decision of the previous suit, it means that the parties were given an opportunity to be heard if they wished to be heard. If the defendant did not appear and the suit was decided *ex parte* against him, it cannot be said that the suit was not heard and decided for the purposes of applying the rule of *res judicata.* (*Allsop and Mathur, JJ.*) RADHA MOHAN *v.* ELIZA JANE HILT. I.L.R. (1947) A. 186=A.I.R. 1947 All. 147.

——S. 11—*Heard and finally decided—Suit challenging mortgage held barred by limitation—No decision as to validity of mortgage—Question of validity of mortgage if can be raised in a subsequent suit.*

Where a suit challenging a mortgage by a Hindu widow is dismissed as barred by limitation and the question of the validity of the mortgage is not decided, it cannot operate as *res judicata* so as to bar that question being raised in subsequent suit by the reversioner. (*Seth, J.*) BAL JIT *v.* CHAND KIRAN. I.L.R. (1950) A. 564=1949 A.W.R. 537=A.I.R. 1950 All. 7.

——S. 11—*Heard and finally decided—Suit dismissed for non-payment of adjournment costs—Fresh suit—If barred.*

The dismissal of a suit on plaintiff's default to deposit adjournment costs not being a dismissal on the merits, will not create any bar to the institution of a fresh suit under S. 11, C. P. Code. (*Thadani, C.J. and Ram Labhaya, J.*) GAUHATI BANK, LTD. *v.* BALIRAM DUTTA. A.I.R. 1950 Assam 169.

——S. 11—*Insolvency—Application to adjudicate debtor—Execution sale of debtor's property—Application by Receiver to withhold confirmation—Rejection—Subsequent adjudication order—Application by Receiver for possession of property sold—Question of title—If* res judicata—*Effect of order confirming sale.*

Where an *interim Receiver* appointed under the Provincial Insolvency Act applies to the Court praying that an execution sale, held pending a petition to adjudicate the debtor, should not be confirmed, without a prayer for its annulment, the Insolvency Court has no jurisdiction under S. 4 of the Act to consider the question of title to the property sold. Hence the order confirming the sale will not operate as *res judicata* and bar the jurisdiction of the Insolvency Court to go into the question of title in an application by the Receiver for possession of the property after an order of adjudication is passed. (*Pollock, J.*) BHALCHANDRA GANGADHAR *v.* G. B. PALSULE. I.L.R. (1946) Nag. 937=A.I.R. 1947 Nag. 76=1946 N.L.J. 597=226 I.C. 290=1946 Nag. Nag. (Rul.) 232.

——S. 11—*Litigating under same title—First suit under S. 92 in representative capacity—Second suit in personal capacity*—Res judicata.

The first suit by the plaintiff was under S. 92, C. P. Code on the basis that the temple in dispute was a public one. The prayer in that suit was that the defendant should be made to render accounts and he should be removed from the position of the manager of the temple. The Court found that the temple was not a public one and dismissed the suit as incompetent. The basis of the second suit was that the plaintiff as a descendant of one of the founders had a right to a share in the management.

Held, that the second suit was not barred by *res judicata.* The causes of action in the two suits were different. The plaintiff in the second suit was litigating under a different title. His first suit was in a representative capacity and he was suing in the second suit in his individual capacity on the basis of personal rights. The ground of attack taken in the second suit could not have been included in the suit under S. 92. It would have destroyed the basis of the former litigation. The rule of constructive *res judicata* also could not apply as the cause of action set up in the second suit could not have been included in the former suit. (*Ram Labhaya, J.C.*) BENI GOPAL *v.* GANGADHAR. 4 D.L.R. (A. & M.) 61=A.I.R. 1949 Ajmer 23.

——S. 11—*"Litigating under same title"—Title—Meaning of.*

The word "title" in the expression "litigating under the same title" in S. 11, C. P. Code, refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself in his own interest or for himself as representing the interest of others along with himself and it has nothing to do with the particular cause of action on which he sues or is sued. (*Grille, C.J. and Hemeon, J.*) RAJAH CHATTAR SINGH *v.* DIWAN ROSHAN SINGH. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A.I.R. 1946 Nag. 277.

———**S. 11**—*"Litigating under the same title"—Meaning of—Claim to possession as purchaser and as usufructuary mortgagee.*

A person pleading his right to possession as purchaser in a prior suit and suing for possession later on his right to possession as usufructuary mortgagee of the same property must be held to be "litigating under the same title" for purposes of *res judicata.* In each of the two suits he is litigating in his individual capacity for his own self and in his own interest. It is only when the plaintiff or defendant, as the case may be sues or is sued in the different suits as different *legal persona,* that he can be regarded as not litigating under the same title. (*Meredith and Ray, JJ.*) GOSHWARALI *v.* ADHIKLAL. 26 Pat. 24=A.I.R. 1948 Pat. 302.

———**S. 11**—*Litigating under same title—Suit by plaintiff as heirs of deceased mortgagor for redemption decreed* ex parte—*Subsequent suit against them as executors or administrators filed by mortgagee on mortgage for sale—Whether barred.*

A and *B* instituted a suit for redemption of a mortgage on the basis of a claim that they were entitled at law to the estate of the deceased mortgagor. The suit was decreed *ex parte.* The mortgagee who was the defendant in the previous suit then instituted a suit for the recovery of the amount due under the mortgage by sale of the mortgaged property against *A* and *B* in their capacity as executors or administrators representing the estate of the deceased mortgagor. *A* and *B* were under the will of the deceased mortgagor the sole legatees. It was contended that the previous decision could not be *res judicata* as *A* and *B litigated in different capacities in the two* suits. Overruling that contention,

Held, that as everybody who could possibly be interested in the estate of the deceased mortgagor was a party to the first suit and the same persons were parties to the second suit, *A* and *B* in their capacity as executors or administrators did not represent the interest of persons who were not represented in the previous suit but represented only their own interest as legatees. Further the plaintiffs in the previous suit were alleging that they represented the estate of the deceased mortgagor and that they were the owners of the equity of redemption. As a decree was passed in their favour, it was also *res judicata* between the plaintiff in the present suit and the defendants that the persons entitled to redeem the mortgage had already redeemed it. (*Allsop and Mathur, JJ.*) RADHA MOHAN *v.* ELIZA JANE HILT. I. L. R. (1947) A. 186=A.I.R. 1947 All. 147.

———**S. 11**—"Might and ought". *See* C. P. CODE, S. 11, EXPL. IV.

———**S. 11**—Miscellaneous proceedings—Application under S. 174, Bengal Tenancy Act—Decision in—If *res judicata* in subsequent title suit. *See* B. T. ACT, S. 174. A.I.R. 1949 Dacca 1.

———**S. 11**—*Miscellaneous proceedings*—Ex parte *decree for ejectment in suits under S.* 61 *of Oudh Rent Act—Subsequent suits by tenants under S.* 108, *Cl.* (10) *of Oudh Rent Act converted into suits under S.* 183 *of the U. P. Tenancy Act—Earlier judgment, if operates as* res judicata.

Where after *ex parte* decrees for ejectment had been obtained against tenants under S. 61 of the Oudh Rent Act, the tenants filed suits under S. 108, Cl. (10) of the Rent Act and they are converted into suits under S. 183 of the U. P. Tenancy Act, the prior judgment in the suits under S. 61 of the Rent Act would not operate as *res judicata* in the later suits under the Tenancy Act. (*Misra, J.*) KAPURTHALA STATE *v.* RAM AVADH. I.L.R. (1949) All. 836.

———**S. 11**—*Miscellaneous proceedings—Proceeding under S. 26-F, Bengal Tenancy Act—Decision in, as to nature of tenancy*—Res judicata.

Although S. 11, C. P. Code, does not in terms apply to proceedings under S. 26-F, Bengal Tenancy Act, which are instituted by an application and are not suits strictly so called, principles analogous to those embodied in the said section apply. Accordingly, a decision in a proceeding under S. 26-F, Bengal Tenancy Act, to the effect that the tenancy in question is an occupancy holding, is *res judicata* in a subsequent suit between the same parties for a declaration that the tenancy is a *mokrari nowrashi* holding and not an occupancy holding. 51 C.W.N. 644, rel. on. (*G. N. Das and Das Gupta, JJ.*) APARNATH MUKHERJEE *v.* KANAI LAL CHATTERJEE. A.I.R. 1950 Cal. 300.

———**S. 11**—Miscellaneous proceedings—Proceedings under O. 9, R. 13—Decision in—If *res judicata* in subsequent suit to set aside *ex parte* decree. *See* C. P. CODE, O. 9, R. 13. A.I.R. 1949 All. 198.

———**S. 11**—*"Parties under whom they or any of them claim"—Decision in suit against Hindu widow—If* res judicata *against her adopted son.*

An adopted son of a Hindu, claims not through the widow adopting him but as heir to his adoptive father. Hence a decision in a suit against his adoptive mother who could not represent the whole interest in that litigation which was of a domestic character, in which she was defending her own interest as against persons claiming under her deceased husband, cannot operate as *res judicata* in a subsequent suit by a son adopted by her to her husband. (*Stone, C.J. and Divatia, J.*) BABANNA GURUSANGAPPA *v.* CHANNAPPA CHANMALLAPPA. 231 I.C. 282=48 Bom.L.R. 788=A.I.R. 1947 Bom. 140.

———**S. 11**—*Plea of* res judicata—*Pleading—Mode of—Pleadings if to be set out at length.*

In pleading *res judicata* it is not necessary to set out the pleadings in the earlier suit at length. The Court can look at the pleadings in the former suit to determine whether the issue sought to be raised again was fairly raised in the former suit. The structure of the pleadings should not be stressed too strictly, where sufficient notice has been given to the other side. (*Hidayatullah, J.*) Zingu Deorao *v.* Mahadeo. I.L.R. (1948) Nag. 747=3 D.L.R. (Nag.) 41=A.I.R. 1948 Nag. 358.

———S. 11—*Plea of* res judicata—*Plea based on specific estoppel—Case set up not made out—Circumstances disclosing another species of estoppel—If can be availed of.*

A plea of *res judicata* is only a plea of estoppel by judgment, if a party is unable to make out the particular species of estoppel set up by him, he can still rely upon another species of estoppel made out by the circumstances disclosed in the case. (*Achhru Ram and Khosla, JJ.*) Chiranji Lal *v.* Ram Kanwar. 2 D.L.R. 811=A.I.R. 1948 East. Punj. 26.

———S. 11—*Plea of* res judicata—*Plea if can be raised for the first time in second appeal.*

The question of *res judicata* being one of law can be taken for the first time in second appeal. (*Chandrasekhara Aiyer, J.*) Papamma *v.* Narayana. 1947 M.W.N. 364=60 L.W. 241=A I.R. 1948 Mad. 54=(1947) 1 M.L.J. 274.

———S. 11—*Plea of* res judicata—*Sustainability—Non-production of judgment and decree in previous suit.*

A plea of *res judicata* has to be established by the production of the judgment and decree in the previous suit. In the absence of such judgment and decree, the admitted facts cannot take the place of estoppel by record. (*Thadani, C.J. and Ram Labhaya, J.*) Bhuturi Chutiani *v.* Mikira Chutia. A.I.R. 1950 Assam 162.

———S. 11—*Plea of* res judicata—*Plea if can be raised in appeal.*

A plea of *res judicata* may be properly raised in appeal when the judgment which is pleaded as a bar was delivered after the decision of the trial Judge, and no further facts are to be brought on the record in order to substantiate it. (*Din Mahomed and Mahomed Sharif, JJ.*) Seth Ganga Sagar *v.* Inam Ilahi. 48 P.L.R. 195=224 I.C. 117=1946 Lah. (Rul.) 325=A.I.R. 1946 Lah. 387.

———S. 11—Principles of *res judicata*—How far applicable to Patels and Patwaris Law. *See* Berar Patels and Patwaris Law. 1946 N.L.J. 59.

———S. 11—*Prior decision—Prior suit by manager of temple for declaration of title and possession—Decision against temple on issue of adverse possession—If operates as* res judicata *against temple.*

There is no justification for making a distinction between the manager of a temple and the temple for the purposes of a suit for declaration of title and possession—a subject which must be considered with reference to the substantive law governing the parties, the Code of Civil Procedure and the Law of Limitation. A decision in a prior suit brought by the manager of a temple, which was in substance a suit by the temple suing by its manager, is not merely a decision against the then manager of the temple but is a decision against the temple. A decision in that suit that the title of the temple to the property in suit had been extinguished by reason of adverse possession, would operate as *res judicata* against the temple. **40 C.W.N. 901 (P.C.)**, foll. (*Lodge, C.J. and Thadani, J.*) Lakshmidar Goswami *v.* Upendra Nath Sen. A.I.R. 1950 Assam 92.

———S. 11—*Question of law—Decision on—When binding on parties.*

It is not every decision of a question of law between the parties which is binding but only that decision on such a question which affects the subject-matter or creates a legal relation between the parties or defines the status of either of them, which is binding. Accordingly, a decision of a Division Court on the question of its jurisdiction to pass orders for certain purposes in a Privy Council matter does not operate as *res judicata* between the parties at a later stage so as to preclude another Division Court from making a reference to a Full Bench on the general question of the powers of the Court to pass orders in the same matter. The specific matters which were before the Court at the earlier stage are binding between the parties but the general question which is the subject-matter of reference was not directly and substantially in issue and is not so binding. 56 C. 728 (F.B.), referred to. (*Das, Mookerjee and Lahiri, JJ.*) Santosh Kumar Das *v.* Nripendra Kumar Roy. 53 C.W.N. 533 =A.I.R. 1949 Cal. 430 (F.B.).

———S. 11—*Question of law—Interpretation of words used in deed—If operates as* res judicata.

Where the question decided is as to the correct interpretation of the words used in a deed and no question as to any principle of law or the interpretation or application of any statute is involved, the decision of such a point does operate as *res judicata.* The Oudh view has always been that a finding even on a question of law operates as *res judicata.* (*Misra and Kidwai, JJ.*) Ahmad Alikhan Alavi *v.* Hinga Lal. 21 Luck. 586=1946 Oudh (Rul.) 276=A.I.R. 1947 Oudh 74=227 I.C. 208=1946 O.W.N. 287=1946 A.W.R. (C.C.) 220=1946 O.A. (C.C.) 220.

———S. 11—*Rent suit—Amount of rent payable in money in default of payment of rent in kind—Decision as to*—Res judicata.

A decision in a previous rent suit based on the construction of a lease as to the amount of rent payable in money in default of payment of rent in kind, operates as *res judicata* in a subsequent rent suit. (*Chakravartti, J.*) Tarangini Mitra *v.* Abhinash. I.L.R. (1946) 1 Cal. 510=50 C.W.N. 473.

———S. 11—*Rent suit—Decision as to status of defendant—Subsequent suit for arrears of rent for different period*—Res judicata.

Where in a suit for arrears of rent, the status of the defendant, is determined and decided, it will operate as *res judicata* in any subsequent suit for arrears of rent though for a different period. (*Bates, J.M.*) Jatsaranji *v.* Ram Singh. 1946 A.W.R. (Rev.) 40.

———S. 11—*Rent suit—Decision on tenant's right to abatement of rent—If and when* res judicata.

The question as to whether a decision in a rent suit on an issue bearing on the right of the tenant to abatement of rent is *res judicata* in a subsequent rent suit depends on the question as to whether that issue was directly and substantially in issue or arose only incidentally in the previous rent suit. If the issue was limited as to cover the period of the suit only or was decided in a manner so as to cover only the period for which the rent suit was instituted, the issue would be considered to be raised incidentally; if however, it would appear from the proceedings of the rent suit that the intention of the parties was to raise the question for all times to come and the decision of the Court was intended to cover the liability for all times to come, then and then only the point will be considered to be substantially in issue. Where the claim to proportionate abatement of rent as made in the previous suit and as made in the subsequent suit is founded by the tenant on what he alleged to be the deficiency in the area, and the question about the area was left open between the parties in the previous suit, it must be taken that the decision of the Court on the issue of the tenant's right to abatement of rent was given only for the period of that suit, and that decision is not, therefore, *res judicata.* 30 C.W.N. 593, foll. (*Mitter and Sharpe, JJ.*) Raj Narayan Kundu *v.* Sital Chandra Koley. I.L.R. (1948) 2 Cal. 284.

———S. 11—*Rent suit*—Ex parte *decree—Evidentiary value of—Rate of rent.*

Even if an *ex parte* decree for rent does not operate as *res judicata* on the question of the rate of rent, it would be almost conclusive evidence unless the decree could be attacked on some grounds such as fraud or collusion or such like. A.I.R. 1926 Cal. 767, foll. (*Harries, C.J.*) Haji Abdur Rahim *v.* Maulvi Ahamed Sagir Chaudhuri. I.L.R. (1948) 1 Cal. 469.

———S. 11—*Rent suit*—Ex parte *decree in—If operates as* res judicata *regarding rate of rent in subsequent suit.*

The question whether an *ex parte* decree for arrears of rent operates as *res judicata* or not regarding the rate of rent in a subsequent suit must be determined with reference to the special facts of each case.

In a suit for arrears of mulgeni rent the only dispute was as regards the rate of rent payable and the plaintiff contended that the rate claimed by him was concluded by *res judicata* by reason of the judgment in a prior suit for arrears of rent between the same parties. The rate of rent claimed in that suit was not patent on the face of the records available but could be deduced by calculation from the amount decreed and it was also clear that the decree was *ex parte.*

Held, in the circumstances, the prior decree did not operate as *res judicata* as regards the rate of rent. (*Rajamannar, J.*) Gopalakrishna Bhatta *v.* Gururajacharya. 1947 M.W.N. 126=60 L.W. 97=A.I.R. 1947 Mad. 299=(1947) 1 M.L.J. 109.

———S. 11—*Rent suit*—Ex parte *decree—Rate of rent*—Res judicata.

A previous *ex parte* rent decree is admissible as evidence of the rate of rent decreed by it. It may in some cases be only a piece of evidence to which such value is to be attached as circumstances demand. It may in other cases be binding and conclusive if an examination of what was pleaded, proved and decided shows that one of the things pleaded, proved and decided was the rate of rent. (*Hindley, J.*) Braja Nath Bhakat *v.* Bimalendu Ray. 228 I.C. 426=1947 Cal. (Rul.) 99=A.I.R. 1947 Cal. 21.

———S. 11—*Rent suit—Question of title—Decision on*—Res judicata *in subsequent suit—Suit for rent by donee—Plea and decision that gift was inoperative for undue influence and not acted upon—Effect of in later suit.*

Where in a suit for rent by a donee under a deed of gift, basing his claim on the gift deed, the question of title is raised and the gift deed is attacked as having been executed under undue influence and therefore inoperative, and an issue is raised between the parties on the point and it is held that the deed of gift set up in the plaint had been executed under undue influence and remained inoperative, not having been ever given effect to, it cannot be said that the issue as to title was raised and decided only incidentally. It must be held that the question was directly and substantially in issue and was finally decided by a Court competent to decide it and therefore the decision will be *res judicata* on the question of title in a subsequent suit between the parties. (*Manohar Lall, Ag. C.J. and Ray, J.*) Ram Chandar Prasad *v.* Sital Prasad. 1947 P.W.N. 42=A.I.R. 1948 Pat. 130.

———S. 11—*Rent suit—Question of title—Implied decision—Constructive* res judicata.

The purchaser of property at a rent sale instituted a rent suit against the tenants impleading the plaintiff as a defendant upon the allegation that as a result of the rent sale the plaintiff's darpatni interest had been annulled. The Court held that the darpatni had been annulled and decreed the suit. The plaintiff then brought a suit for a declaration that his interest was that of a darmokoraridar and not a darpatni interest and that his interest had not been annulled.

Held, that it was incumbent on the plaintiff as defendant in the previous rent suit to set up all possible grounds on which annulment could be resisted, and if he did not choose to set up the nature of his interest as a ground against annulment, he could not be allowed to agitate that question again in the present suit. The rule of constructive *res judicata* meant that any issue which might and ought to have been raised by a party in a suit if not raised, must be deemed to have been decided against the party. As the question of title and the question of annulment liung together, the question of title must be said to have been impliedly decided against the plaintiff in the previous rent suit as being involved in the finding that the plaintiff's interest had been annulled. The issue of annulment as raised in the rent suit did directly and substantially raise the issue of title, which in its turn depended upon the nature of the interest which the plaintiff held in the disputed lands. (*Biswas and Blank, JJ.*) Malaya Kumar Mazumdar *v.* Fakir Mahomed. A.I.R. 1947 Cal. 393.

———S. 11—Res judicata—*Change of law after decision.*

Any decision in a previous suit on a particular question between the same parties will not operate as *res judicata* on the same question in a subsequent suit when a different law is in force. (*Chandiramani, J.*) SALIK RAM *v.* SUBEDAR SINGH. 1948 O.A. (C.C.) 6=1948 A.W.R. (C.C.) 6=A.I.R. 1948 Oudh 270=3 D.L.R. (Oudh) 48.

———S. 11—*Res judicata*—Decisions of Revenue Courts on questions of title. *See* MADRAS ESTATES LAND ACT (I OF 1908), Ss. 20-A AND 189. (1949) 2 M.L.J. 454.

———S. 11—Res judicata—*Failure by plaintiff to appeal against decree negativing part of claim as being barred by limitation—Defendant appealing—Different rule of limitation held applicable—Plaintiff's right to portion decreed, if affected.*

Where on a wrong view of the law of limitation applicable, the trial Court holds part of a plaintiff's claim to be barred and the plaintiff submits to the decree and does not appeal against it he cannot be made to suffer by any rule of *res judicata* so far as the remaining property is concerned when the appellate Court on an appeal by the defendant finds that a different rule of limitation is applicable, which really embraces the dismissed portion of the claim also. (*Mushtaq Ahmad, J.*) NAZEERUL HASAN *v.* MAHABIR SINGH. 1949 A. W.R. 368.

———**S. 11 and Income-tax Act (XI of 1922), S. 10 (2) (vi)**—Res judicata *in income-tax matters—Same questions referred to High Court in respect of two successive years—Decision in one only—Claim of assessee upheld becoming untenable by reason of a subsequent decision of the Privy Council—Decision of the High Court on the first reference, if operates as* res judicata *in the decision of the second reference.*

As regards decisions of Courts in income-tax matters, a distinction has to be drawn between decisions which affect the assessment of a particular year and decisions which settle rights or titles and which are, therefore, likely to affect the assessment of not only that year but of other years. In the latter class of cases the doctrine of *res judicata* will apply. If in the course of the assessment for one year a general question of right or title has been decided, this decision will not only govern the assessment for the year in question but in subsequent years. Even if the question has not been expressly decided but the decision is by implication, either because the point was not raised or was conceded, the same result will follow.

Where the question as to the right of an assessee to claim under S. 10 (2) (vi) of the Income-tax Act as set off of the unabsorbed previous depreciation was referred to the High Court in respect of two successive years in regard to the same assessee and the High Court upheld the claim in one reference (while the other was adjourned) and such a claim became untenable by reason of a subsequent decision of the Privy Council,

Held, that the decision of the High Court in the prior reference cannot operate as *res judicata* in decision of the second reference. (*Malik, C.J. and Seth, J.*) KAMLAPAT MOTILAL *v.*

COMMISSIONER OF INCOME-TAX, U. P. A.I.R. 1950 A. 249=1950 A.L.J. 178=1950 I.T.R. 812.

———S. 11—Res judicata—*Principle of, if affected by one of the defendants in the prior suit being in collusion with the plaintiffs—Effect of such collusion.*

Even if one of the defendants to the prior suit was in collusion with the plaintiff, the decision in the suit would still be binding on the defendants on the principle of *res judicata.* The only requisite condition is that the issue raised in the subsequent suit should have been raised in the prior suit directly and substantially between the parties and that it was finally decided. The fact of collusion would not affect the issue being substantially and directly in question. The only effect of the collusion would be that they would not contest the suit and had let an *ex parte* decree be passed. But even *ex parte* decrees and consent decrees operate as *res judicata.* (*Agarwala, J.*) BABOO *v.* KIRPA DEI. 1950 A.W.R. 575=A.I.R. 1950 All. 488.

———S. 11—Res judicata—*Property of Mappilla tarwad held not liable to attachment in execution in earlier suit—Subsequent execution petition claiming that debtors had shares in the same property under Mappilla Maramakkattayam Act* (1938) (*Madras Act XVII of* 1939)—*Barred by* res judicata.

Where in a suit to which the decree-holder was a party it has been held that the property of a Mappilla tarwad of which the judgment-debtors were members was not liable to attachment and the execution petition is dismissed it is not open to an assignee of the decree from the original decree-holder to claim in a fresh execution petition that the judgment-debtors were entitled to a share in the properties under the provisions of the Mappilla Marumakkattayam Act and ask for attachment of the debtors' rights in the property. Such a claim is barred by *res judicata* as that is a point which the decree-holder could have raised in the earlier proceedings but failed to do so. (*Lord Simonds.*) SHIVRAJ GOPALJI *v.* AYISSA BI. 54 C.W.N. 55=62 L.W. 770=1949 M. W.N. 683=A.I.R. 1949 P.C. 302=51 P.L.R. 411=1949 A.W.R. 576=(1949) 2 M.L.J. 493 (P.C.).

———S. 11—*Revenue proceedings—Decision as to title and possession in correction of papers case—If* res judicata *in later suit for declaration of rights.*

A decision in a correction of papers case that a person had no title to a grove and was not in possession would not operate as *res judicata* in a subsequent suit by that person for a declaration of his rights in that grove. (*Pedley, S.M.*) ALGU *v.* BHAWANI CHARAN. 1947 R.D. 208 (1)=1947 A.W.R. (Rev.) 103.

———S. 11—*Revenue proceeding—Wife becoming statutory tenant after inheriting holding from husband—If bound by decision against husband in earlier litigation.*

Where a wife becomes a statutory tenant by operation of law (U.P.) after inheriting the holding from her husband, she is not divested on that account of her obligation to decisions in a previous litigation between her husband, her predecesor-in-interest and the party concerned in the subsequent litigation. So long as the origin of her tenancy rights lay in inheritance she is bound by the previous litigation. (*Lal, J.M. I and Haider, J.M. II*|) BACHCHA SHUKUL *v.* SAMPATA. 1949 R.D. 62.

———**S. 11**—*Scope of.*

Where the title put forward by a plaintiff is totally different and wholly independent of the title put forward in an earlier suit, the bar of *res judicata* does not apply. Explanation 4 of S. 11 of the Civil Procedure Code requires that the matter not only "might" but "ought" to have been made a ground which implies that the plaintiff was bound to include the present claim also in the earlier suit. But, where the present claim of the plaintiff is his individual right which he was not bound to include in the earlier suit which was filed by the plaintiff as karnavan of the tarwad wherein he was bound to include only all the available title of the tarwad, Explanation 4 would have no application. (*Satyanarayana Rao and Viswanatha Sastri, JJ.*) MADHAVAN VARIAR v. CHATHU NAMBIAR. 63 L.W. 956=1950 M.W.N. 713=(1950) 2 M.L.J. 501.

———**S. 11**—Scope—Bar of trial of issue and of suit. [*See* Q.D. 1941-1945, Col. 767.] MAHOMED OBEDULLAH KHAN *v.* MAMOMED ABDUL JALIL KHAN. 1945 A.W.R. (H.C.) 414=222 I.C. 196=1946 A. (Rul.) 135.

———**S. 11 and O. 32**—Scope and effect—Decree against minor—Setting aside by minor—Suit in ground of gross negligence of guardian—Competency. *See* MINOR—DECREE AGAINST. 27 Pat. 441 (F.B.).

———**S. 11**—*Scope—Decree against minor—Right of latter to avoid.*

Per *Mahajan, J.*:—It cannot be seriously suggested that S. 11, C. P. Code, has any application to an action by a minor to have a decree vacated on the ground of gross negligence of his guardian. Under that section the Court is prevented from trying a suit on an issue which has already been determined, but if the judgment previously determining the suit or the issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud collusion or gross negligence, the obstacle contemplated by S. 11 is automatically removed. (*Abdul Rahsid, Ram Lall and Mahajan, JJ.*) IFTKHAR HUSSAIN KHAN *v.* BEANT SINGH. I.L.R. (1946) Lah. 515=225 I.C. 456=48 P.L.R. 280=A.I.R. 1946 Lah. 233 (F.B.).

———**S. 11**—*Scope—Doctrine of* res judicata—*If prevails over* lis pendens—*Rule—Relative meaning and effect.*

Where there is conflict between *res judicata* and *lis pendens, lis pendens* gives way and the principle of *res judicata* reigns supreme. *Res judicata* means a matter adjudicated upon or a matter on which judgment has been pronounced. *Lis pendens* is an action pending and the doctrine of *lis pendens* is that an alienee *pendente lite* is bound by the result of the litigation. Therefore, the rule of *res judicata* prevails over the doctrine of *lis pendens;* and once a judgment is duly pronounced by a competent Court in regard to the subject-matter of the suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them. 61 Cal. 494, foll. 34 I.A. 102, ref. (*Bhagwati and Dixit, JJ.*) DIGAMBARRAO HANMANTRAO *v.* RANGRAO RAGHUNATH RAO. I.L.R. (1949) Bom. 480=51 Bom.L.R. 623=A.I.R. 1949 Bom. 367=4 D.L.R. (Bom.) 183.

———**S. 11**—*Scope—How far exhaustive.*

Although S. 11, C. P. Code, is not exhaustive of the circumstances under which the principle of *res judicata* may be applied and the principle may be applicable to a case which does not fall within the four corners of that section, where a case does fall within the purview of that section, then all the requirements of that section must be complied with before the rule of *res judicata* can be held to be applicable, as it is of the essence of a Code to be exhaustive on all matters with which it deals. The principles of *res judicata* independently of S. 11 have been applied to proceedings other than suits and to decisions given at different stages in the same suit. Where the question is whether a decision given in a previous suit about a particular matter should operate as *res judicata* in a subsequent suit in which the same matter is directly and substantially in issue, the rule of *res judicata* cannot be applied if all the requirements of the section have not been fulfilled. (*Bhandari and Achhru Ram, JJ.*) BACHINT KAUR *v.* KARAM CHAND. A.I.R. 1948 Lah. 195.

———**S. 11**—*Scope of the rule of* res judicata—*How different from that under the Code of* 1859.

While the bar of *res judicata* under the old Code of 1859, depended upon the identity of the causes of action, under the present Code it depends upon the identity of the issues raised in the two cases. Further the old Code did not include the rule of constructive *res judicata,* whereas the present Code has been enacted to give a statutory recognition to that rule also. (*Seth, J.*) BISHUN DAS *v.* LAXMI NARAIN. 1949 A.W.R. 142=A.I.R. 1949 All. 596=1949 A.L.J. 33.

———**S. 11**—*Second appellate decision not on merits—Finality of the decision of the lower appellate Court.*

Where a second appeal is dismissed on some technical ground the decision of the first appellate Court becomes final and the latter will operate as *res judicata* in a subsequent suit between the same parties as regards the questions decided by it. (*Misra and Kidwai, JJ.*) AHMAD ALIKHAN ALAVI *v.* HINGA LAL. 21 Luck. 586=1946 Oudh (Rul.) 276=A.I.R. 1947 Oudh 74=1946 O.W.N. 287=227 I.C. 208=1946 A.W.R. (C. C.) 220=1946 O.A. (C.C.) 220.

———**S. 11**—*Suits for grant of patta and recovery of rent under the Madras Estates Land Act—Decisions in—Limits to their binding nature—Prior suit for rent claiming extra charge for water drawn from landholder's tank—Dismissal* in limine—*Liability of tenant for water rate as 'rent' not decided—Subsequent suit by landholder for subsequent years claiming water rate as part of the rent—If barred by* res judicata.

With reference to suits for grant of patta and recovery of rent under the Madras Estates Land Act, if the terms and conditions of the tenancy generally are decided for a particular year in a litigation between the landlord and tenant, the decision would bind the parties in future years also, unless fresh circumstances intervene or there is an alteration in the law governing the rights of parties. The case, however, would be different if the former decision was based on facts and circumstances, special or peculiar to the year, with respect to which the prior decision was rendered.

The rule that a decision would be *res judicata* even if it is not specific and express but is necessarily implied in the decree can have no application to a case where the court in the former suit has expressly left undecided the issues that arose for decision in the later suit.

Where a Collector dismisses the previous suit for rent *in limine* on the sole ground that the landholder not having complied with the statutory requirements entitling him to an enhancement of rent, could not sue for the water rate which he had not hitherto collected, and declines to go into the question whether the tenant would be liable for the water rate as rent, the decision in that suit cannot operate as *res judicata* in a subsequent suit by the landholder against the same tenant claiming water rate as part of the rent for subsequent years. (*Viswanatha Sastri, J.*) Goripalayam Durga, Madura *v.* Kesavaswamy Iyer. 5 D. L.R. (Mad.) 138=1949 M.W.N. 466=(1949) 2 M.L.J. 153.

———**Ss. 11 and 47**—*Suit on judgment when decree remains unsatisfied but inexecutable—Maintainability.*

In cases where an executable decree became incapable of enforcement at the instance of the person entitled to its benefit and the rights thereunder are not extinguished by satisfaction or otherwise, neither S. 11, C. P. Code, nor the principle of *res judicata* operates as a bar to the maintainability of the suit on the judgment. (*Misra, J.*) Hamid Ali Khan *v.* Shanti Devi. 5 D.L.R. (A.) 147=1950 A.W.R. 272.

———**S. 11, Expl. IV**—*Applicability—Conditions.*

For the applicability of Expl. IV to S. 11, C. P. Code, it is not only necessary that the defendant could have raised the defence in reply to the former suit but it must also be shown that he was bound to do so. (*Grille, C.J. and Hemeon, J.*) Rajah Chattar Singh *v.* Diwan Roshan Singh. I.L.R. (1946) Nag. 159=1946 N.L.J. 690=A. I.R. 1946 Nag. 277.

———**S. 11, Expl. IV**—*Applicability—Decree amended under S. 30 of the U. P. Agricultural Relief Act—No objection that the original transaction was not a loan—Subsequent plea that it was not a loan—Bar of* res judicata.

Where a Court amends a decree under S. 30 of the U. P. Agriculturists Relief Act and reduces the interest without any objection from the debtor, it must be deemed to have decided, by necessary implication, that the transaction was a loan, as otherwise, it could not have reduced the interest. In such a case the principle of constructive *res judicata* would bar the debtor from raising the plea subsequently that the transaction was not a loan. (*Wanchoo, J.*) Ram Prasad *v.* Lala Hansraj. A.I.R. 1950 All. 106.

———**S. 11, Expl. IV**—Applicability—Knowledge of facts—If material. [*See* Q.D. 1941—1945, Vol. I, Col. 769.] Bakaram *v.* Kashi Rao. I.L.R. (1945) Nag. 1005.

———**S. 11, Expl. IV**—*Applicability—Prior suit asking for dissolution of partnership if one found to exist—Decision that defendant was the sole proprietor—Subsequent suit for dissolution and accounts—Bar of* res judicata.

In a suit of 1937, the plaintiff prayed that if it be found there was a partnership with the defendant it be dissolved and the latter be called to account and it was decided that the defendant was the sole proprietor of the concern in question. In a later suit the same plaintiff asked for dissolution of partnership and accounts.

Held: Expln. IV to S. 11, C. P. Code, applied to the case. The plaintiff had envisaged in the earlier suit one set of circumstances in which the partnership may be held to exist. He kept back other grounds which he ought to have raised which he is now debarred from raising by Expln. IV to S. 11. (*Malik, C.J. and Kidwai, J.*) Behari Lal *v.* Ram Swarup. I.L.R. (1949) A. 144=1949 A.W.R. 35=A.I.R. 1949 All. 265.

———**S. 11, Expl. IV**—*Applicability—Proceeding under S. 112-A of Bihar Tenancy Act—Defence not raised by landlord in that proceeding—Whether can be raised in subsequent suit.*

As a proceeding started on the basis of an application by a tenant under S. 112-A of the Bihar Tenancy Act is a suit, any defence which the landlord could have raised in that proceeding cannot be raised by him in a subsequent suit brought by him as the principle of *res judicata* clearly applies to such a situation. (*Fazl Ali, C.J., Shearer and Sinha, JJ.*) Ram Ran Bijoy Prasad Singh *v.* Ramaqya Kuer. 226 I.C. 363=1946 Pat. (Rul.) 381=12 B.R. 736=1946 P. W.N. 304=A.I.R. 1946 Pat. 354 (F.B.).

———**S. 11, Expl. IV**—*Applicability—Suit by alienee from Hindu widow for partition after her death—Reversioner impleaded in suit not setting up his title—Subsequent suit by him for declaration and possession of alienated property—Constructive* res judicata.

Where in a suit for partition brought by an alienee from a Hindu widow after her death, the reversioner impleaded in that suit does not set up his title to the alienated property as reversioner and the suit is decreed, a subsequent suit by him for a declaration and for possession of that property as a reversioner is barred by the principle of constructive *res judicata.* 5 I.A. 149 and 52 I.A. 100, applied. (*Manohar Lall and Mahabir Prasad, JJ.*) Mt. Mantorni *v.* Krishna Ballabh Rai. 27 Pat. 835=A.I.R. 1949 Pat. 340.

———**S. 11, Expl. IV**—*"Might and ought"—Admission by party in previous suit of certain facts for getting decision on question of law—Suit, if involved decision as to facts.*

Under S. 11, Expl. IV, C. P. Code, the question is whether a matter ought to have been raised by a party in the previous suit. It is not sufficient that the matter might have been raised and if raised a decision on it might have resulted in the dismissal of the suit against him. If the party in the previous suit chose to admit certain facts for the purpose of getting a decision on an important question of law, it is impossible to say that the suit involved a decision as to the facts and in the circumstances Expl. IV cannot be used to preclude the party from raising the point. (*Sir Madhavan Nair.*) GOVERNMENT OF THE PROVINCE OF BOMBAY *v.* PESTONJI ARDESHIR WADIA. 76 I.A. 85=53 C.W.N. 489=I.L.R. (1949) Bom. 110=4 D.L.R. (P.C.) 187=62 L. W. 444=1949 M.W.N. 407=A.I.R. 1949 P. C. 143=51 Bom.L.R. 635=(1949) 2 M.L.J. 161 (P.C.).

———**S. 11, Expl. IV**—*Might and ought—Argument open to party but not advanced—Decision adverse to party*—Res judicata.

It is no answer to a plea of *res judicata* that an argument which could be advanced was not advanced in the previous suit. Where in a prior suit which was hotly contested on almost all possible pleas, a decision is given which is adverse to the contesting party, it cannot but be binding on him and his successors. Where an argument was open to the party, the fact that he did not advance it would not remove the bar of *res judicata,* if it is otherwise binding. (*Ghulam Hasan, C.J. and Kaul, J.*) RAJ BRIJRAJ SINGH *v.* SHATRANJAI SINGH. 21 Luck. 463=A.I.R. 1947 Oudh 45=226 I.C. 154=1946 Oudh (Rul.) 220.

———**S. 11, Expl. IV**—*Might and ought—Decree amended under S.* 30 *of the U. P. Agricultural Relief Act—No objection that the original transaction was not a loan—Subsequent plea that it was not a loan—Bar of* res judicata.

Where a Court amends a decree under S. 30 of the U. P. Agriculturists Relief Act and reduces the interest without any objection from the debtor, it must be deemed to have decided, by necessary implication, that the transaction was a loan, as otherwise, it could not have reduced the interest. In such a case the principle of constructive *res judicata* would bar the debtor from raising the plea subsequently that the transaction was not a loan. (*Wanchoo, J.*) RAM PRASAD *v.* LALA HANSRAJ. A.I.R. 1950 All. 106.

———**S. 11, Expl. IV**—*Might and ought—Different suits in respect of recurring liability.*

Where the former suit in respect of an allowance for a particular period is filed in the Munsif's Court and the subsequent suit in respect of the same allowance for a subsequent period is filed in a Court of higher jurisdiction namely, the Court of the Civil Judge, because of the larger amount due then and a point is raised in the later suit which might and ought to have been raised in the earlier suit, Expl IV to S. 11, C. P. Code, will apply so as to make the decision in the earlier suit operate as *res judicata* in the later suit. (*Kidwai, J.*) HUSAIN MIRZA *v.* RAGHUBAR DAYAL. 22 Luck. 37=228 I.C. 225=1946 A.W.R. (C.C.) 257=1946 O.W.N. 349=1946 O.A. (C. C.) 257=1947 Oudh (Rul.) 22=A.I.R. 1947 Oudh 122.

———**S. 11, Expl. IV**—Might and ought—Ejectment—Plea of protection under Buildings Act not raised—Decree—Execution—Plea of bar—*Res judicata. See* BIHAR BUILDINGS (LEASE, RENT AND EVICTION) CONTROL ACT, S. 11. A.I. R. 1950 Pat. 354.

———**S. 11, Expl. IV**—*Might and ought—Execution proceedings—Notice under O.* 21, *R.* 22, *C. P. Code, on execution application for delivery of property—Judgment-debtor not raising plea of limitation—Order for delivery—Plea of limitation at later stage—Maintainability.*

Where a notice of an execution application for delivery of possession under O. 21, R. 22, is served upon the judgment-debtor, but he remains silent though appraised of the fact that delivery proceedings had been started, he cannot, at a subsequent stage of the proceedings, raise a plea of limitation, which must be deemed to have been decided against him when the Court makes an order for execution. The judgment-debtor, by reason of his omission to raise the plea on receipt of notice, must be held estopped from raising the question of limitation at a later stage, though the plea might be well-founded. (*Mukherjea and Sharpe, JJ.*) HARIS CHANDRA CHOWDHURY *v.* DINES CHANDRA CHOWDHURY. I.L.R. (1946) 1 Cal. 637=224 I.C. 111=1946 Cal. (Rul.) 206=50 C.W.N. 667=A.I.R. 1946 Cal. 375=82 C. L.J. 226.

———**S. 11, Expl. IV**—*Might and ought*—Ex parte *decree*— Res judicata.

Where the defendants in a suit raise an important issue in their written statement, but do not press that issue and remain *ex parte,* a decision *ex parte* given against them operates as *res judicata* against them in a subsequent suit in respect of that issue. (*Shearer and Sinha, JJ.*) MARKANDA *v.* V. K. R. NAIDU. 26 Pat. 717=A.I.R. 1949 Pat. 197.

———**S. 11, Expl. IV**—*Might and ought—Facts on which plea might have been raised not within knowledge of party at time of former suit—Plea, if barred.*

Where a plea was not actually raised and the facts on which it might have been raised were not within the knowledge of the party at the time of the former suit, the plea is not barred in a subsequent suit by *res judicata,* either actual or constructive. (*Padhye, J.*) JAGO RAMA *v.* NARAYANA SADOBA. I.L.R. (1947) Nag. 985=A.I.R. 1948 Nag. 150=1948 N.L.J. 65.

———**S. 11, Expl. IV**—*Might and ought—Issue raised but referred by Court to separate suit*—Res judicata.

Where the defendant's right to the relief which he seeks in a subsequent suit instituted by him might and ought to have been raised in the earlier suit against him, and where he had in fact raised it in the earlier suit, but the Court remitted him to another suit, the subsequent suit would still be barred by *res judicata,* notwithstanding that liberty had been expressly reserved to him to institute a separate suit. (*Biswas and Blank, JJ.*) MALAYA KUMAR MAZUMDAR *v.* FAIK MAHOMED. A.I.R. 1947 Cal. 393.

———**S. 11, Expl. IV**—*Might and ought—Maintenance decree—Failure to set up plea in* *prior application for execution that decree had become unexecutable by resumption of co-habitation after decree—Plea if can be set up in subsequent execution application—Bar of constructive* res judicata.

Where in a prior application for execution of a decree for maintenance against the husband, the latter after notice does not come forward to resist the application, he cannot come forward to resist a subsequent application on the ground that cohabitation was resumed after decree and that as such the decree had become ineffective and unexecutable. Such a plea is barred by constructive *res judicata*. It is an objection which might and ought to have been raised in the prior application for execution. (*Chandrasekhara Aiyar, J.*) Palaniammal *v.* Arumugham Chetti. 227 I.C. 148=1946 M.W.N. 432=59 L.W. 219=A.I.R. 1946 Mad. 481=(1946) 1 M.L.J. 277.

——**S. 11, Expl. IV**—*"Might and ought"—Meaning of—Claim as usufructuary mortgagee to possession—If might and ought to be included in claim based on purchase.*

On an identical cause of action all different grounds of attack or defence and the whole claim, arising therefrom, should be pleaded or claimed, as the case may be, provided the facts to be pleaded and proved in evidence of all the claims and all the different grounds of attack or defence are not mutually destructive of each other. When the cause of action is one and identical, the whole of the claim arising out of that must have been included or must be deemed to have been included in the former suit, however inconsistent the several standpoints of that claim may be. A claim to possession based as usufructuary mortgagee not only might but ought to be included in a claim based as purchaser, when the action is the act of dispossession by the defendant. (*Meredith and Ray, JJ.*) Goshwarali *v.* Adhiklal. 26 Pat. 24=A.I.R. 1948 Pat. 302.

——**S. 11, Expl. IV**—*Might and ought—Mortgage—Suit by subsequent mortgagee impleading prior mortgagee—Prior mortgagee failing to appear or to set up priority of his mortgage—Effect—*Res judicata—*Right to set up priority later on in execution or suit.*

It is perfectly clear that where a prior mortgagee is made a party to a mortgage suit for sale brought by a subsequent mortgagee, who neither attacks the prior mortgage nor seeks to postpone it to his own, the failure by the prior mortgagee to appear in the suit or to set up his priority does not in any sense render the decree in that suit *res judicata* against the prior mortgagee, so as to debar him from thereafter bringing the property to sale in enforcement of his own mortgage. If the prior mortgagee is attacked, then it would be incumbent upon the mortgagee to appear and defend his right by setting up his priority over the plaintiff's mortgage, as otherwise his failure to do so in such a case would bar him on the principle of *res judicata* from afterwards claiming priority in execution or in a later suit. The failure to defend something which has never been attacked can never form the basis for a plea of *res judicata*. 39 I.A. 68, dist.: 47 I.A. 11, foll.; 58 A. 1056 (F.B.); A.I.R. 1915 Cal. 570; A.I.R. 1937 Cal. 446; A.I.R. 1930 Lah. 1063; 1 P.L.T. 629, ref. (*Manohar Lall, J. on difference of opinion between Meredith and Bennett, JJ.*) Rajnarain *v.* Saligram. 27 Pat. 332.

——**S. 11, Expl. IV**—*"Might and ought"—Omission to claim relief claimable in prior suit—Right to claim in later suit—*Res judicata.

Where a party could obtain a relief in a suit but fails to pray for it, and the rights of the parties are fully adjudicated upon in the suit, the party failing to raise the point and to claim such relief must be held to be debarred from raising that question and claiming the relief in a later suit. (*Verma and Bennett, JJ.*) Jamna Prasad *v.* Ahmad Wali Khan. 228 I.C. 553=1947 A. (Rul.) 95=1947 A.L.W. 261=1947 A.W.R. (H.C.) 313=A.I.R. 1947 A. 311.

——**S. .11, Expl. IV**—Might and ought—Plea not raised in prior suit—If can be raised in later suit—*Res judicata.* [*See* Q.D. 1941-1945, Vol. I, Col. 775.] Sobhag Singh *v.* Ranjit Singh. 221 I.C. 531=12 B.R. 246=1946 P.C. (Rul.) 90=I.L.R. (1945) Kar. (P.C.) 299 (P.C.).

——**S. 11, Expl. IV**—*Might and ought—Prior* ex parte *decrees.*

There is a constructive *res judicata* in case of previous *ex parte* decrees and all matters which were or could have been directly and substantially in issue in the previous suit are deemed to have been heard and finally decided in the previous case unless it is proved that the previous *ex parte* decree was either a nullity (on some legal ground) or was not based on the merits of the case. (*Lal, J. M. I.*) Niranjan Prasad *v.* Nanda. 1949 R. D. 221.

——**S. 11, Expl. IV**—*Might and ought—Question of paramount title in a mortgage suit—Adjudication—*Res judicata—*Conditions.*

In a mortgage suit the question of paramount title is not ordinarily considered to be a matter which might have or ought to have been made a ground of defence. But where the mortgagee denies the validity of the title set up by a person which title the mortgagee considers would affect his remedy on the basis of the mortgage and wants an adjudication of that title and impleads such person on the express ground that the title set up might be decided, the person impleaded must appear and plead if he wants that a decision should not go against him by default. (*Malik, C.J. and Wali Ullah, J.*) Durga Prasad *v.* Ghasi Ram. A.I.R. 1950 All. 314.

——**S. 11, Expl. IV**—*"Might and ought"—Rent suit—Objection based on S. 168-A* (1) (b) *of Bengal Tenancy Act not raised by judgment-debtor in suit—Whether can be raised at execution stage.*

Where after the sale at which the decree-holder purchased the tenure in execution of the earlier rent decree was confirmed, a suit for rent is brought for the period between the date of the earlier suit and confirmation of the sale, an objection based on S. 168 (1) (*b*) of the Bengal Tenancy Act is available to the judgment-debtor and ought to be taken by him as a defence to the subsequent rent suit. If he fails to do so, he is precluded by the rule of constructive *res judicata* from taking that objection at the execution stage. 49 C.W.N. 614, 50 C.W.N. 803 and 50 C.W. N. 261, Dist. (*Mitter and Sharpe, JJ.*) Tarapada Roy *v.* Amano Barmonya. 83 C. L. J. 206.

——————**S. 11, Expl. IV**—*Might and ought—Suit and decree for ejectment under S.* 171, *U. P. Tenancy Act—Subsequent suit by defendant tenant under S.* 183—Res judicata.

Where a tenant has been ejected under a decree under S. 171 of the U. P. Tenancy Act he cannot file a suit under S. 183 of the Tenancy Act on the ground that certain plots in the holding constituted a grove and that in respect of them the earlier decree under S. 171 was without jurisdiction. The earlier decision will operate as *res judicata* because, the question of certain plots being grove ought to have been raised in defence in the earlier suit and a decision obtained. (*Sultan Ahmad, J.M. and Singhal, M.*) Hanuman Prasad *v.* Md. Bux. 1949 R.D. 162.

——————**S. 11, Expl. IV**—*"Might and ought"—Suit for partition on basis of gift deed and sale deed—Defence based on allegation of deeds being not true and valid—Omission to set up title as reversioner in defence—Suit subsequently by defendant as reversioner*—Res judicata.

Where a plaintiff claims an estate and the defendant resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge then to bring forward. Where in a prior suit for partition instituted on the basis of a gift deed and a sale deed, the defendant resists the claim pleading that the deeds of sale and gift were not true and valid, but fails to set up his title as a reversioner in defence, he is debarred on the principle of *res judicata* from claiming as a reversioner, in a subsequent suit, the same properties. The omission to set up title as a reversioner in the former suit operates as *res judicata* in the later suit. 47 I.C. 141, diss.; 46 All. 230; A.I.R. 1931 All. 21; 60 Cal. 1406; 10 Luck. 361, dist.; 5 I.A. 149; 19 I.A. 234; 52 I.A. 100, foll.; 2 I.A. 283; 2 Cal. 152 (F.B.); 34 I.A. 87; 2 Pat. 125 (F.B.); 2 Pat. 217, ref. (*Manohar Lall and Mahabir Prasad, JJ.*) Mantorni *v.* Krishnaballabh. 27 Pat. 835=A.I.R. 1949 Pat. 340.

——————**S. 11, Expl. IV and O. 21, R. 63**—*Might and ought—Suit by money decree-holders for declaration that charge decree for maintenance in favour of the judgment-debtor's mother was collusive and not binding filed before claim application by the mother was made and pending when adverse order on claim application was passed—Sale in execution and claimant filing no separate suit under O.* 21, *R.* 63, *within one year of adverse order—Effect—Creditors not setting up in their suit and appeal thereon the finality of the order on claim application and claimant succeeding in the suit—Claimant seeking to execute her maintenance decree and enforce the charge—Auction purchasers in the sale in execution of the money decree if barred from questioning the binding nature of the maintenance decree by a fresh suit for declaration to that effect*—Res judicata *if applies.*

X a money decree-holder attached in execution of his decree six items of property and when the properties were posted for sale on 13th July, 1936, *Y*, the mother of the judgment-debtor intervened and claimed in her application that she had been given a maintenance charge over those six items and other items of property by a decree in her favour. Four days before the claim application was filed, *X* and another decree-holder *K* filed a suit representing the general body of creditors for a declaration that the charge decree obtained by *Y* was collusive and not binding on the creditors. When the claim application came on for hearing on 13th July, 1936, *X* informed the Court that he had filed a suit on 9th July, 1936, for a declaration that the charge was not binding. The Court thereupon passed the order. "Notify the suit presented and charge claimed by the petitioner." The property was brought to sale and five items were purchased by *K* (one of the plaintiffs in the creditors' suit) and one item was purchased by a stranger. The suit by the creditors was dismissed on 15th December, 1939. An appeal was allowed, the Subordinate Judge holding that the maintenance decree obtained by *Y* was vitiated by fraud and collusion. In second appeal however the decree of the trial Court was restored upholding the charge over the six items in favour of *Y*. When *Y* filed an execution application to enforce her maintenance decree the application was resisted and *K* and *S* the purchasers in the prior execution filed a suit for a declaration that since *Y* had not filed a suit under O. 21, R. 63, C. P. Code, within one year of the adverse claim order, *K* and *S* had obtained as auction-purchasers an absolute right to the properties. On a question whether *K* and *S* were barred by *res judicata* from questioning *Y's* right to execute her decree,

Held: The provisions of O. 21, R. 63, C. P. Code, are mandatory and the decision in a claim petition is final unless the party aggrieved takes the course indicated in the rule by instituting a suit to supersede it within a year. The specific provisions of O. 21, R. 63, override the more general principle enunciated in S. 11, C. P. Code.

In any event as the auction-purchasers obtained an indefeasible right to the properties upon the expiry of one year from the adverse claim order which was after the suit had been filed, the creditors were not bound to rely on that new right in the pending suit. Accordingly the second suit by the auction-purchasers is maintainable and not barred by *res judicata*.

Case-law reviewed. (*Horwill, Viswanatha Sastri and Balakrishna Aiyar, JJ.*) Seethamma *v.* Kotareddi. I.L.R. (1950) Mad. 101=62 L. W. 337=1949 M.W.N. 265=A.I.R. 1949 Mad. 586=4 D.L.R. (Mad.) 209=(1949) 1 M.L.J. 593 (F.B.).

——————**S. 11, Expl. IV**—*Might and ought—Suit for arrears of maintenance charged on two properties—Decree against one property alone and the other held not liable—Second suit for arrears* *claiming it from the property held liable in prior suit—Plea that it was liable only to a proportionate share of charge—If open.*

In a suit in the Munsiff's Court for arrears of maintenance charged on two items of property one was held not liable to the charge and the suit decreed as against the other. In a later suit for subsequent arrears filed in the Civil Judge's Court, the arrears was claimed only from the property held liable in the prior suit. It was contended in defence that that property was liable only to a proportionate share of the charge.

Held, that the plea now raised was one which ought to have been raised in the earlier suit.

Expl. IV to S. 11, C. P. Code, barred its being raised in the later suit and for this purpose it did not matter that the earlier suit was in the Munsiff's Court and the later one in the Court of the Civil Judge. (*Chandiramani and Misra, JJ.*) Raghubar Dayal *v.* Husain Mirza. 23 Luck. 13=A.I.R. 1948 Oudh 147=1948 O.W.N. 209.

———**S. 11, Expl. IV**—*Mortgage suit—Person entitled to priority by subrogation impleaded—Omission to set up right*—Res judicata.

Where, to a suit by a mortgagee on a mortgage bond of certain property, a person who has a right by subrogation to priority is made a party and he omits to set up his right, a suit subsequently brought by him for that purpose is barred by *res judicata* by virtue of Explanation IV to S. 11, C. P. Code. (*Hemeon, J.*) Suwabai *v.* Krishna. I.L.R. (1947) Nag. 668=A.I.R. 1948 Nag. 256=1948 N.L.J. 170.

———**S. 11, Expl. VI**—*Applicability—Adjudication of title to property based on a settlement deed—Subsequent suit by children of one of the parties—Basis of claim in both suits same—Bar of* res judicata.

O. P. No. 106 of 1924 was filed by the appellant for Letters of Administration to the estate of one *P*, deceased and *A* the adoptive mother of the appellant filed affidavits admitting that the appellant was her adopted son and only heir and legal representative of the deceased *P*. More than four years later she *A* sought to set aside the grant of Letters of Administration claiming to be the sole legal representative of the deceased, alleging that her previous affidavits were obtained from her on false and fraudulent misrepresentations; but the contentions were overruled. No attempt was made to carry this on appeal. Nearly eleven years after this in 1943, *A* executed a deed of settlement in favour of *G* and his wife, conveying the suit property which was comprised in the estate of *P*, and in a suit filed by the appellant for recovery of possession of the suit property *G* and his wife *inter alia* contended that the property belonged to *A* and in the alternative raised the plea of adverse possession by *A*. Both of these contentions were overruled and the suit decreed. This decree was allowed to become final by *G* and his wife. The present suit was filed in 1945 by the children of *G* and his wife claiming title to the said property under the same settlement deed.

Held, the facts were covered by Expl. VI to S. 11 of the C. P. Code, and that the suit was barred by the rule of *res judicata* by reason of the decision in the prior suit. The parents of the plaintiffs in the prior case must be deemed to have represented not only their interests but also the interests of the children under the same deed. (*Rajamannar, O.C.J. and Mack, J.*) Narayanaswami Naidu *v.* Parvati Bai. 61 L.W. 542=1948 M.W.N. 555=A.I.R. 1949 Mad. 379=(1948) 2 M.L.J. 211.

———**S. 11, Expl. VI**—Applicability of principle of. *See* Aliyasanthana Law. (1949) 2 M.L.J. 413.

———**S. 11, Expl. VI**—*Applicability—Claim on behalf of others—If to be clearly made.*

In order to attract the provisions of Expl. VI to S. 11, C. P. Code, the person litigating must put forward a right common to him and others not only on his behalf but on behalf of the others as well. It is not sufficient if he simply puts forward a right alleged to be common to him and others. (*Edgley and Clough, JJ.*) Abdul Karim Mondai *v.* Tara Prasad Sukul. 51 C. W.N. 452.

———**S. 11, Expl. VI**—*Applicability and scope—If controlled by O. 1, R. 8—Suit not complying with O. 1, R. 8—Decision in—If* res judicata.

Expl. VI to S. 11, C. P. Code, is controlled by O. 1, R. 8, and unless the provisions of O. 1, R. 8, C. P. Code, were complied with in respect of a prior suit, S. 11, Expl. VI would not apply, so as to make the decision therein operate as *res judicata* in respect of a later representative suit. 24 Cal. 385; 60 I.A. 278, foll.; 64 I.A. 17; (1937) Lah. 70; 44 All. 19; 94 I.C. 47; (1932) Cal. 271, ref. (*Kaul and Chandiramani, JJ.*) Mohan Kishan *v.* Seth Ramprasad. 4 D.L.R. (Luck.) 25=A.I.R. 1949 A. 761.

———**S. 11, Expl. VI**—*Compromise decree in suit under S.* 92—Res judicata.

A compromise decree passed in a suit relating to a public trust under S. 92, C. P. Code, may operate as *res judicata* under S. 11, Expl. VI, C. P. Code. In order to attract the provisions of that Explanation it must be shown that the suit was a *bona fide* litigation in respect of a public right and the defendants were persons interested in that right. (*Henderson, J.*) Chand Bibi *v.* Shaikh Esmail. I.L.R. (1945) 1 Cal. 500=A.I.R. 1949 Cal. 214.

———**S. 11, Expl. VI**—*Joint Hindu family—Suit on behalf of that family by leading member—Decision in—If* res judicata *in subsequent suit by non-impleaded minor member.*

A decision given in a suit instituted on behalf of a joint Hindu family by a leading member of that family, operates as *res judicata* in a subsequent suit brought for the same relief by a son of the plaintiff in the previous suit, who was a minor at that time and was not impleaded as party. (*Sinha and Mahabir Prasad, JJ.*) Lakhan Lal Jha *v.* Jiwach Jha. A.I.R. 1948 Pat. 388.

———**S. 11, Expl. VI**—Parties and representatives—Hindu law—Partition suit—Father and sons made parties—Compromise decree—Sons refusing to accept compromise and given up and struck off—Decree—If *res judicata* in respect of subsequent suit by son. *See* Hindu Law—Partition. 2 D.L.R. 84.

———**S. 11, Expl. VI**—Parties and representatives—Minor—Suit by guardian for possession—Dismissal—Failure of guardian to appeal—Gross negligence—Minor if barred from filing fresh suit by reason of *res judicata*. *See* Adverse Possession—Interruption. 26 Pat. 220.

———**S. 11, Expl. VI**—*Prior suit against manager of Hindu family though not described as such—Decision in, how far operates as* res judicata *against the other members of the family not impleaded by name—Plea of* res judicata *can be raised for first time in second appeal.*

The question of *res judicata* being one of law can be taken for the first time in second appeal. It is not necessary that a suit should be filed against a person as manager of a Hindu family describing him as such for the proceedings to be binding on the other members. Merely because the other members of the family were not parties to the suit by name it does not follow that they are not bound by the decree. If it can be gathered that the suit was directed against the defendant as manager of the family the other members are bound and the decree will operate as *res judicata* against them in any subsequent suit. (*Chandrasekhara Aiyar, J.*) Papamma *v.* Narayana. 1947 M.W.N. 364=60 L.W. 241=A.I.R. 1948 Mad. 54=(1947) 1 M.L.J. 274.

———**S. 11, Expl. VI**—*Representative suit—Decision in suit by reversioner*—Res judicata.

A reversioner's suit is always regarded as a representative suit brought on behalf, and for the benefit of, the entire reversionary body regardless altogether of the consideration whether in the plaint he has purported to sue on behalf of such body. This result is implicit in the nature of a reversionary interest. Till succession opens out the interest of all the reversioners is nothing more than a mere *spes successionis* and it cannot be predicated with regard to any particular individual that he will be the person entitled to the property as a reversioner at the time the estate falls into possession. The right which is given to the near reversioner to sue to avoid a transfer is intended for the protection of the interests of the entire reversionary body and it is for this reason that a suit brought by him in the exercise of such a right has always been regarded as a representative suit. A decision in such a suit, therefore, operates as *res judicata* in a subsequent suit by another reversioner for a similar relief. (*Achhru Ram, J.*) Chanan Singh *v.* Chuhar Singh. 50 P.L.R. 208.

———**S. 11, Expl. VI**—*Representative suit—Suit by managing committee of mosque as trustees—Decision in*—Res judicata.

A decision in a suit brought by the managing committee of a mosque in the capacity of trustees is binding upon every person who is interested in the mosque by virtue of Expl. VI to S. 11, C. P. Code. 1938 Lah. 499; 1938 Lah. 369 and 1937 P.C. 1, ref. (*Teja Singh and Khosla, JJ.*) Laxmi Narain Gododia *v.* Mahomed Shafi Bari. A.I.R. 1949 East Punj. 141.

———**Ss. 13 and 44-A**—*Decree passed by Lahore High Court—Execution—Jurisdiction of Court in Indian Union.*

After the 15th August, 1947, the Lahore High Court has become, in relation to a Court in the Indian Union, a "Foreign Court". There has been no notification in the Official Gazette declaring Pakistan to be a reciprocating territory for the purposes of S. 44-A, C. P. Code. That being so, after the 15th August, 1947, a Court in the Indian Union has no jurisdiction to entertain any application for execution of a decree passed by the Lahore High Court. A.I.R. 1950 Cal. 12, rel. on. (*Harnam Singh, J.*) Said-ul-Hamid *v.* Federal Indian Assurance Co., Ltd., New Delhi. 52 P.L.R. 396.

———**Ss. 13 and 44-A**—*Decree passed before "appointed day" by Court now situate in Pakistan—Transfer of that decree by that Court to Court in Indian Dominion for execution after "appointed day"—Jurisdiction of latter Court—Judgment on which decree was passed—If "foreign judgment"—Independence Act, S.* 18 (3).

Before the "appointed day", (*i.e.*) 15th August, 1947, a decree was passed by a Court which after that day is situate in Pakistan. On an application by the decree-holder after the appointed day, that Court transferred the decree for execution to the Court of Small Causes at Calcutta in the Indian Dominion. The decree-holder filed in the latter Court an application for execution of the decree so transferred.

Held, that the Court of Small Causes at Calcutta had no jurisdiction to entertain the application for execution. From after 15th August, 1947, the Court which passed the decree under execution became in relation to that Court, a "foreign Court" and the judgment on the basis of which the decree was passed, was a "foreign judgment". Accordingly, the provisions of S. 13 read with S. 44-A, C. P. Code, were attracted to the case. A person who intends to enforce the judgment of a foreign Court will have to satisfy the requirements under S. 13, unless the judgment is by a Court situate within the territories of a reciprocating country as under S. 44-A of the Code. (*Mookerjee and Chunder, JJ.*) Dominion of India *v.* Hiralal Bathra. 53 C.W.N. 817=A.I.R. 1950 Cal. 12.

———**S. 13**—*Foreign Court—Submission to jurisdiction—Question of fact—Issue of commission by foreign Court—Party taking part in enquiry—Inference.*

The question as to whether there was submission to the foreign Court is a question of fact. Even though a person protests against the jurisdiction of a particular Court and pleads that the Court had no jurisdiction and does not submit expressly, still if he does any act which is likely to place his viewpoint before the trial Court and if he is likely to be benefited by the decision in his favour, it must be presumed that he voluntarily did an act which would amount to submission to the jurisdiction of that Court. Where the defendant was shown not only to have engaged counsel but to have instructed him to object to several questions and even got himself cross-examined and raised a plea which if it had been accepted by the Court would have ended in the dismissal of the suit,

Held, that the defendant did take part in the proceedings and the facts were enough to raise an inference that he submitted to the jurisdiction of the foreign Court. (*Kuppuswami Ayyar, J.*) Subramanya Aiyar *v.* Annaswami Iyer. 1947 M.W.N. 531=60 L.W. 577=A.I.R. 1948 Mad. 203=(1947) 2 M.L.J. 279.

———**S. 13**—*Foreign judgment—Meaning of—'Directly adjudicated upon'—Requisites.*

Notwithstanding the definition of judgment in S. 2, C. P. Code, the expression "foreign judgment" in S. 13 must be understood to mean an adjudication by a foreign Court upon the matter before it.

There is nothing in S. 13 to support a contention that every step in the reasoning which led the foreign Court to its conclusion must have been "directly adjudicated upon". "Directly" does not mean "expressly". Hence where the "matter" which was "directly adjudicated upon" by the foreign Court was the validity of an award and the order of the Court in effect was that the award had been properly filed and that the objections to it must be dismissed, that order is a "judgment" within S. 13 of the C. P. Code which is conclusive between the parties as to the validity of the award. (*Lord Du Parcq.*) Brijlal Ramjidas *v.* Govindram Gordhandas Seksaria. 74 I.A. 203=2 D.L.R. 277=1948 M.W.N. 214=50 Bom.L.R. 556=60 L.W. 701=1947 A.L.J. 578=A.I.R. 1947 P.C. 192=(1947) 2 M.L.J. 498=52 C.W.N. 82 (P.C.).

———**S. 13 (b)**—*Foreign Court—Compromise decree—Decree in effect a recognition of arrangement already arrived at between parties—Decree whether on merits—If conclusive between parties.*

From the language of S. 13 of the C. P. Code and the observation of the Privy Council in *Keymer* v. *Viswanathan Reddi,* (1916) 44 I.A. 6: 32 M.L.J. 35: I.L.R. 40 Mad. 112 (P.C.), it would appear that for a decree of a foreign Court to be conclusive there should be a controversy and an adjudication thereon. The present petitioner and the respondent went to the *Yanam* Court in French territory with a drafted compromise, and the decree in question was passed on the strength of that compromise. On a question whether that decree can be regarded as a decision given on merits within the meaning of S. 13, C. P. Code,

Held, that when the parties went to that Court they had no dispute and there was nothing for the Court to decide. The decree given mechanically in accordance with a prescribed rule was in effect a mere recognition by the Court of an arrangement already arrived at between the parties, and in the circumstances it could not be said that the decree of the *Yanam* Court was a decision on merits and cannot be said to be conclusive between the parties. (*Shahabuddin, J.*) Appalaraja *v.* Venkatasubbarao. 1946 M.W.N. 70=225 I.C. 348=59 L.W. 60=A.I.R. 1946 Mad. 296=(1946) 1 M.L.J. 66.

———**S. 13 (b)**—*Decree of foreign Court against absent defendant by consent of plaintiff and remaining defendant without hearing any evidence—Decree not one given on merits.*

Where in a suit in a foreign Court against two defendants the real issue between the parties was as to which of the defendants was in possession of the goods in dispute and liable to surrender them to the plaintiff and one of the defendants being absent at the time of the hearing a decree is passed against the absent defendant alone by consent of the plaintiff and the other defendant without hearing any evidence from the plaintiff, the decree is not a decree passed on the merits of the case within the meaning of S. 13 (*b*) of the C. P. Code so as to bind the absent defendant. (*Bell, J.*) Nemichand Sowcar *v.* Y. V. Rao. 59 L.W. 315=1946 M.W.N. 427=A.I.R. 1946 Mad. 448=1947 Mad. (Rul.) 18=227 I.C. 465=(1946) 2 M.L.J. 16.

———**S. 13 (a)**—*Applicability—Foreign Court's decree—Execution by Court of another State—Defences open to judgment-debtor—Decree* ex parte—*Defendant not submitting to jurisdiction or authority—Effect.*

It is open to a Court executing a foreign Court's decree to enquire whether the foreign Court had jurisdiction to pass the decree. A decree pronounced by a Court of a foreign State in a personal action *in absentem,* the absent party not having submitted himself to its authority, is a nullity. The judgment-debtor has the same defences open to him as if he were sued on a foreign judgment, *i.e.,* those arising under S. 13, C. P. Code, he can plead under S. 13 (*a*) that the foreign judgment has not been pronounced by a Court of competent jurisdiction. 21 I.A. 171; 40 Bom. 551; I.L.R. (1938) Bom. 16; 63 Cal. 1033, rel. (*Rajadhyaksha and Shah, JJ.*) Chunilal Kasturchand *v.* Dundappa Damappa. 5 D.L.R. (Bom.) 197=52 Bom.L.R. 660.

———**S. 15, O. 7, R. 10 and O. 23, R. 3**—*Scope and effect—Suit in Munsif's Court—Court holding that it had no jurisdiction and returning same for presentation to proper Court—Subsequent presentation to proper Court—Jurisdiction of latter Court to record compromise entered into filed in first Court before return of plaint—Suit when 'instituted' and pending.*

A compromise arrived at when the suit is not pending is not covered by O. 23, R. 3, C. P. Code, and the Court has no jurisdiction to record such a compromise under O. 23, R. 3, C. P. Code. The party affected may enforce his rights by a separate suit. The combined effect of S. 15, C. P. Code, and O. 7, R. 10, is that a suit cannot be said to be instituted so long as the plaint is not presented before the Court competent to try the suit. When the Court before which the plaint is filed returns it for presentation to the proper Court the suit has to be considered as instituted only on the date of such presentation in the proper Court. The institution of the suit commences from that date (*i.e.,* date of presentation to the proper Court) and the suit thus instituted is not a continuation of the suit before the first Court which had really no jurisdiction to entertain it and therefore returned for presentation to the proper Court. Till the date of presentation in the proper Court there is no "suit" pending within the meaning of O. 23, R. 3, C. P. Code; and therefore a compromise filed before the first Court which returned the plaint for presentation to the proper Court (having decided that it had no jurisdiction to try the same) could not be said to be filed in the proper Court and the Court to which the plaint is then presented would have no jurisdiction to record the compromise as it is not filed during the pendency of the suit before that Court. O. 23, R. 3 does not apply. The party affected might in such a case have a remedy by a separate suit to enforce the compromise, but not under O. 23, R. 3, C. P. Code. 16 W.R. 47; A.I.R. 1941 Mad. 711, dist.; 52 Bom. 548; 15 C.L.J. 241; 30 C.W.N. 90; A.I.R. 1940 Mad. 689, foll.; A.I.R. 1915 All. 344, not foll. 18 P.L.T. 250, rel. on. (*Ramaswami and Sarjoo Prasad, JJ.*) RAM KISHUN RAI *v.* ASHIRBAD RAI. 29 Pat. 699=A.I.R. 1950 Pat. 473.

———**S. 16**—*Jurisdiction—Suit for partition of immovable property in Ceylon being assets of money-lending firm owned by joint Hindu family in British India—Suit if can be treated as one for taking accounts of a dissolved partnership or for enforcement of a trust.*

A British Indian Court has no jurisdiction to decree a division of immovable properties situate in Ceylon or even to decree that such properties are joint family properties. Such property cannot be treated as personalty for purposes of jurisdiction. The fact that the properties are assets acquired by a money-lending business owned by a Hindu joint family in India will not have the effect of converting them into partnership assets so as to enable the British Indian Court to treat the suit as one for taking accounts of a dissolved partnership. Nor can the suit be treated as one, for the enforcement of a trust so as to enable the British Indian Court to act *in personam*. The manager of a joint Hindu family is not under the well-known obligations of a trustee with regard to the administration of the funds of the family. (*Wadsworth and Rajamannar, JJ.*) NACHIAPPA CHETTIAR *v.* MUTHU KARUPPAN CHETTIAR. I.L.R. (1946) Mad. 858=228 I.C. 506=1947 Mad. (Rul.) 87=59 L.W. 227=1946 M.W.N. 240=A.I.R. 1946 Mad. 398=(1946) 1 M.L.J. 310.

———**Ss. 16 and 20**—*Jurisdiction—Test—Agreement at Karaikal to sell immovable property in Tiruchirapalli and receipt of advance—Suit in Tiruchirapalli Court for specific performance of agreement and possession—Maintainability.*

The criterion for jurisdiction is whether the defendant owns property in the jurisdiction of the Court in which the suit is filed and whether the suit sought to be filed against him is to obtain relief respecting such property.

When a non-resident foreigner owns property within the jurisdiction of an Indian Court and enters into a contract regarding that property no matter where such a contract is entered into, the Indian Court clearly has jurisdiction to try that suit by reason of the immovable properties being situate within its jurisdiction. Hence, where a suit for specific performance of an agreement entered into at Karaikal for the sale of a building in Tiruchirapalli District and for possession is filed in the Tiruchirapalli Court, that Court clearly has jurisdiction to try that suit. (*Mack, J.*) MAHOMED EUSOOF MARICAR *v.* SUBRAMANIAN CHETTIAR. 63 L.W. 43=A.I.R. 1950 Mad. 272=(1949) 2 M.L.J. 735.

———**S. 16 (d)**—*Applicability—Suit for commission payable under agreement on sale of coal during term of mining lease—Nature of obligation—T. P. Act, S. 40.*

S. 16 (*d*), C. P. Code, does not apply to a suit for commission payable to the plaintiff under an agreement on all coal sold by the defendant during the term of his mining lease, as the suit is not one for the determination of an interest in immovable property. The coal is not immovable property, and the obligation is one falling under S. 40, T. P. Act, as an obligation annexed to the ownership of immovable property but not amounting to an interest therein. The suit may, therefore, be brought in the Court at the place where the money is payable. (*Pollock, J.*) MANNIBAI *v.* S. C. CAMBATA & CO., LTD. I. L. R. (1948) Nag. 200=A.I.R. 1948 Nag. 286=1948 N.L.J. 467.

———**Ss. 16 (d) and 20**—*Applicability—Suit for dower debt and administration of estate—Prayer for declaring dower debt as charge on estate—Only fractional portion of properties within Court's jurisdiction.*

A widow of a deceased Mahomedan filed a suit for recovery of her dower debt and also for the administration of her deceased husband's estate. She also prayed for a declaration that the dower debt was a charge upon that estate. Only a fractional portion of the properties was situated within the jurisdiction of the Court in which the suit was filed.

Held, that the Court had jurisdiction to entertain the suit and that S. 16 (*d*) and not S. 20, C. P. Code, applied to the facts of the case. (*Sinha and Mukarji, JJ.*) GAUHAR JEHAN BEGUM *v.* IMTEYAZ JEHAN BEGUM. 26 Pat. 523=A.I.R. 1948 Pat. 384.

———**S. 20**—"Cause of action"—What constitutes—Contract for sale of goods completed by correspondence—Jurisdiction in respect of breach of such contract. [*See* Q.D. 1941—1945, Vol. I, Col. 789.] POKHAR MAL *v.* KHANEWAL OIL MILLS. 221 I.C. 594=1946 Lah. (Rul.) 118.

———**S. 20 (c)**—*Contract—Breach—Suit for damages—Court situate in place of revocation of contract—Jurisdiction of.*

There can be no doubt that the revocation of a contract is part of the cause of action in a suit for damages for breach of the Court and therefore the Court at the place where the contract was revoked has jurisdiction to entertain and try such suit. (*Fazl Ali, C.J. and Ray, J.*) A. B. & CO., LTD. *v.* DISTRICT BOARD, GAYA. 25 Pat. 292=A.I.R. 1947 Pat. 134=231 I.C. 10=13 B.R. 476.

———**S. 20**—*Jurisdiction—Contract for sale of goods C.I.F. or F.O.R.—Consignment found at destination to be not according to sample—Claim for breach—Court in place of such discovery* *has jurisdiction as part of the cause of action arose there.*

The law presumes delivery to the buyer on a C.I.F. or F.O.R. contract at the time of the consignment on the basis that goods according to sample are being consigned. If the seller fails to supply goods according to sample or dishonestly supplies goods of another description, the buyer in law has a right to refuse acceptance. Therefore it cannot be said that no part of the cause of action arose in the place where the buyer made the discovery that the goods consigned were not according to sample. The District Munsif's Court in that place has clear jurisdiction to try a suit resulting from damages alleged by reason of the breach of the implied contract underlying the C. I. F. or F. O. R. contract that the goods supplied would be in accordance with the particular sample or description. It would be strange in law that if a merchant in Madras orders goods from Bombay F.O.R. or C.I.F., pays for them and finds on opening the consignment sent to him that they are not according to sample or of an entirely different description, he should be compelled to go to the Court within whose jurisdiction the seller lives and sue him there. (*Mack, J.*) Jwarmal Shivanath Malu *v.* Haji Ibraham Kassam Uplitwala. 1950 M. W. N. 16=A.I.R. 1950 Mad. 768=(1950) 1 M.L.J. 38.

———**S. 20**—*Jurisdiction of Court—Suit against Dominion of India—Cause of action arising outside jurisdiction.*

A Court has no jurisdiction to entertain a suit brought against the Dominion of India, where the cause of action has arisen wholly outside the ordinary original jurisdiction of that Court, on the sole ground that the Dominion of India dwelt or carried on business or personally worked for gain within the local limits of that Court. 40 C. 308. applied. (*Harries, C.J. and Banerjee, J.*) Dominion of India *v.* R. C. K. C. Nath & Co. 5 D.L.R. (Cal.) 53=A.I.R. 1950 Cal. 207.

———**S. 20 (c)**—*Jurisdiction of Court—Suit for declaration that registered deed of surrender is fraudulent and collusive—Registration of deed —If part of cause of action.*

In a suit for a declaration that a registered document surrendering certain rights in immovable property is fraudulent and collusive, the registration of the document is a part of the cause of action, and the Court within whose jurisdiction the registration took place has, therefore, jurisdiction to entertain the suit. (*Das Gupta, J.*) Rajlakshmi Dassi *v.* Banamali Sen. 85 C.L. J. 270=A.I.R. 1950 Cal. 510.

———**S. 20**—Place of suing—Contract—Provision for payment of balance against Railway receipt—Place of suing. *See* Contract—Place of suing. (1948) 2 M.L.J. 101.

———**S. 20**—*Place of suing—Suit for protection of unregistered trade-mark—Jurisdiction of Court in place where offending goods were supplied on commercial scale by defendant.*

If the trade-mark for the protection of which a suit is brought has not been registered, the suit is in the nature of a passing off action, such as may be brought to assert the right of a person who uses a particular mark to prevent others using the same in such manner that there is a likelihood of the public being deceived into thinking that the goods sold by such others are goods made by the plaintiff. In such a case, it is not necessary for the plaintiff to show that any member of the public has actually been deceived on account of the alleged infringement of his exclusive right in relation to the trade-mark in question; it is sufficient that there is a strong probability of confusion occurring in the normal course of trade. Nor is it necessary that an actual attempt should be alleged on the defendant's part to sell goods as those of the plaintiff; it is sufficient that the defendant should be shown to be selling goods which are of so similar a nature to those of the plaintiff that a purchaser might infer a common origin.

In order, therefore, that a Court at a place should have jurisdiction, it is necessary to show that the defendant was responsible for sending out to that place goods which were liable to deceive intending purchasers into believing that they were goods manufactured by the plaintiff. It would of course not be sufficient if such goods were supplied by the defendant to individual purchasers for use, as in such a case, the probability of any members of the public being deceived would be slight. It is necessary to show that the supply has been on a commercial scale to persons who are likely to offer the goods in question for sale. In order that the Court should have jurisdiction, it is not necessary to show that the transfer of property in such goods was effected within its jurisdiction. Although this question may be of importance in a suit founded on the bill for peromance of the contract of sale, it is hardly relevant for the determination of the question whether there has been commercial supply of the offending goods within the jurisdiction by the defendant. (*Cornelius, J.*) Bhagwan Das Ramji Lal *v.* Watkins Mayor & Co. A.I.R. 1947 Lah. 289.

———**Ss. 20 and 21**—*Place of suing—Suit in respect of contract—Terms of business—Condition regarding forum—Strict constuction.*

Whee one of the conditions of the business was that any legal proceedings in respect of or arising out of the contract should be instituted in the Madras Courts, but in respect of the suit transaction there was no completed contract but merely an offer from one side.

Held, that the condition as to place of suing did not apply. When parties enter into an agreement restricting their rights to institute suits except in particular Courts it must be strictly proved that the restriction applies to the particular proceeding instituted. (*Horwill, J.*) Vastiram Manmal & Co. *v.* Ramaswamy Iyer. 230 I.C. 228=1947 Mad. (Rul.) 180=A.I.R. 1947 Mad. 99=59 L.W. 551=1946 M.W.N. 639=(1946) 2 M.L.J. 270.

———**S. 20**—*Place of suing—Suit on promissory note providing for payment of the amount anywhere.*

Where a promissory note is executed in Bombay and the defendant is a resident of Bombay, a suit cannot be filed on it in Kutch because of a recital in the promissory note that the money may be paid anywhere. (*Trivedi, J.C.*) Manek Devji *v.* Ratanbai A.I.R. 1950 Kut. 66.

———S. 20 (b)—*Meaning of expression 'voluntarily resides' in S. 20 (b).*

The expression 'voluntarily resides' in S. 20 (*b*) of the Code, does not mean permanent residence and temporary residence will confer jurisdiction on the Court. (*Balakrishna Ayyar, J.*) Devaraja Aiyar *v.* Srinivasan. 63 L.W. 1172=1950 M.W.N. 705=(1950) 2 M.L.J. 484.

———**S. 20 (c)**—Posting of offer—Part of cause of action, if arises at the place of posting. *See* Contract Act, S. 4 and C. P. Code, S. 20 (*c*). 1947 A.L.J. 193.

———**S. 20 (c)**—Sale of goods—Contract for—Breach—Failure to supply goods—Claim for refund of overpayments and damages for non-supply of goods —Jurisdiction of Court where part of the cause of action arose. *See* C. P. Code, O. 2, R. 2 and S. 20 (*c*). 225 I.C. 96.

———**S. 20 (c)**—*Scope and effect of—Non-resident foreigner—Suit against in Indian Court —Cause of action arising within jurisdiction—Competency—Decree—Executability in India and in foreign territory—Considerations—Principles governing.*

The competency of a Court to entertain a suit when the cause of action has arisen within its jurisdiction is not affected by reason of the fact that the defendants or one of the defendants, if there are more than one, is a non-resident foreigner. The competency of a Court to entertain an action and to pass a decree must be judged by the municipal law of the State when that question arises in a Court within the limits of the State which has constituted the Court which entertains the suit or passes the decree and is not to be judged by rules of international law. But when a question arises as to the enforcement of a decree or order passed by a Court in another territory, the rules of international law must prevail.

When the cause of action has arisen within the jurisdiction of a Court of India, a suit against a non-resident foreigner on such cause of action is properly instituted in that Court and the decree passed in such Court would be a decree of a competent Court, having regard to S. 20 (*c*), C. P. Code, and can be executed against any property belonging to the judgment-debtor anywhere in the territory in India. But the competency of an Indian Court by reason of the cause of action having arisen within its limits cannot render the decree one passed by a Court of competent jurisdiction so as to make it enforceable against the judgment-debtor who is foreigner and is not ordinarily residing within the jurisdiction of the Court which passed the decree and who has not submitted to that Court's jurisdiction. The judgment-debtor is entitled to raise all contentions which he could raise if a suit were filed on a foreign judgment; when a question arises as to the enforcement of a decree or order passed by a Court in another territory, the rules of international law must prevail. While a Court in British India cannot disclaim jurisdiction against a non-resident foreigner, if the plaintiff's cause of action, wholly or in part, arose within its jurisdiction, the question as to what sanctity will attach to its decree if it is questioned in a foreign country is a different question. 56 All. 828; 17 Bom. 662; 25 Bom. 528; 26 Mad. 544 (P.C.), foll. (*Rajadhyaksha and Shah, JJ.*) Chunilal Kasturchand *v.* Dundappa Damappa. 5 D.L.R. (Bom.) 197=52 Bom.L.R. 660.

———**S. 20 (c)**—*Scope—Cause of action arising wholly or in part—Test—Suit on contract—Place where cause of action arises.*

Although Expl. III to S. 17 of the Code of Civil Procedure of 1882 corresponding to S. 20 of the present Code of 1908 has been omitted as no longer necessary in view of the wide ambit of clause (*c*) of the present S. 20 of the Code, it is nevertheless a correct statement of what is still the law. Accordingly in suits arising out of contract the cause of action arises at any of the following places, *viz.*, (1) the place where the contract was made; (2) the place where the contract was to be performed or performance thereof completed; (3) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. Where an agent in Madras to whom goods were sent from Rajahmundry for sale on commission undertook to pay the net sale value to the owner on the third day after the transaction closes, there is by necessary implication an agreement to make the payment of the money due to the owner of the goods at Rajahmundry. In such circumstances part of the cause of action arose at Rajahmundry and a suit filed at Rajahmundry in respect of the contract is within jurisdiction. (*Yahya Ali, J.*) Galley & Co. *v.* Appalaswami Naidu. 226 I.C. 133=1946 Mad. (Rul.) 236=1946 M.W.N. 20=A.I.R. 1946 Mad. 300=(1946) 1 M.L.J. 11.

———**S. 20**—*Suit against private firm in Bombay—Owners having permanent residence in Kutch —Jurisdiction of Kutch Court.*

A suit lies against the owners of a private firm where they have a residence. Where the owners of a private firm carrying on business in Bombay reside in Bombay only for business purposes but have their permanent residence in Kutch province, they or their firm can be sued in either of the places in respect of a cause of action arising wholly in Bombay. (*Trivedi, J.C.*) Murarji Surji *v.* Jayant Trading Corporation, Ltd., Bombay. A.I.R. 1949 Kut. 5.

———**S. 20**—*Suit for breach of contract—Renunciation or disclaimer of contract communicated by post—Jurisdiction of Court at place of communication.*

It must be assumed that an offer is made, not at place where, if it is made by letter, the letter is put into the post, but at the place where the letter is delivered. Similarly, the acceptance of an offer takes place at the place where the acceptance is communicated. The post office is the agent of the sender of the letter or telegram and not the agent of the addressee. That being so, it is logical and reasonable to assume that when there has been a renunciation or disclaimer of a contract, the renunciation or disclaimer takes place when and where it is communicated to the other party to the contract.

It is obvious that any disclaimer or renunciation of a contract to be effective must be communicated to the other party to the contract. Unless and until it is communicated, there is no such disclaimer or renunciation as would entitle the other party to it to exercise its option either to sue immediately for damages or to await the period fixed for the performance of the contract and then sue if it is not performed. That also suggests that the disclaimer or renunciation is not complete until it is communicated and, therefore, takes place at the place where the communication is made and not at the place where the letter or telegram containing the disclaimer or renunciation is despatched. The disclaimer or renunciation of the contract is clearly a material fact which the plaintiff has to establish in a suit for damages for breach of contract and therefore part of the cause of action. The Court at the place where the disclaimer or renunciation is communicated has, therefore, jurisdiction to try the suit. 25 P. 292, foll. 58 C. 539 and 49 C.W.N. 123, Not. foll. (*Shearer and Reuben, JJ.*) Dhanraj Mills, Ltd., Liability Co. *v.* Narsingh Prasad. 27 Pat. 723=A.I.R. 1949 Pat. 270.

———**S. 20 (c)**—*Suit for damages for breach of contract—Jurisdiction at place where contract had to be performed in part—Cause of action.*

A suit for breach of contract can be filed at any place where the contract should have been performed in whole or in part. A suit for damages for breach can be filed at the place either where the goods were deliverable or the price payable. Part of the cause of action arises where the price is to be paid. (*Horwill, J.*) Lakshmipathi Naidu *v.* Mohamed Ghani. 230 I.C. 185=1947 Mad. (Rul.) 176=A.I.R. 1947 Mad. 83=59 L. W. 531=1946 M.W.N. 628=(1946) 2 M.L.J. 255.

———**S. 20, Expl. 2**—*Applicability—Dominion of India.*

The Dominion of India is not a Corporation within the meaning of Expl. 2 to S. 20, C. P. Code. (*Harries, C.J. and Banerjee, J.*) Dominion of India *v.* R. C. K. C. Nath & Co. 5 D.L.R. (Cal.) 53=A.I.R. 1950 Cal. 207.

———**S. 20, Expl. 2**—*Interpretation—Life Insurance Company having head office at* B *and branch office at* L*—Branch office merely acting as post office forwarding proposals and sending monies—Suit for refund of premiums on cancellation of policy—Jurisdiction of Court at* L *to entertain.*

A Corporation can be said to carry on business at the head office or at the place where it has a branch in respect of a cause of action which arises, wholly or in part, at the place where the branch office is situated. If no part of the cause of action arises at the place of the branch office, the Corporation cannot be said to transact business at that place. This is the only possible interpretation of Explanation II of S. 20, C. P. Code.

Where therefore a Life Insurance Company having its head office at *B* has a branch office at *L*, but the branch office does nothing but act as a post office forwarding proposals and sending monies, the Court at *L* has no jurisdiction to entertain a suit against the company for the refund of premiums paid by the plaintiff at *L* on the wrongful cancellation of his policy, no part of the cause of action having arisen at that place. (*Khosla, J.*) Bhola Nath *v.* Empire of India Life Assurance Co., Ltd. 49 P.L.R. 163=A.I.R. 1948 Lah. 56.

———**S. 21**—*Applicability—Proceedings under U. P. Agric. Rel. Act or U. P. Debt Red. Act.*

S. 21 of the C. P. Code has application even to proceedings under the U. P. Agri. Rel. Act or Debt Red. Act. (*Sinha and Harish Chandra, JJ.*) Balmakund *v.* Jiwan Ram. I.L.R. (1947) All. 672=A.I.R. 1948 All. 58=1947 A. W.R. (H.C.) 160=1947 A.L.J. 276.

———**S. 21**—*Objection as to territorial jurisdiction—If can be raised in execution Court.*

The question of territorial jurisdiction could not be raised in the executing Court. A person against whom a decree has been passed in a Court which had no jurisdiction, must raise the matter by way of an appeal or in revision. If he does not do so, he cannot raise the matter in execution or by way of collateral proceedings. (*Horwill, J.*) Pattabhiramayya *v.* Mallareddi. 63 L. W. 62=(1949) 2 M.L.J. 747.

———**S. 21**—*Objection to decree being beyond territorial jurisdiction—Competency of executing Court to go into.*

The well-settled principle of law that an executing Court cannot go behind the decree is one which should be enforced in all but the most exceptional cases. An execution Court can only go behind a decree which is sent to it for execution, where the decree is null and void and that fact is patent upon the face of the record. But it cannot be said that a decree in a case to which S. 21, C. P. Code, was applicable can be regarded as null and void and as such it cannot be questioned in execution proceedings. (*Mulla and Yorke, JJ.*) Shambhu Singh *v.* Rampal Singh. I.L.R. (1945) A. 479=A.I.R. 1945 A. 177=1945 A.L.J. 117=1946 A.W.R. (H.C.) 266.

———**S. 21**—*Objection to place of suing—Failure of justice—Need for proof—Trial of suit by Assistant Commissioner instead of by Sub-Judge in Ajmer-Merwara.*

Under S. 21, C. P. Code, there must be failure of justice owing to wrong place of suing before objection can be allowed. 1924 Pat. 527, 7 P. 216, 1924 M. 457 and 1925 M. 171, rel. on. In Ajmer-Merwara the Assistant Commissioner and other revenue officers have been invested with the powers of a Sub-Judge and are on the same footing as Sub-Judges, though there is an arrangement that only rent and cess suits should be tried by the former. No party can, therefore, be prejudiced by reason of the fact that the trial of a suit other than a rent or cess suit took place before the Assistant Commissioners and not before any other Sub-Judge. (*Ramabhadran, J.C.*) Durgah Committee *v.* Ahsan Ali. 4 D.L.R. (A. & M.) 71=A.I.R. 1949 Ajmer 41.

———**S. 21**—Sale in execution by Court without jurisdiction—Nullity—Consent of parties—If can confer jurisdiction. *See* C. P. CODE, Ss. 39 AND 21. (1947) 1 M.L.J. 306 (F.B.).

———**Ss. 22 and 23**—*Transfer of suit—Considerations.*

It is well settled that where the law allows a person to institute a suit in two different Courts, it is the plaintiff who is the *arbiter litis.* It is he who has the right to choose his forum and his choice will not be interfered with by Courts except where special circumstances are proved to exist. The Court has not only to prevent injustice to the defendants but has also to see that no injustice is caused to the plaintiff by depriving him of his right to bring a suit in a place which is allowed to him by law. Where the plaintiff institutes a suit in a place where one of the defendants resides after obtaining leave to sue under S. 20 (*b*), C. P. Code, the suit cannot be transferred to another place where the other defendants reside on the ground that no notice was given to them before granting leave to sue, when there is nothing to show that any grievous injustice would be done to them. A.I.R. 1928 Lah. 183 and 159, 1920 Lah. 381 and 41 A. 381, referred to. (*Kapur, J.*) BODH RAJ *v.* LAKHMI DASS. 5 D.L.R. (Simla) 231.

———**Ss. 24, 141 and O. 40, R. 1**—*Application for transfer of suit to High Court—Notice served on defendants—Order for transfer not made—Application for appointment of receiver—Maintainability in High Court.*

When an application for the transfer of a suit to the High Court is made under S. 24, C. P. Code, and notice is ordered, it is in the nature of an original proceeding within the meaning of S. 141 of the Code and the procedure of the Court in regard to suits becomes applicable thereto. O. 40, R. 1 of the Code will be attracted by S. 141 to such proceedings and the High Court will have power to appoint a receiver before the petition for transfer had been served on the defendants. (*Satyanarayana Rao, J.*) SUBBAREDDI *v.* NARAYANASWAMIREDDI. 61 L.W. 596=1948 M. W. N. 597=(1948) 2 M.L.J. 251=A.I.R. 1949 Mad. 283=4 D.L.R. (Mad.) 65.

———**S. 24**—Application under, to transfer election petition referred to District Judge under S. 35-C, U. P. District Board Act—Maintainability. [*See* Q.D. 1941—1945, Vol. I, Col. 795.] MAHESHAWARI PRASAD SINGH *v.* RUDRA PRATAP SINGH. 221 I.C. 542.

———**S. 24**—*Case remanded on appeal by High Court to the Court of the Subordinate Judge which disposed of the suit—Transfer of that suit by District Judge to a different Subordinate Judge's Court—Legality.*

On appeal against the dismissal of a suit by the Subordinate Judge of Masulipatam, the High Court set aside the order of dismissal and remanded the suit to the same Court for disposal according to law. When the suit was pending in that Court after remand, the District Court on the application of one of the parties transferred it to the Court of another Subordinate Judge. On a question as to the legality of the order,

Held: That the order of the District Judge was not without jurisdiction. Different considerations may arise if the order of remand on special grounds indicates a particular Judge to try a case or not to try it, but that was not the case before the Court. (*Rajamannar, O.C.J. and Satyanarayana Rao, J.*) SESHAGIRI RAO *v.* SOMASUNDARAMMA. I.L.R. (1949) Mad. 94=A. I. R. 1949 Mad. 65=61 L.W. 326=1948 M.W.N. 326=3 D.L.R. (Mad.) 21=(1948) 1 M.L.J. 315.

———**S. 24 and Divorce Act (IV of 1869), S. 3**—*'District Court' in S. 24, if synonymous with the same expression used in the Divorce Act.*

It cannot be said that the expression "District Court" appearing in S. 24 of the C. P. Code, is equivalent to the expression "District Court" as defind in S. 3 of the Divorce Act. The words are not used synonymously. (*Marten, Bhandari and Cornelius, JJ.*) GEYER *v.* GEYER. I.L.R. (1947) Lah. 867=A.I.R. 1949 Lah. 34 (F.B.).

———**S. 24**—*Power of High Court—Suit pending on original side—Transfer to mofussil Court—Powers of Bench on appellate side to order—Considerations—Convenience—Relevancy.*

It is beyond dispute that a bench on the appellate side of the High Court has power under S. 24, C. P. Code, to make an order transferring a suit pending on the orginal side of the High Court for trial to a Court in the mofussil; the Court must, however, be satisfied that such a transfer is necessary. The question of convenience is a relevant consideration, though not decisive. 39 Mad. 80; 32 Bom. L.R. 207; 1937 Lah. 389; 13 Bom. 178, ref. (*Dixit and Jhagirdar, JJ.*) VAMAN VASUDEO CHITALEY *v.* RAGHUNATH GANESH. 51 Bom. L.R. 226=A.I.R. 1949 Bom. 263.

———**S. 24**—*Scope—Powers of High Court and District Judge—"Transfer" and direction to transfer—High Court stating that case should be tried by another Judge and asking District Judge to transfer case to another Judge to be selected by him—Effect of.*

Where the High Court, in an appeal from an interlocutory order in a suit, considers that the suit should be dealt with by some other subordinate Judge and asks the District Judge to transfer the suit to another Subordinate Judge of competent jurisdiction to be selected by him, it cannot be said that it does not amount to an order of transfer but only a direction to the District Judge to make the transfer. Under S. 24, C. P. Code, the High Court and the District Judge have concurrent powers of transfer and there is no question of the High Court empowering the District Judge to make the transfer. The order is clearly final so far as the transfer is concerned only the choice of the Subordinate Judge being left to the District Judge. (*Reuben and Jamuar, JJ.*) SATRUGHAN PRASAD SINGH *v.* JAGDISH PRASAD SINGH. 5 D.L.R. (Pat.) 161.

———**S. 34**—Discretion—Interest on cess *pendente lite*—Award of. *See* LANDLORD AND TENANT—CESS. 12 B.R. 676.

———**S. 34**—*Discretion—Interest* **pendente lite** *and future interest—High rate of interest under contract—If can be taken into consideration.*

The granting of *pendente lite* and future interest is in the discretion of the Court, and the

Court may take the high rate of interest into consideration in exercising its discretion, though no relief can be given in that respect under the Usurious Loans Act. 1940 P.W.N. 614, ref. (*Reuben and Jamuar, JJ.*) Gajadhar Marwari *v.* Baidyanath Mandal. 29 Pat. 545=A.I.R. 1950 Pat. 379.

———S. 34—Discretion—Mortgage suit—*Pendente lite* and future interest—Rate—Court, if bound to award at contract rate—Amendment of 1929—Effect of. *See* C. P. Code, O. 34, R. 11. A.I.R. 1950 Pat. 391.

———S. 34—*Interest on unpaid prices for purchases—Whether can be granted.*

Interest is not payable on unpaid prices for purchases, in the absence of a contract to that effect. It would be payable only from the date of the suit as compensation if the defendant fails to pay on demand or denies his liability. (*Trivedi, J.C.*) Jethi Lalji Kanji *v.* Chandhi Karson Ramji. A.I.R. 1949 Kut. 6.

———S. 35—*Appeal from order for costs—When lies.*

It is now settled law that an appeal against costs only does lie when the costs are awarded by a decree, if the order as to costs involves a question of principle. (*McNair and Gentle, JJ.*) Prokash Krishna *v.* Radha Madan Gopal. 50 C.W.N. 296.

———S. 35—Applicability—Appeal before District Judge under S. 476-B, Cr. P. Code—Costs—Jurisdiction to award. *See* C. P. Code, S. 115. 2 D.L.R. 492 (F.B.).

———S. 35—Costs—Award of—Government made party on its own request. [*See* Q.D. 1941-1945, Vol. 1, Col. 1563.] Raghunath Dass *v.* Bhagwan Dass. 222 I.C. 406=1946 Lah. (Rul.) 213=A.I.R. 1946 Lah. 6.

———S. 35—Costs of successful party—Disallowance—Party succeeding on technical plea of want of proper notice to quit raised at late stage—Right to costs. *See* Appeal—New Plea. 5 D.L.R. (Mys.) 52.

———S. 35—Costs—Particular item—Discretion of Court to allow or not—Subsistence allowance claimed paltry—Not a ground for disallowing it. [*See* Q.D. 1941-1945, Vol. I, Col. 301.] Kameshwar Singh *v.* Nebilal Mistri. 18 R.P. 146.

———S. 35—*Costs—Personal decree for—Person sued as legal representative of deceased debtor.*

A Court of law is at liberty to pass personal decree for costs against a person sued as a legal representative of a deceased debtor and such a decree may be executed against the defendant personally. (*Madeley, J.*) Hajra Begam *v.* Tahawwar Ali Khan. 1947 O.A. (C.C.) 136=1947 O.W.N. 364=1947 A.W.R. (C.C.) 136=A.I.R. 1947 Oudh 217.

———S. 35—*Costs—Proper order as to, where only part of the claim is decreed.*

Where the defendant admits only a portion of the claim of the plaintiff and it is decreed, the proper order to pass is to decree the plaintiff's suit with costs to the extent of the claim admitted, and to dismiss with costs his suit as regards

the rest of the claim. (*Bates, J.M. and Nehru, A.M.*) Ram Narain *v.* Rashid Ali. 1947 A.W.R. (Rev.) 130 (1).

———**S. 35 and Stamp Act, S. 29 (c)**—Costs—Stamp duty and penalty paid by plaintiff on rent note executed by defendant—Whether can be awarded as costs against latter. [*See* Q.D. 1941-1945, Vol. I, Col. 802.] Lokmat Motor Service *v.* New Lockmat Lodging. I.L.R. (1945) Nag. 928.

———S. 35—*Costs incurred in previous litigation—Suit to recover—Maintainability.*

A separate suit does not lie for recovery of costs incurred but not awarded by Court in a previous litigation between the parties. 1932 Lah. 257, ref. (*Akram, C.J.*) Bhubanjoy Bhattacharjiya *v.* Jinnat Ali. 1 D.R. 99.

———S. 35—*Discretion of Court—Interference by appellate Court.*

The question of costs in every case is a matter for the discretion of the Judge, which discretion must, of course, be properly exercised. An appellate Court will not interfere with the exercise of this discretion, unless it is shown that the Judge of first instance was wrong, even when the Appellate Court might have exercised the discretion differently. (*McNair and Gentle, JJ.*) Prokash Krishna *v.* Radha Madan Gopal. 50 C.W.N. 296.

———S. 35—*Discretion of Court—Dismissal of suit—Defence of defendants common—One set of costs—If sufficient.*

Costs are within the discretion of the Court. If in a case of dismissal of a suit with costs, the defence of the defendants is more or less common, one set of costs will be sufficient. (*Ramabhadran, J.C.*) Beni Gopal *v.* Damodardass. A.I.R. 1949 Ajmer 34.

———S. 35—*Discretion of Court—Order for costs—Municipal committee dragged in unnecessary litigation.*

Where the plaintiff is responsible for dragging a public body (*e.g.*) a municipal committee, in an unnecessary litigation, the Court should in the exercise of its power and discretion direct the plaintiff to pay the costs of the litigation and not throw the expense upon the rate-payers. (*Bose, J.*) Model Industries, Dayalbag *v.* Rambhau Narayan. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

———S. 35—Discretion—Nature and mode of exercise of—Interference in appeal and revision. [*See* Q.D. 1941-1945, Vol. I, Col. 803.] Kameshwar Singh *v.* Nebilal Mistri. 18 R.P. 146.

———S. 35 — Jurisdiction—Plaint presented wrongly in Small Cause Court—Order returning for presentation to proper Court—Direction that Court trying suit will make order as to costs—Propriety. [*See* Q.D. 1941-1945, Vol. I, Col. 804.] Gopalakrishnayya *v.* Subba Naidu. 1946 Mad. (Rul.) 22.

———S. 35—*Jurisdiction—Plaint returned for presentation to superior Court—Order that "costs will be costs in cause"—Power to make—Plaint not re-presented—Suit by would-be defendant to recover costs—Competency.*

Where a Court returns a plaint for presentation to the proper Court, the suit being beyond its pecuniary jurisdiction, it has no jurisdiction to make an order respecting costs to the effect that "costs will be costs in the cause". When the plaint is not again re-presented, it is not open to the defendant in the prior plaint to institute a suit against the plaintiff for recovery of the costs provided for in the order returning the plaint. (*Horwill, J.*) Kankanadi Baidale Garadi Bhandaram *v.* Thaniappa. 1946 M.W.N. 74 (2)=A.I.R. 1946 Mad. 345.

———S. 35—*Liability for costs—Non-parties—Successful parties—If can be ordered to pay cost.*

A person who is not a party but who has been guilty of abuse of the process of the Court can be ordered to pay the costs. When in a suit or proceeding, a person who is not a prty but uses the name of a man of straw as a plaintiff or uses the name of another as a blind for himself, such conduct is an abuse of the process of the Court and that person can be ordered to pay the costs which, ordinarily, would be awarded against the person whose name has been used as a party. An order for costs can also be made in a proper case against a person in whose favour a decree is passed (*e.g.*) a defendant against whom the suit is dismissed. When such party is one of two persons by whom, in fact, the proceedings were instituted, if the circumstances justify an order for costs being made against both these persons, the incident that one of them is a party cannot prevent an order being made against him when, had he not been a party, such order would be made. (*McNair and Gentle, JJ.*) Prokash Krishna *v.* Radha Madan Gopal. 50 C.W.N. 296.

———S. 35—Power of Civil Court acting under S. 476, Cr. P. Code, to award costs. *See* Cr. P. Code, S. 476. 12 B.R. 614.

———S. 35—*Suit instituted by some of defendants in name of another as plaintiff—Suit unsuccessful—Proper order as to costs.*

Where some of the defendants in substance and in fact are the plaintiffs and have used the name of the wife of one of them as plaintiff for the institution of the suit against themselves and the other defendants, they and not the nominal plaintiff should be made liable for costs in the event of the suit being unsuccessful. (*Gentle, J.*) Sree Sree Sreedhar Jew *v.* Kanta Mohan. 50 C.W.N. 14=A.I.R. 1947 Cal. 213=81 C.L.J. 167.

———S. 35-A—*Compensatory costs—If can be ordered merely on the basis of past activities of plaintiff and his propensity to file suits for getting properties.*

The past activities of the plaintiff in filing suits and his propensity to file suits for getting properties should not be taken into consideration for the purpose of awarding compensatory costs against him. A suit involving arguable and complicated questions of fact and law cannot be held to be "frivolous and vexatious" to warrant the awarding of compensatory costs. (*Subba Rao and Panchapakesa Ayyar, JJ.*) Kotturuswami *v.* Viravva. 62 L.W. 752=(1949) 2 M.L.J. 582.

———S. 35-A—*Compensatory costs—Conditions necessary for awarding—Exercise of discretion—Interference by revisional Court.*

Before awarding compensatory costs under S. 35-A, C. P. Code, the Court has to satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff, that the interests of justice require compensatory costs to be awarded, and that the defendant had put forward his objection that the suit was false or vexatious at the earliest opportunity.

Compensatory costs should be awarded with some caution; but a revisional Court would be reluctant to interfere with the exercise of any discretion by the lower Court regarding costs, unless it has proceeded on some perverse or at any rate some wrong considerations, or has disregarded the ordinary rules of law relating to the awarding of costs. (*Horwill, J.*) Bharadrajulu *v.* Lakshminarayana. 63 L.W. 57=1950 M.W.N. 41 (2)=(1949) 2 M.L.J. 744.

———S. 35-A—*Costs awardable under—Nature of.*

Costs which can be awarded under S. 35-A, C. P. Code, are compensatory and not penal. (*Kaul, J.*) Gaya Prashad Shastri *v.* Ram Ji Lal. I.L.R. (1949) All. 135.

———S. 36—*Order in contempt proceedings—If executable under.*

An order of the High Court in contempt proceedings is an order within the meaning of S. 2 (14), C. P. Code, and can be executed under S. 36, C. P. Code. 59 B. 10, foll. (*Majumdar, J.*) Onkermull Jalan *v.* Padampat Singhania. I.L.R. (1949) 1 Cal. 355=53 C.W.N. 310.

———Ss. 37 and 38—"Court which has ceased to exist or to have jurisdiction to execute it"—Meaning of—Transfer of jurisdiction after decree—Execution—Jurisdiction of new Court to entertain application to execute decree. [*See* Q.D. 1941-1945, Vol. I, Col. 807.] Narain Das *v.* Saindad. 18 R.S. 62.

———S. 37—*Decree passed by predecessor presiding over—Court for amount exceeding successor's pecuniary jurisdiction—Jurisdiction to execute decree.*

A decree for over Rs. 1,000 passed by a Court which was presided over by an officer who had pecuniary jurisdiction to try suits valued up to Rs. 2,000, can be executed by the same Court at a time when it is presided over by an officer having jurisdiction to try suits valued up to Rs. 1,000 only. 37 C.W.N. 679, foll. (*Thadani, C.J. and Ram Labhaya, J.*) Suryanarayan *v.* Maheswar Keot. A.I.R. 1950 Assam 115.

———S. 38—*Scope.*

The words of S. 38, C. P. Code, do not warrant the construction that at one and the same time execution proceedings can be carried on in both the Courts.

Hence when a decree has been transferred to another Court for execution and has not been returned to that Court with a certificate of non-satisfaction, the Court passing the decree cannot entertain another application for the execution of the decree, because it is not the proper Court.

(*Abdul Hakim Khan, J.*) Ramchandra Rao *v.* Ram Prasad. A.I.R. 1950 M.B. 120.

——**S. 38**—*Simultaneous execution—Permissibility.*

Simultaneous execution of a decree is permissible. Where as a matter of fact the decree-holder proceeds with the second application for execution of the decree filed by him while his first application was pending after getting the latter application struck off, the contention that the second application for execution is incompetent has no substance. 53 B. 844 and A.I.R. 1936 All. 655, referred to. 1940 A.M.L.J. 129, dist. (*Atma Charan, J.C.*) Bhura Lal *v.* Sultan Singh. 4 D.L.R. (A. & M.) 86=A.I.R. 1950 Ajmer 3.

——**S. 39**—*Jurisdiction—Decree of higher Court attached in execution of decree of Court of lower grade—Transfer to latter—Jurisdiction of latter to execute decree of value exceeding its own pecuniary jurisdiction.*

It is not correct to hold that the Court to which a decree is transferred for execution cannot execute the transferred decree if the decretal sum be a sum which exceeds the jurisdiction of the Court to which the decree is transferred. Where a decree of a superior Court is attached in execution of decree against the holder thereof passed by a Court of lowergrade though the decretal sum of the attached decree exceeds the pecuniary jurisdiction of the Court which gets that decree attached and to which it is transferred the decree in execution of which the attached decree is to be executed, being within the jurisdiction of the Court to which it is transferred, that Court has jurisdiction and is competent to execute it. The transferee Court is executing that decree not on behalf of the holder thereof or for the full amount, but on behalf of the holder of the decree of its own and to the extent of its own pecuniary jurisdiction. It matters not, therefore, that the transferred decree exceeds in value the pecuniary jurisdiction of the transferee (executing) Court, because the decree is not to be executed in full; but only in substitution of the executing Court's own decree and to the limit of its jurisdiction. (*Davis, C.J.*) Shivalomal *v.* Bholashah. I.L.R. (1945) Kar. 445=225 I.C. 472=A.I.R. 1946 Sind 103.

——**S. 39**—Transfer of decree by Court to Registrar of Co-operative Societies—Necessity. *See* Madras Co-operative Societies Act (VI of 1932), S. 57-A. (1949) 2 M.L.J. 682.

——**Ss. 39 and 21**—*Transfer of decree for execution—Attachment of property in execution by transferee Court—Removal of that property from the jurisdiction of the transfere Court to another Court—Jurisdiction of the former Court to order sale of that property thereafter—Sale, when held, if a nullity—Objection to jurisdiction not raised by judgment-debtor—Right of other creditors of the same judgment-debtor to proceed against that property.*

Where a Court which passes a money decree transfers that decree to another Court for execution and in an execution petition for attachment and sale of immovable property belonging to the judgment-debtor situate within the territory of the transferee Court an order for attachment has been made by that Court and the property is thereafter removed from the territory of the transferee Court to another Court, the former Court can make no order for sale of that property by Court auction so as to give a good title to the purchaser. A Court cannot make a valid order for sale in execution unless, at the time the order is made, the property is within its territory and a sale ordered otherwise would be a nullity. Though an objection to the jurisdiction of the executing Court to order sale is not taken by the judgment-debtor, it would be open to other judgment-creditors of the same judgment-debtor to proceed in execution against the property so sold as the sale is a nullity. When a Court has no jurisdiction no agreement or act of a party can confer jurisdiction which it does not possess. S. 21 of the C. P. Code, does not cover an objection going to the nullity of an order on the ground of want of jurisdiction. (*Gentle, C.J. and Lakshmana Rao and Rajamannar, JJ.*) Srimanthu *v.* Venkatappayya. I.L.R. (1948) Mad. 18=60 L.W. 277 (2)=1947 M.W.N. 233 =A.I.R. 1947 Mad. 347=(1947) 1 M.L.J. 306 (F.B.).

——**S. 39 (1)**—*Right to apply under—Person entitled to restitution under a decree because of the variation of the decree owing to its being scaled down under Madras Act IV of 1938.*

A defendant entitled to recover costs from the plaintiff in a suit which is dismissed will be a "decree-holder" and can get the decree transferred to another Court to recover his costs. So too, a person entitled to restitution (under a decree) by a variation of the decree owing to the scaling down under the Madras Agriculturists' Relief Act, can get it transferred to another Court for execution as there is an order for restitution capable of being executed. (*Panchapakesa Ayyar, J.*) Amikutty Umma *v.* V. P. Ramochen Nedungadi. 62 L.W. 315=A.I.R. 1949 Mad. 651=1949 M.W.N. 292=(1949) 1 M.L.J. 486.

——**S. 39 (2)**—Scope—Transfer of decree for execution by one subordinate Court to another —Propriety. [*See* Q.D. 1941-1945, Vol. I, Col. 811.] Narain Das *v.* Saindad. 18 R.S. 62.

——**Ss. 40 and 42**—*Scope and effect of—Decree of Calcutta High Court executed by Bihar Court—Law applicable—Bihar Money-Lenders Act, Ss. 13 and 14—Application of.*

A Court to which a decree is transferred for execution has in executing such decree, to execute it in accordance with the law of procedure obtaining in that Court, but has to determine the rights and liabilities of the parties in accordance with the substantive law obtaining in the Court which passed the decree. Where a decree passed by the High Court of Calcutta in its original side in respect of a commercial loan is transferred for execution to a Court in Bihar, the provisions of the Bihar Money-Lenders Act cannot be applied in executing that decree. (*Meredith and Sinha, JJ.*) Inder Chand *v.* Bansropan. 26 Pat. 307=A.I.R. 1948 Pat. 245.

———**S. 41**—*Certificate of non-satisfaction sent by transferee Court—Copy of decree not returned—Effect on jurisdiction of transferee Court—Subsequent order for sale by such Court—Validity.*

If a certificate of non-satisfaction under S. 41, C. P. Code, is sent by the transferee Court to the Court which passed the decree, that deprives the transferee Court of jurisdiction, whether the certificate should or should not in the circumstances have been sent.

Once a certificate of non-satisfaction has been sent, the transferee Court ceases to have jurisdiction, though it might have failed to return the copy of the decree sent to it.

The transferee Court has, therefore, no jurisdiction to entertain a second application for execution after it has sent the notice of non-satisfaction, and orders passed by it thereon are wholly null and void and can have no effect either as an estoppel or by way of *res judicata* or otherwise. Consequently an order for sale passed by the transferee Court in the second execution case is wholly ineffective and must be set aside. (*Harries, C.J. and Sarkar, J.*) BENOY KRISHNA MUKERJEE *v.* MOHANLAL GOENKA. A.I.R. 1950 Cal. 287.

———**S. 41**—*Court transferring decree to another Court for execution—Jurisdiction to appoint receiver to realise decree.*

A Court transferring a decree for execution to another Court does not lose all jurisdiction in connection with the case. The transferor Court still retains jurisdiction to pass necessary orders. It has jurisdiction to appoint a receiver to realise the decree. (*Meredith and Ray, JJ.*) DARSAN SINGH *v.* BALDEO DAS. 25 Pat. 145=1946 Pat. (Rul.) 171=223 I.C. 251=12 B.R. 361=A.I.R. 1946 Pat. 365.

———**S. 41**—*Form of certificate.*

There is no particular form of certificate prescribed in S. 41, C. P. Code; if an intimation is sent that the execution case is dismissed as infructuous, that is sufficient compliance with S. 41, C. P. Code. (*Meredith and Ray, JJ.*) DARSAN SINGH *v.* BALDEO DAS. 25 Pat. 145=1946 Pat. (Rul.) 171=223 I.C. 251=12 B.R. 361=A.I.R. 1946 Pat. 365.

———**Ss. 41 and 48**—*Transfer of decree to another Court—Application to Court which passed decree for an order re-transferring it—Step-in-aid of execution—Substantive application for execution—Forum.*

An application may always be made to the Court which passed the decree for an order re-transferring it if it has been transferred elsewhere and such an application is a step-in-aid of execution and prevents limitation running against the decree-holder. But a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under S. 41 of the C. P. Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree was sent, had been stayed for the purpose of executing the decree in the former Court. (*Horwill and Bell, JJ.*) NAGI REDDI *v.* KOTAMMAL. I.L.R. (1948) Mad. 117=60 L.W. 130=1947 M.W.N. 165=A.I.R. 1947 Mad. 431=(1947) 1 M.L.J. 156.

———**Ss. 42 and 44**—*Applicability—Decree of Native State—Execution in British Indian Court—Law applicable.*

When a decree of the Courts in Jaipur State have to be executed in British India it is S. 44 of the C. P. Code and not S. 42 that applies. Such decrees are executable in Oudh as if they were passed by British Indian Courts.

But as it is well settled that in matters of procedure it is the *lex fori* that applies and as the term "procedure" has to be taken in its widest sense and would include "limitation of an action or other proceeding", the execution application would have to be dealt with according to the law of limitation in regard to execution of decrees in force in British India. The fact that a certificate was issued by the Court of the State that the amount due under the decree was still unrealised, cannot be taken as binding on the British Indian Court on the question of the decree being within time for execution according to the law of British India. (*Kaul and Kidwai, JJ.*) AMAR NATH *v.* NARAIN DAS. 22 Luck. 353=230 I.C. 440=1947 O.W.N. 267=1947 O.A. (C.C.) 185=1947 A.W.R. (C.C.) 185=A.I.R. 1947 Oudh 206.

———**S. 42**—*Power of transferee Court—Decree becoming unenforceable.*

It is open to the transferee Court to take into account later happenings. If the decree becomes unenforceable, the transferee Court can take that fact into account and pass orders which it considers fit. 4 R. 562, referred to. (*Hidayatullah and Kaushalendrarao, JJ.*) KUNDANBAI *v.* SATNARAYAN. I.L.R. (1915) Nag. 491=1950 N.L.J. 281.

———**S. 42**—*Powers of transferee Court in execution—O. 21, Rr. 16, 50 and 53—Effect of.*

S. 42, C. P. Code, is co-extensive and must be read, with O. 21, R. 53, C. P. Code. When once a decree is transferred for execution to another Court, the latter Court executing the decree has the same powers for the purpose of executing the decree as if the decree has been passed by itself. The wordings in Rr. 16, 50 and 53 of O. 21, C. P. Code, cannot make any difference in the matter. (*Nagarkar, J.C.*) MADAN MOHAN *v.* MOHAN LAL. 3 D.L.R. (A.M.) 47.

———**S. 42**—Transferee Court having seisin of execution—Application made to Court passing decree—Effect. *See* LIMITATION ACT, ART. 182 (5)—FINAL ORDER. (1948) 1 M.L.J. 350. I.L.R. (1950) Nag. 491=1950 N.L.J. 281.

———**S. 44**—*Decree passed by Munsif's Court in Travancore State—Transfer to Presidency Small Cause Court, Madras, for execution—Jurisdiction of Small Cause Court to execute.*

S. 44, C. P. Code, is not one of the sections included in S. 8, C. P. Code, nor has S. 44, C. P. Code, been made applicable to the Presidency Small Cause Court. As S. 44 empowering British Indian Courts to execute the decree of notified Indian States has not been made applicable to the Presidency Small Cause Court that Court has no jurisdiction to execute a decree passed by a Munsif's Court in Travancore and transferred to the Presidency Small Cause Court for execution. (1917) 33 M.L.J. 539, *obiter*, not followed. (*Raghava Rao, J.*) Subramaniam Chettiar *v.* Srinivasa Ayyar. 1950 M.W.N. 798=(1950) 2 M.L.J. 472.

———**S. 44-A**—Applicability and requirements. *See* C. P. Code, O. 21, R. 16 and Ss. 44-A and 146. (1946) 2 M.L.J. 132.

———**S. 45**—*Decree passed by Court outside Kutch—Transfer for execution to Kutch—C. P. Code—Application to Kutch.*

A decree of a Court outside Kutch can be transferred to Kutch for execution after 1st August, 1949, since the provisions of the C. P. Code are applicable to Kutch and as Kutch is to be administered as a Chief Commissioner's Province from that date. (*Trivedi, J.C.*) Khusalchand Damji *v.* Vishanji Hansraj. A.I.R. 1950 Kut. 11.

———**S. 47**—*Appeal—Alteration of decree into instalment decree under O. 20, R. 11 (2).*

An order converting a decree into an instalment decree under O. 20, R. 11 (2), C. P. Code, falls within S. 47, C. P. Code. As the order is appealable, no revision lies. (*Harries, C.J.*) Chandra Nath Bhose *v.* Sahadabia Kumarin. 52 C.W.N. 440.

———**S. 47 and O. 21, R. 90**—*Appeal—Application for setting aside sale—Appeal by stranger auction-purchaser—If competent.*

An appeal by a stranger auction-purchaser against an order passed on an application for setting aside sale under O. 21, R. 90 and S. 47, C. P. Code, is incompetent, as he was not a party to the suit. (*Das, J.*) Kali Charan Chatterjee *v.* Balai Krishna Ghosh. 83 C.L.J. 197.

———**S. 47**—*Appeal—Attachment—Objection by judgment-debtor—Order allowing—Appeal—O. 21, R. 58—Applicability.*

An objection filed by a judgment-debtor and not by a third party, to an attachment of property falls under S. 47, and the order allowing the objections being one under S. 47 is appealable. O. 21, R. 58 does not apply to such a case. (*G. N. Das and B. K. Guha, JJ.*) Province of West Bengal *v.* Bholanath Sen. 85 C.L.J. 105=A.I.R. 1950 Cal. 174=5 D.L.R. (Cal.) 18.

———**S. 47**—*Appeal—Claim by legal representative of deceased judgment-debtor claiming property as own—Order on—Appeal—Revision—Competency—O. 21, R. 58.*

A claim to attached property preferred by the legal representative of the deceased judgment-debtor, on the ground that the property belongs to her in her own right, falls under S. 47, C. P. Code, and not under O. 21, R. 58, and hence the order on the claim is open to appeal and a revision is not the proper remedy. The fact that the claim is preferred not after decree only but even before in proceedings for attachment before judgment does not alter the position. A.I.R. 1939 Pat. 354, explained; 39 Cal. 298; 20 C.L.J. 481; 3 P.L.T. 613, ref. 51 All. 878; 58 Bom. 513; 17 Cal. 711; A.I.R. 1935 Cal. 14; I.L.R. (1938) Mad. 1080; A.I.R. 1934 Pat. 188; 5 Rang. 659, rel. (*Reuben, J.*) Baidya Nath Banerji *v.* Himangsu Bala Bose. A. I. R. 1950 Pat. 90.

———**S. 47**—*Appeal—Competency—Order on objection to preparation of final decree.*

An objection to the passing of a final decree by a creditor who had attached the preliminary decree is not an objection under S. 47, C. P. Code, relating to execution, discharge or satisfaction of the decree and an order rejecting such objection will not be open to appeal. (*Harish Chandra and Chandiramani, JJ.*) Bhuru Mal *v.* Makhan Lal. 5 D.L.R. (All.) 256.

———**S. 47**—*Appeal—Competency—Order refusing to stay execution.*

An appeal lies against an order of the lower Court refusing to stay execution. (*Horwill, J.*) Sundaresan *v.* Venkatesiah. 1948 M. W. N. 777=61 L.W. 795=A.I.R. 1949 Mad. 196=(1948) 2 M.L.J. 421.

———**S. 47**—*Appeal—Decision under O. 21, R. 58—Death of judgment-debtor pending claim petition—Claimant becoming his representative.*

Where after a claim petition is filed under O. 21, R. 58, C. P. Code, the judgment-debtor dies and the claimant becomes his representative, a decision regarding the claim made thereafter, is a decision under S. 47, C. P. Code, and an appeal is, therefore, competent. (*Mukherjea and Sharpe, JJ.*) Amiya Probha Das *v.* Jyoti Prokash Ghosh. 224 I.C. 381=1946 Cal. (Rul.) 249=50 C.W.N. 548=82 C.L.J. 131=A.I.R. 1947 Cal. 364.

———**S. 47**—*Appeal—Mortgaged property—Purchaser at sale in execution of money decree—Dispute between him and mortgagee-decree-holder—Order—Appeal.*

A purchaser of mortgaged property at a sale in execution of a simple money decree against the mortgagor is to that extent a representative of the debtor, and an order passed against him in execution proceedings arising out of the decree passed on the mortgage is open to appeal. A dispute between such purchaser and the mortgagee-decree-holder falls under S. 47, C. P. Code. (*Sharif, J.*) Sain Ditta Mal *v.* Bulaqi Ram and Sons. 226 I.C. 366=1946 Lah. (Rul.) 454=A.I.R. 1947 Lah. 230.

———**S. 47**—*Appeal — Mortgage suit—Final decree—Judgment-debtor dead before decree—Objection by legal representative to execution—Order on—Appeal.*

Where a legal representative of a deceased judgment-debtor challenges the validity of the final decree in the mortgage suit on the ground that the judgment-debtor had died before the final decree was passed and contends that it is not executable, the objection falls under S. 47 and an appeal lies from an order on such objection. 4 P.L.J. 240, rel. (*Shearer and Reuben, JJ.*) Bhagirath Prasad *v.* Jamuna Devi. A.I.R. 1950 Pat. 211.

———**S. 47**—*Appeal—Objection as to who are legal representatives of deceased judgment-debtor—Decision on—Appeal.*

A question between the parties as to who are the legal representatives of a deceased judgment-debtor falls within the purview of S. 47, C. P. Code, which enjoins the executing Court to decide the question of whether certain persons alleged to be the legal representatives of a deceased judgment-debtor are really the persons who can be substituted as the legal representatives of the deceased judgment-debtor. The question can properly be decided on an objection under S. 47, and the order on the objection is therefore appealable. (*Sinha and Mahabir Prasad, JJ.*) REHI DAMODAR *v.* SONE BASANT. 27 Pat. 848.

———**S. 47**—Appeal—Order allowing application for refund of deposit made under S. 168-A (1) (*b*) of B. T. Act. *See* B. T. ACT, S. 168-A (1) (*b*). 51 C.W.N. 286.

———**S. 47**—*Appeal—Order for costs passed in favour of Commissioner of partition—Order of dismissal of application for execution of that order—If appealable.*

No appeal lies from an order dismissing an application by a Commissioner of partition for execution of an order for costs passed in his favour. The proceedings for execution of the order in question do not come under S. 47, C. P. Code, as a question relating to execution, discharge or satisfaction of a decree does not arise in this case. Further this question does not arise between the parties to the suit. (*Nasim Ali, Ag. C.J. and Hindley, J.*) DHARANIDHAR GHOSE *v.* PHANI BHUSAN MUKHERJI. I.L.R. (1946) 2 Cal. 444=82 C.L.J. 152=A.I.R. 1947 Cal. 18=228 I.C. 584=50 C.W.N. 837.

———**S. 47**—Appeal—Order refusing to amend decree under U. P. Debt Redemption Act, S. 8. *See* U. P. DEBT REDEMPTION ACT, S. 8. 225 I.C. 382.

———**S. 47**—Appeal—Order refusing to amend decree under S. 8, U. P. Debt Redemption Act. *See* U. P. DEBT REDEMPTION ACT (XIII OF 1940), S. 8 AND C. P. CODE (V OF 1908), S. 47. 5 D.L.R. (All.) 353 (F.B.).

———**S. 47**—*Appeal—Order restoring possession under S. 37-A (8) of Bengal Agriculturists Debtors' Act.*

An appeal lies from an order of restoration of possession after setting aside the sale under S. 37-A (8) of the Bengal Agriculturists Debtors' Act, as the matter relates to execution of the decree and comes, therefore, within the scope of S. 47, C. P. Code. (*Akram, J.*) BONAMALI PRAMANIK *v.* RADHAGOBINDA GHOSH. A. I. R. 1947 Cal. 388.

———**S. 47**—*Appeal—Order under O. 21, R. 93, C. P. Code, calling upon Nazir to refund commission received on sale proceeds deposited by purchaser—Applicability.*

The Nazir who is an officer of the Court conducting the sale is in no sense a party to the case; and an order calling upon him to refund the commission received by him out of the sale proceeds, under O. 21, R. 93, C. P. Code, as a result of the sale being set aside, cannot be regarded as relating to the execution, discharge or satisfaction of the decree, and does not fall under S. 47, C. P. Code. Such an order under O. 21, R. 93 is not consequently appealable as a decree or as an order. (*Ram Labhaya, J.C.*) GUMAN MAL *v.* PAHLAD DAS. 4 D.L.R. (A.M.) 24=A.I.R. 1949 Ajmer 47=1949 A.M.L.J. 1.

———**S. 47**—Appeal—Orissa Money-Lenders Act—Application under Ss. 11 and 13—Order on—Appealability. *See* ORISSA MONEY-LENDERS ACT, Ss. 11 AND 13. 12 Cut.L.T. 85.

———**S. 47**—*Appeal—Question between rival decree-holders, affecting judgment-debtor—Decision, if appealable.*

A decision of a question between rival decree-holders which affects the judgment-debtor, falls within S. 47, C. P. Code, and is appealable. (*Manohar Lall and Mukharji, JJ.*) RAI KUMAR SINGH *v.* ABHAI KUMAR SINGH. A.I.R. 1948 Pat. 362.

———**S. 47**—*Appeal—Right of auction-purchaser.*

The question of appealability of the order, which amounts to a decree, being an order under S. 47, Civil Procedure Code, is not affected by the fact that the appeal is lodged by the auction-purchaser, assuming that he is not only not a party to the suit but is not a representative of either of the parties. It is always to be examined whether the question at issue is one which relates to execution, discharge or satisfaction of the decree arising as between parties to the suit or their representatives. As soon as this condition is satisfied, the fact that any person other than the party has also been impleaded does not change its nature and character. If the auction-purchaser has any right to prefer an appeal against an order under S. 47, it is because he has been impleaded as a party to the proceeding and the order passed therein binds him. His right of appeal arises because he is made bound by the decree. 19 C. 683 (P.C.) and 41 M. 403 (P.C.), referred to. (*Ray, C.J. and Panigrahi, J.*) MURALIDHAR BHATTAR *v.* MAHENDRANATH DAS. I.L.R. (1949) Cut. 269=A.I.R. 1949 Orissa 73.

———**S. 47**—*Appeal—Scheme decree—Budget framed according to directions—Objections to certain items—Order rejecting—Appeal—Revision.*

An order dismissing an application objecting to certain items of a budget framed in accordance with the directions contained in the scheme of a temple, which gave power to the Court to hear such matters, is not a decree; nor is it an order falling under S. 47, C. P. Code, and hence no appeal lies from such order.

A revision application does not also lie under S. 115, C. P. Code, because the Court under the scheme has jurisdiction to hear such matters. (*Macklin and Bavdekar, JJ.*) BALDEVDAS VALLABHDAS *v.* DEVENDRA PRASAD. 49 Bom. L. R. 306=A.I.R. 1947 Bom. 462.

———**S. 47 and T. P. Act (IV of 1882), S. 52**—*Applicability of S. 47—Appellant's purchase* pendente lite *respondent's mortgage suit—Appellant and respondent representatives of common judgment-debtor—Principle of* lis pendens *if operates.*

The respondent filed a suit against one *M* on the foot of a mortgage and in execution of the decree obtained by him brought the property to sale and purchased it himself. He then applied to the Court for delivery of possession and impleaded as party to the application, the appellant, who pending the disposal of the respondent's suit had purchased the property in a Court sale, in execution against *M*. The appellant contended that the respondent's application under S. 47, C. P. Code, was not maintainable, as both he and the respondent derived title from the common judgment-debtor.

Held, whatever the merits of that contention might have been, it could not be urged by the appellant in the circumstances of this case, where he purchased the property pending disposal of the mortgage suit; even though the transfer was not a voluntary one, the principle of S. 52 of the T. P. Act applied. (*Satyanarayana Rao, J.*) SUBBA RAO *v.* VENKATASESHACHARLU. 61 L. W. 535=1948 M.W.N. 577=(1948) 2 M.L.J. 128=A.I.R. 1949 Mad. 207.

———**S. 47**—Applicability—Application by judgment-debtor to set aside execution sale on ground of want of jurisdiction—Application made after confirmation of sale—If maintainable. [*See* Q. D. 1941—1945, Vol. I, Col. 822.] SARAT CHANDRA GAYAN *v.* PORT CANNING AND LAND IMPROVEMENT CO., LTD. 224 I.C. 335=1946 Cal. (Rul.) 237=A.I.R. 1946 Cal. 45.

———**S. 47**—*Applicability—Application under O. 21, R. 90, disposed of upon compromise—Judgment-debtor complying with its terms—Order rejecting application by decree-holder for relief—Second appeal.*

Where an application under O. 21, R. 90, C. P. Code, for setting aside a sale was disposed of upon compromise and the decree-holder made an application purporting to be one under S. 47, C. P. Code, claiming that as the terms of the compromise had not been fulfilled by the judgment-debtor there should be a declaration that the sale stands good, an order rejecting that application is not one under O. 21, R. 92, C. P. Code, but is one under S. 47, C. P. Code, which is unaffected by the provisions of S. 104, C. P. Code. That being so, a second appeal lies from the order. (*Sen, J.*) RAM KALPA KUNDU *v.* KASI NATH DATTA. A.I.R. 1950 Cal. 582=54 C.W.N. 690.

———**S. 47**—Applicability—"Between the parties to the suit"—Interpretation—Conflict in the suit—Necessity—Defendant's sailing together and supporting each other—Conflict in execution—Appeal—Maintainability. [*See* Q.D. 1941—1945, Vol. I, Col. 822.] BAGYALAKSHMI AMMAL *v.* BAPPU AIYAR. I.L.R. (1940) Mad. 640=223 I. C. 325=1946 Mad. (Rul.) 109=A.I.R. 1946 Mad. 90.

———**S. 47**—*Applicability—Compensation for excessive or wrongful execution.*

Where in execution of a decree for possession of land, the building on it is demolished, the remedy of the judgment-debtor for compensation is by way a separate suit for the wrong committed.

An application for compensation under S. 47, C. P. Code, cannot lie as it is not a question relating to execution, discharge or satisfaction of the decree. (*Seth, J.*) PANCHOO JOLAHA *v.* MOHD. ISMAIL. 1948 A.L.W. 311=1948 O.W.N. 316=A.I.R. 1949 A. 263.

———**S. 47**—*Applicability—Decree against assets of deceased in hands of judgment-debtor—Execution—Objection to attachment—Plea that attached property belongs to deity of mutt and not to deceased—Order—Appeal—C. P. Code, O. 21, R. 60.*

Where a judgment-debtor in a decree which is confined to the assets of a deceased person in his hands, objects in execution to the attachment and sale of certain properties on the ground that the attached properties are not the properties of the deceased but are held by him as marfatdar of a *deity of a mutt,* an order on such objection falls not under S. 47, C. P. Code, but under O. 21, R. 60, and no appeal lies. An order allowing such appeal would be without jurisdiction. (*Das and Ayyar, JJ.*) RADHASHYAM DAS *v.* DOLOGOBIND SAHU. 13 Cut.L.T. 57.

———**S. 47**—*Applicability—Dispute as to identity of property sold—Remedy.*

Where a dispute is clearly one relating to the identity of the property sold, it cannot be said that it is one which relates to the execution, discharge or satisfaction of a decree falling under S. 47, C. P. Code, and as such a separate suit is not barred. (*Chandiramani, J.*) BHAGWATI SARAN *v.* GARGI DIN. A.I.R. 1950 All. 186.

———**Ss. 47 and 145**—*Applicability—Execution of warrant for possession of house—Decree-holder getting possession—Movables found in house made over by process-server to decree-holder without security bond—No order for attachment—Application by judgment-debtor for return—Competency—Remedy—Dismissal of application and appeal therefrom—Revision—Competency.*

Where in execution of a warrant for delivery of possession of house, the process-server breaks open the lock of the house which was locked up and delivers possession to the decree-holder, and also makes over to him certain items of movable property found therein without taking any security bond from him, there being also no warrant or process for attachment of the movables, an application by the judgment-debtor for return of the movables from the decree-holder to the executing Court is not maintainable. S. 47, C. P. Code, does not apply as the matter does not relate to execution, discharge or satisfaction of the decree; nor does the application lie under S. 145, as there was no attachment of the movables or entrustment of the same to the decree-holder as a surety. The remedy of the judgment-debtor is by a regular suit only. Where the application is dismissed as incompetent, and such dismissal is also confirmed on appeal, the judgment-debtor cannot maintain an application in revision to the High Court. If his contention that the matter falls under S. 47 is correct, the remedy is a second appeal and therefore no revision lies. 23 M. 55; 20 N.L.J. 90; 20 N.L.J. 93; (1915) Pat. 308, Dist. (*Sarwate, J.*) NIYAZBI *v.* AMDUMIYAN. 4 D.L.R. (Nag.) 47=A.I.R. 1949 Nag. 375.

———**S. 47**—*Applicability—Garnishee not a party to the suit.*

A garnishee who was not a party to the suit in which the decree was obtained and in execution of which attachment is sought of money in the hands of the garnishee, would not come within S. 47, C. P. Code. (*Sinha and Wanchoo, JJ.*) Kailash Nath *v.* Joti Prasad. I.L.R. (1948) All. 207=(1948) A.W.R. (H.C.) 51 (2)=1948 O.A. (H.C.) 51 (2)=A.I.R. 1948 A. 307=1948 A.L.J. 103=1948 A.L.W. 153.

———**S. 47**—Applicability—Order setting aside sale in execution of rent decree under the Estates Land Act. *See* Madras Estates Land Act (I of 1908), Ss. 131 and 132. (1946) 2 M.L.J. 476.

———**S. 47**—Applicability—Order passed in execution under the Madras House Rent Control Order, 1941—Appealability. *See* Madras House Rent Control Order (1941), S. 7-A (2-A). (1946) 2 M.L.J. 368.

———**S. 47**—*Applicability—Proceedings in enforcement of award—Validity of such proceedings—If can be questioned in separate suit.*

Proceedings arising out of an award and the enforcement of an award under the Co-operative Societies Act are not covered by S. 47, C. P. Code, and the section is no bar to questions relating to the validity of those proceedings being raised in a separate suit. (*Ormond, J.*) Matiar Rahaman Khan *v.* Raisuddin Mia. 2 D.R. 256.

———**S. 47 and O. 21, R. 90**—*Applicability—Purchase by decree-holder—Balance of sale price not deposited—Effect on sale—Application to avoid sale—Limitation.*

Where a decree-holder purchaser does not deposit the balance sale price due by him in respect of sale to him, the sale is void even though it may be confirmed by the Court. In such a case an application to avoid the sale is governed not by O. 21, R. 90, C. P. Code, but by S. 47, and the 30 days' limitation does not apply. 72 C.L.J. 129, rel. on. (*K. C. Chunder, J.*) Necharuddi Safui *v.* Ayad Ali. 5 D.L.R. (Cal.) 11.

———**S. 47**—*Applicability — Representative—Mortgage-decree — Execution—Auction-purchaser—If a representative of decree-holder—Execution sale of property of extent in excess of that directed by decree—If void—Suit to recover possession of excess area sold—If barred—O. 21, R. 92—Limitation Act, Arts. 12 and 142.*

The plaintiff who was the owner of a half share in a survey number mortgaged it to defendant No. 2 in 1917. In 1921, a suit was brought to enforce that mortgage and a decree was obtained for sale of that half share. In 1921, plaintiff became the owner of the other half share also. In 1931, defendant No. 2 applied to execute the decree by sale of the property directed to be sold under the decree. The property was, however, described in the execution application as the whole survey number, both the share which was mortgaged and which was directed to be sold and also the share subsequently acquired by the plaintiff. The whole survey number was sold in August, 1931, and it was purchased by defendant No. 1, who obtained a sale certificate from the Court in November, 1932 and obtained possession in April, 1933. In March, 1945, the plaintiff filed a suit for recovery of possession of the additional half share in the survey number which, though it was not included in the mortgage or the decree for sale was wrongly sold in execution; the auction-purchaser and the decree-holder were made defendants to the suit. It was pleaded that the suit was barred by S. 47 and O. 21, R. 92, C. P. Code, and that it was also out of time and barred under Art. 12, Limitation Act.

Held: (i) that the auction-purchaser was neither a party to the suit in which the decree was passed, nor a representative of the decree-holder, within the meaning of S. 47, C. P. Code, and the suit being one by the judgment-debtor against the auction-purchaser and the decree-holder, was not barred as S. 47, C. P. Code, had no application to the case; (ii) that the mortgage-deed having authorised that sale of only a half share, the executing Court had no jurisdiction to sell the additional half share and the sale of the additional half share was therefore void and a nullity and hence neither R. 90 nor R. 92 of O. 21, C. P. Code, applied to the case and the suit was therefore not barred under O. 21, R. 92. 50 All. 686; 41 Cal. 590, foll.; (1939) All. 385, not foll.; (iii) that the sale being a nullity, Art. 12, Limitation Act, had no application, as a void sale need not be set aside. 45 Bom.L.R. 553, foll.; 22 Bom.L.R. 1082, not foll.; (iv) that the suit was governed by Art. 142, Limitation Act, and having been brought within 12 years of the dispossession (April 1937), was in time and not barred. 40 Bom.L.R. 166, foll. (*Dixit, J.*) Ram Ganu *v.* Hari Sambhu. A.I.R. 1950 Bom. 346=52 Bom.L.R. 358.

———**S. 47**—*Bar of suit—Attachment of personal property of legal representative against whom a decree has been passed for recovery from the estate of the deceased—Proper remedy.*

Where in execution of a decree passed against a legal representative to be recovered from the estate of the deceased certain personal property of the legal representative is attached, he being a party to the suit his remedy is under S. 47, C. P. Code, and not by a separate suit. (*Teja Singh, J.*) Sant Ram *v.* Atma Singh. 50 P. L. R. 73=A.I.R. 1948 East Punj. 8.

———**S. 47**—*Bar of suit—Decree-holder auction-purchaser taking only symbolical possession and not actual possession—Subsequent suit to obtain delivery—If barred by S. 47.*

Where symbolical possession is taken by the decree-holder auction-purchaser, S. 47 of the Code of Civil Procedure is not a bar to a separate suit by him for obtaining actual possession. The delivery of symbolical possession even erroneously operates to give the person put in possession a fresh cause of action and places the judgment-debtor in the position of a trespasser. It cannot be said that the symbolical possession obtained is a mere nullity and that actual delivery must be obtained in the execution department and not by suit. (*Somayya and Yahya Ali, JJ.*) Subbaraya Goundan *v.* Samiappa Goundan. 59 L. W.

323=1946 M.W.N. 394=A.I.R. 1946 Mad. 529=(1946) 1 M.L.J. 414.

———**S. 47**—Bar of suit—Hindu reversioners impleaded as legal representatives of widow in execution of mortgage decree against her—Defence open—Separate suit to challenge the mortgage in question—Maintainability. [*See* Q.D. 1941-1945, Vol. I, Col. 826.] GANGA SINGH *v.* BADRI SINGH. 20 Luck. 472.

———**S. 47**—Bar of suit—Mortgage suit—Death of defendant—Decree against legal representative—Subsequent suit by legal representative challenging decree for sale and pleading that property is not liable to sale in execution of decree—If barred. *See* C. P. CODE, O. 22, R. 4 (2). 48 Bom.L.R. 174.

———**S. 47**—*Bar of suit—Order of executing Court sanctioning lease of judgment-debtor's land in decree-holder's favour for certain period in satisfaction of decretal debt—Suit by decree-holder for actual possession of leased land—If barred.*

The executing Court ordered that a certain land of the judgment-debtor should be let in farm for a certain period to the decree-holder himself in full and complete satisfaction of the decretal debt. The decree-holder was put in symbolical possession by the executing Court but in spite of his repeated efforts did not succeed in getting actual possession. He brought a suit for possession of the leased land against the judgment-debtor. It was contended by the latter that the suit was barred by S. 47, C. P. Code, and that the period of the lease having long since expired the plaintiff had no subsisting right to be put in possession of the suit land. Overruling this contention,

Held, that S. 47, C. P. Code, could not be pleaded in bar of the suit, as the matter that arose between the parties was not one relating to the execution, discharge or satisfaction of the decree. The decree was in fact satisfied as soon as the Court made an order for the land being let in farm to the plaintiff for a certain period. The suit of the plaintiff was based on the title acquired by him in pursuance of the order sanctioning the lease of the suit land in his favour. The cause of action for the suit was constituted by the defendant's wrongful withholding of the possession of the land from the plaintiff. As the order sanctioning the lease, did not specify the date from which the lease was to take effect, it must be taken, in the absence of any indication to the contrary in the order itself, that the lease was to take effect from the date on which the lessee got actual possession of the land covered by the lease. (*Achhru Ram, J.*) GOKALCHAND *v.* SUNDAR SINGH. A.I.R. 1949 E.P. 282.

———**S. 47**—*Bar of suit—Sale of holding in contravention of statutory prohibition—Validity of—If can be raised in execution—Separate suit on basis of prohibition—Maintainability.*

The question whether the disputed property (directed to be sold under a mortgage decree) could be alienated or sold in spite of a prohibition contained in a statute (Chota Nagpur Tenancy Act) and that the sale is void is essentially a question relating to the execution, discharge and satisfaction of the decree, to be decided between the decree-holder and the judgment-debtor in execution proceedings, under S. 47, Civil Procedure Code; and a separate suit raising such a plea is barred by S. 47. 15 P.L.T. 661 cons. and dist.; 23 Pat. 333 foll.; 7 P.L.J. 468, not foll.; 63 I.A. 53, ref. (*Manohar Lall and Ray, JJ.*) RAJIBNATH *v.* CHOTA NAGPUR B. ASSN. LTD. 27 Pat. 399.

———**S. 47**—*Bar of suit—Suit for declaration by decree-holder that proceedings under C. P. Debt Conciliation Act are void and that he is entitled to execute decree—One of parties to suit not party to decree but party to Debt Conciliation proceedings—Suit, if barred.*

The plaintiff obtained a money decree against the defendant who applied to the Debt Conciliation Board for conciliation of his debts. The Board issued a certificate under S. 15 of the C. P. Debt Conciliation Act against the plaintiff and passed an order settling debt due to another creditor and making it payable in instalments. The plaintiff's application for execution of his decree was struck off as infructuous with an observation by the executing court that attachment would take effect after the instalments of the Board were satisfied. The plaintiff thereupon filed a suit for a declaration that the proceedings before the Board and the certificate issued to the plaintiff in respect of his decretal debt were null and void on account of fraud and that the plaintiff was entitled to execute his decree.

Held, that the suit was not barred by S. 47, C. P. Code. The agreement under S. 12 of the C. P. Debt Conciliation Act between the debtor and the other creditor which made the debt payable by instalments was the main obstacle to immediate execution. That obstacle could not be removed unless the other creditor was a party to the proceedings and he could not be a proper party as he was not a party to the decree or a representative of a party to the decree. Any dispute between the plaintiff and that creditor would fall beyond the scope of S. 47. (*Padhye, J.*) JAGORAMA *v.* NARAYAN SADOBA. I.L.R. (1947) Nag. 985=A.I.R. 1948 Nag. 150=1948 N.L.J. 65.

———**S. 47**—Decree-holder-purchaser—If a representative of mortgagor. *See* T. P. ACT, S. 52 AND C. P. CODE, S. 47. (1949) 2 M.L.J. 534.

———**Ss. 47 and 151**—*Delivery of property in contravention of stay order—Application for re-delivery—Appeal against an order on such application—Maintainability—Order for sale obtained with knowledge of order of stay of execution—Fraud on the Court.*

An application to set aside the sale held in contravention of a stay order is, as between the parties to the suit, an application under S. 47, C. P. Code. It cannot be said that an application to direct re-delivery of a property delivery of which was ordered in execution of a decree could be said to be not as one relating to execution of a decree. In any event it is an application maintainable under S. 151 of the Code and an order thereon is appealable.

Having been aware of the order of stay, to apply for execution as if there was no stay would amount to practising fraud on the Court and an order obtained in such circumstances could not be allowed to stand.

An order dismissing the application for stay of execution before the Appellate Court pending disposal of the appeal, on the ground that there was nothing to stay, would not be a bar to the maintainability of an application for re-delivery of property delivered. (*Krishnaswami Nayudu, J.*) AYYAMMAL *v.* THANGAVELU PADAYACHI. A.I.R. 1950 Mad. 317=(1949) 2 M.L.J. 764.

———S. 47—*Executability of decree—Objections based upon error in frame of suit—If maintainable.*

Where a suit was filed by a chairman of a municipality for the recovery of an amount due to the municipality, and the defendant without taking any objection admitted his liability and even paid a portion of the decretal amount, he cannot in a proceeding in execution for the recovery of the balance raise an objection that the chairman of the Municipality had not right to sue and that the decree was a nullity and therefore incapable of execution. Even if the institution of the suit by the chairman was an error, it was of a technical nature and may be disregarded. (*Varma and Shearer, JJ.*) BADRIDAS AGARWALA *v.* CHAIRMAN, DHANBAD MUNICIPALITY. 222 I.C. 11=12 B.R. 247=1946 Pat. (Rul.) 89=1946 P.W.N. 265=A.I.R. 1946 Pat. 268.

———S. 47—*Executability of decree—Objection to—If open—Mortgage decree for sale—Plea that decree not capable of execution—Power of executing Court to entertain and consider.*

It is settled law that the Court executing a mortgage decree which directs the sale of a specific item of property cannot allow the judgment-debtor or his legal representatives to object to the execution of the decree on the ground that it is not capable of execution either because the judgment-debtor had no right originally to execute the mortgage bond on the basis of which the decree was passed or because since the date of the decree, owing to the death of the judgment-debtor or otherwise, the judgment-debtor had no longer any interest in the item of property. The executing Court is bound to execute the decree and cannot, apart from fraud or other recognised grounds, consider whether the decree directing the sale of the property is one which the Court which passed the decree ought rightly to have passed. (*Manohar Lall and Dass, JJ.*) JATRU *v.* AMBIKAJIT. 24 Pat. 741=A.I.R. 1946 Pat. 214=227 I.C. 630=1947 Pat. (Rul.) 52=13 B.R. 108.

———S. 47—*Executability of decree—Scheme of management drawn up in decree—Passed in declaratory suit.*

A scheme of management drawn up in a decree passed in a declaratory suit relating to debutter properties cannot be enforced by executing the decree. (*Lodge and Ahmed, JJ.*) ATUL KRISHNA ROY *v.* MANMATHA NATH ROY. 52 C.W.N. 439=A.I.R. 1949 Cal. 215=83 C.L.J. 48.

———S. 47—Executing Court—Duty of—Decree in favour of wife for maintenance creating charge on husband's properties—Death of husband—Widow inheriting husband's property—Execution of decree for maintenance—Plea in bar of execution on ground of her inheriting as heir—Sustainability—Power of executing Court to refuse execution. *See* HINDU WOMEN'S RIGHTS TO PROPERTY ACT, S. 3. I.L.R. (1949) Cut. 336.

———S. 47—*Executing Court—Powers—Execution of personal decree under O. 34, R. 6, against family property of the deceased judgment-debtors and their legal representatives—Right of legal representatives to object to the execution on the ground that there was no debt.*

In execution of decree on a mortgage executed by a mother and her two sons, the hypotheca was brought to sale and as it was insufficient to discharge the mortgage debt, a personal decree under O. 34, R. 6, C. P. Code, was passed against the sons after overruling their objection that nothing remained due. In execution of this decree, the legal representatives of those two sons who had died in the meanwhile, objected to the execution on the ground that no debt was due,

Held, that as the legal representatives were questioning the correctness of the decree itself, it cannot be gone into by the executing Court. I.L.R. (1940) Mad. 123 and (1941) 2 M.L.J. 622; I.L.R. (1942) Mad. 271 (F.B.), relied on. (*Horwill and Balakrishna Aiyar, JJ.*) DORAIRAJAM NAYANIM VARU *v.* VEMASWAMI RAMA NAIDU. 62 L.W. 669=1950 M.W.N. 384=A.I.R. 1950 Mad. 47=(1949) 2 M.L.J. 434.

———S. 47—*Executing Court—Powers of going behind decree—Partition decree fixing shares of parties—Shares varied by subsequent events—Executing Court's power to give effect to variance.*

It is a well-known principle that the executing Court cannot go behind the decree, and where a partition decree fixes certain shares for the parties, it is the duty of the executing Court to proceed to partition according to those shares. But there are limits to this principle. Where after the passing of the decree, events happen and the shares are varied by reason of those events, the executing Court can give effect to that variance and it cannot be said that in giving effect to that variance, it is going behind the decree or the decision of the Court which passed the decree. A wide construction should be put upon S. 47, C. P. Code, with regard to introducing parties and ascertaining all possible points in execution proceedings without a fresh suit. (*Constantine, J.*) RATTANMAL *v.* BHUDHALSHAH. I.L.R. (1945) Kar. 455=227 I.C. 287=A.I.R. 1946 Sind 99—1946 Sind (Rul.) 268.

———S. 47—*Executing Court—Powers of—Going behind the decree—When permissible.*

Ordinarily speaking the execution Court has no power to go behind a decree. But it can do so where a personal decree has been passed against the legal representative of a deceased debtor in respect of the debt due from the deceased and this exception does not extend to a decree for costs passed against the legal representative personally. (*Madeley, J.*) HAJRA BEGAM *v.* TAHAWWAR ALI KHAN. 1947 O.A. (C.C.) 136=1947

O.W.N. 364=1947 A.W.R. (C.C.) 136=A.I.R. 1947 Oudh 217.

——**Ss. 47 and 152**—*Executing Court—Powers of—Order recording satisfaction of decree—Validity—Power of Court to decide—Order giving judgment-debtor's land on mortgage to decree-holder in lieu of decretal amount—Decree-holder dispossessed of such land owing to non-specification of khasra numbers in order—Application by decree-holder for amendment of order by specifying khasra numbers—Nature of—Maintainability.*

If an order recording satisfaction of a decree is made by the executing Court and one of the parties comes forward with the allegation that the order is wrongly made or that it is illegal, there is no doubt that the Court can go into the matter and decide the question whether or not the order was valid.

But where the executing Court ordered the judgment-debtor's land to be given to the decree-holder on mortgage in lieu of the decretal amount and recorded complete satisfaction of the decree after the decree-holder obtained actual possession of it but subsequently by reason of the omission in the order to specify the khasra numbers of which the decree-holder was to be the mortgagee the original mutation in his favour was set aside and he was also dispossessed of the land, an application by the decree-holder for the correction of the order by specifying the khasra numbers of the land given to him on mortgage without a prayer for setting aside the order recording the complete satisfaction of the decree by review, does not lie. As the order recording satisfaction of the decree no longer represents the actual state of affairs, neither the decree-holder nor the executing Court can ignore it, and until that order is set aside the executing Court is *functus officio* and cannot afford any relief to the decree-holder by way of amending the order. The application made by the decree-holder for amendment of the order is within the scope of S. 152, C. P. Code, rather than of S. 47. *(Teja Singh, C.J.)* DAULAT RAM *v.* BABOO RAM. A.I.R. 1950 Pepsu 52.

——**S. 47**—Executing Court—Powers of—Power to examine validity of decree based on agreement of parties and containing agreement *prima facie* valid and enforceable—Decree negativing claim for costs and interest—Clause providing for right to decree-holder to realise amounts with interest and costs on default without specifying rate of interest or other details—Power of executing Court to award costs and interest in execution. *See* C. P. CODE, O. 23, R. 3. A.I.R. 1950 Pat. 440.

——**S. 47**—*Executing Court—Powers of—Power to question validity of decree and to refuse execution.*

An executing Court is not generally entitled to question the validity of decree which it is called on to execute. But where it is patent that the decree was, in fact, passed without jurisdiction or a nullity, the executing Court can question its validity and refuse to execute the decree on that ground. *(Grille, C.J. and Puranik, J.)* UTTAMCHAND *v.* WASUDEO. I.L.R. (1946) Nag. 583=

1946 Nag. (Rul.) 141=1946 N.L.J. 317=224 I.C. 224=A.I.R. 1946 Nag. 311.

——**S. 47**—Execution proceeding—Parties—Receiver in possession of property—If necessary party. [*See* Q.D. 1941—1945, Vol. I, Col. 834.] SATYA NARAYAN BANERJI *v.* KALYANI PRASAD SINGH. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

——**S. 47**—Execution proceeding—Person made party to—If continues to be party to subsequent execution proceedings. [*See* Q.D. 1941—1945, Vol. I, Col. 834.] SATYANARAYAN BANERJEE *v.* KALYANI PRASAD SINGH. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

——**Ss. 47, 146 and 151**—*Execution sale—Validity—Sale not confirmed for non-payment of landlord's fees under Bengal Tenancy Act, S. 26-E—Right of auction-purchaser—Purchaser of his right—Position of—Order for his substitution—Inherent power of Court.*

Where on the failure of a mortgagee auction-purchaser to deposit the "landlord's fee" as required by the provisions of S. 26-E of the Bengal Tenancy Act, the Court directed that the purchase-money paid by him should be credited to the execution case which was thereupon dismissed on part satisfaction and the confirmation of sale was withheld,

Held, that although the landlord's fee had not been paid, the sale which had taken place was still subsisting as the forfeiture of the purchase money and resale of the property had not been directed under S. 26-E (3) of the Bengal Tenancy Act, and that the mortgagee auction-purchaser would be entitled automatically to an order for the confirmation of the sale as soon as he deposited the landlord's fee, for which no time limit had been prescribed by the Act. For this purpose it was not necessary for him to institute a fresh execution case. An application by him to the effect that the landlord's fee had been paid and that the sale might be confirmed, cannot be regarded as an application for execution at all and no notice need be issued to the judgment-debtors under the provisions of O. 21, R. 22, C. P. Code. 45 C.W.N. 493, foll.

If a creditor of the mortgagee auction-purchaser attaches the property before the confirmation of the sale and purchases the right, title and interest of the latter, he becomes the successor-in-interest of the mortgagee auction-purchaser and must be regarded as claiming under him within the meaning of S. 146, C. P. Code. It follows, therefore, that by reason of his purchase he steps into the shoes of the auction-purchaser as regards any rights which the latter had in the execution case to deposit the landlord's fees and to obtain confirmation of the sale. It is necessary that his name should be brought formally on the record in the execution case in order that he might be in a position to exercise the rights of the auction-purchaser which had devolved on him, and the Court has inherent power to do so even if O. 22, R. 10, C. P. Code, does not apply to execution proceedings. 44 M. 919, foll. *(Edgley and Blank, JJ.)* BASIR ULLA *v.* NABIN CHANDRA SHAHA. I.L.R. (1947) 1 Cal. 22.

———S. 47—*Maintenance decree—Enforcement—Execution or suit—Charge given by decree—Enforcement—Fresh suit—Necessity.*

It is well-settled that a decree for future maintenance is executable upon each default. Even where the decree says that the maintenance will be a charge on specified properties, no fresh suit is necessary to enforce the charge. The decree can be executed on default. (*Meredith, J.*) SHEONANDAN PANDEY *v.* MT. ASARFI KUER. 223 I. C. 173=1946 Pat. (Rul.) 158=1945 P.W.N. 453=12 B.R. 333=A.I.R. 1946 Pat. 216.

———S. 47, O. 21, R. 2 and O. 34, R. 5—*Mortgage decree—Mortgagors if entitled to set-off in execution a claim against the decree-holders for damages resulting from their failure to supply funds to the receiver (appointed before the decree) for the institution of suits for the recovery of rents due by the mortgagors' tenants—Claim if relates to execution, discharge or satisfaction of decree.*

A judgment-debtor has no right to set-off in execution of the decree passed against him a claim for damages which does not arise under the decree. The mortgagors are not entitled to set-off in proceedings instituted for the execution of a mortgage decree passed against them a claim for damages against the (mortgagees) decree-holders based on their failure to supply funds to the receiver appointed before the decree for the institution of suits for the recovery of the rents due by the mortgagors' tenants. A judgment-debtor cannot evade payment of the decretal amount or obtain a reduction in the sum declared by the decree to be payable because he happens to have a claim for damages against the decree-holder for something done, or omitted to be done by him, which leaves the hypotheca unaffected. Such a claim cannot be treated as a matter "relating to the execution, discharge or satisfaction" of the mortgage decree. A plea to be allowed to set-off in execution proceedings a claim for damages is repugnant to the scheme of the Code and is outside the scope of the principle of equitable set-off which has been applied in certain suits. (*Leach, C.J. and Lakshmana Rao, J.*) KRISHNA RAO *v.* GONTI BAIRAGI. I.L.R. (1947) Mad. 184=229 I.C. 239=1947 Mad. (Rul.) 127=A. I.R. 1927 Mad. 52=59 L.W. 394=1946 M.W. N. 481=(1946) 2 M.L.J. 85.

———Ss. 47, 144, 151 and O. 21, R. 95—*Mortgage suit—Preliminary decree—Application for scaling down—One of the purchasers of properties not joining in the application—*Bona fide *purchasers in good faith—Title of the purchaser whether good.*

A mortgage suit was filed by second respondent herein for recovery of amount due under mortgage executed by defendants 1 to 4 in the suit. Defendants 5 to 8 and 9 and 12 were purchasers of portions of the hypotheca. The 13th defendant was a purchaser of 3 houses from 9th defendant and 14th defendant is a purchaser of one of them from 13th defendant. The 29th defendant, the contesting first respondent, was the legal representative of the 14th defendant. A preliminary decree was passed. Petitions for scaling down of debts under Madras Act IV of 1938, were made and they were also scaled down. The 13th defendant did not join in them. Subsequently he filed a petition under O. 21, R. 2, C. P. Code. On rejection of it he filed an appeal. Pending disposal of it he also prayed for stay of execution in bringing properties to sale by decree-holder. The High Court passed a conditional order. There was no stay with regard to property sold to 14th defendant. Therefore the property was sold and decree-holder purchased the same. The 29th defendant did not take steps to have the debt scaled down so far as he was concerned nor was he a party to the appeal. The first respondent (29th defendant) put in a petition for re-delivery of the house purchased by the decree-holder and sold subsequently to the appellant herein. The petition was filed under Ss. 47, 144, 151 and O. 21, R. 95, C. P. Code.

On the question whether the appeal was competent in a matter arising out of an order under S. 151, C. P. Code.

Held, that as the case related to the discharge and satisfaction of the decree it fell under S. 47, C. P. Code, and therefore appealable.

Held also, on the question whether the 29th defendant could dispossess the appellant who was a purchaser from the decree-holder, that so far as 29th defendant was concerned the decree was voidable as he could have resisted execution by claiming benefit under the Act IV of 1938. He did not choose to do so and the appeal to the High Court was only by the 13th defendant and though the effect of this judgment may enure to his benefit, because he did not oppose the execution of the decree he cannot now come forward and call upon the appellant to deliver possession of the property purchased by him *bona fide*, and in good faith. (*Subba Rao and Somasundaram, JJ.*) IRULAYEE AMMAL *v.* MURUGIAH. 63 L.W. 280=1950 M.W.N. 285=5 D.L.R. (Mad.) 279=A. I.R. 1950 Mad. 640=(1950) 2 M.L.J. 17.

———S. 47—*Objection to execution on the ground of lands being inalienable—Maintainability—Duty of executing Court.*

In an application in 1943 for sale in execution of a maintenance decree of 1928, it was pleaded in bar of execution that the items sought to be sold were inalienable service inam lands and as such it was not open to the executing Court to entertain an application for their sale in execution.

Held, that though the principle is well settled that an executing Court cannot go behind the decree and pass an order in execution which will have the effect of nullifying the decree, two well-known exceptions have been engrafted on the general principle, namely, that the executing Court will stay its hands where it is plain on the face of the record that the alienation is prohibited by statute or that it is opposed to public policy. As it was apparent from the plaint and the judgment in the case that the properties sought to be sold were unenfranchised temple service inam lands and as such inalienable and their sale opposed to public policy, the executing Court was justified in staying its hands and rejecting an application for their sale in execution of the decree. (*Yahya Ali, J.*) Meenakshi Ammal *v.* Chidambaram Chettiar. 60 L.W. 41=1947 M.W.N. 100=A.I.R. 1947 Mad. 341=(1947) 1 M.L.J. 66.

——**Ss. 47 and 115**—*Order dismissing application for amendment of execution petition—Appealability—Revision—Competency.*

An order dismissing an application for the admendment of an execution petition is a decision on a question relating to the execution of the decree and falls within S. 47, C. P. Code. Where the order definitely negatives the right of the decree-holder, there is a final adjudication conclusive as regards the Court expressing it and determining the rights of the parties and therefore the order would be appealable. It is as if a relief claimed by the decree-holder in execution had been finally refused to him. Such an order would clearly come within the meaning of "decree" as defined in S. 2 (2) of the C. P. Code, and a revision against that order would be incompetent. (*Rajamannar, J.*) Gopalaswami Mudaliar *v.* Tyagarajaswami Devasthanam, Tiruvarur. 1947 M.W.N. 570=A.I.R. 1948 Mad. 43=60 L.W. 498=(1947) 2 M.L.J. 235.

——**Ss. 47 and 2 (2)**—*Order on application for stay of execution—Finality—Appeal—Maintainability.*

If any question arising in execution is determined under S. 47, C. P. Code, it automatically becomes a decree by virtue of S. 2 (2), whether the order conclusively determines the rights of the parties or not. Consequently, an order on an application for stay of execution would be a decree within the meaning of S. 2 (2) of the Code, whether the order directs that execution shall be stayed or that execution shall proceed, and is appealable. (*Horwill, J.*) Veeraraghavayya *v.* Rattamma. 61 L.W. 392=A.I.R. 1948 Mad. 524=4 D.L.R. (Mad.) 34=1948 M.W.N. 425=(1948) 1 M.L.J. 425.

——**Ss. 47 and 96**—*Order on miscellaneous petition in execution—Appealability.*

An order in execution proceedings deciding any dispute between the parties affecting the substantive rights can form the subject-matter of an appeal under Ss. 47 and 96 of the Civil Procedure Code. (*Wadsworth and Rajamannar, JJ.*) Periakaruppan Chettiar *v.* Venugopal Pillai. I.L.R. (1947) Mad. 132=59 L.W. 240 (2)=1946 M.W.N. 227=A.I.R. 1946 Mad. 383=(1946) 1 M.L.J. 347.

——**S. 47 and O. 21, R. 66**—*Order settling terms of sale proclamation—Rights of judgment-debtor* inter se *affected—Appealability.*

If there is an order of the Court merely settling the terms of the sale proclamation which does not in any way determine or affect the rights of parties, then the order is not open to appeal. But if in settling the terms of a sale proclamation the rights of judgment-debtors *inter se* who are owners of the equity of redemption, are affected by the order of a Court that would be a matter relating to the execution, discharge or satisfaction of the decree and the decision of the Court would be open to appeal at the instance of the aggrieved party. (*Viswanatha Sastri, J.*) Ramalingaswami Naicker *v.* Venkitaswami Naicker. 1950 M.W.N. 164=A.I.R. 1950 Mad. 296=(1950) 1 M.L.J. 42.

——**S. 47**—Parties and representatives—Money decree—Receiver appointed to realise money by disposing of judgment-debtor's property—Receiver selling property by private treaty with Court's permission—Purchaser, if representative of judgment-debtor. [*See* Q.D. 1941—1945, Vol. I, Col. 836.] Diwan Singh *v.* Mahomed Akbar. 221 I.C. 468=1946 Pesh. (Rul.) 5.

——**S. 47**—*Parties and representatives—Purchaser of property under attachment—If representative of judgment-debtor.*

A purchaser of property under attachment is a representative of the judgment-debtor as contemplated by S. 47, C. P. Code. (*Harries, C.J., Abdul Rashid and Achhru Ram, JJ.*) Bhiku Mal *v.* Ram Chandra Babu Lal. I. L. R. (1946) Lah. 672=224 I.C. 468=1946 Lah. (Rul.) 368=48 P.L.R. 147=A.I.R. 1946 Lah. 134 (F.B.).

——**S. 47**—*"Parties and representatives"—Transferee from defendant pending suit—If representative.*

The word "transferee" in S. 47, C. P. Code, is used in a much wider sense than the word "legal representative," and includes all persons on whom the interest of a party has devolved and who, to the extent of that interest, are bound by the decree. A transferee of a defendant's interest *pendente lite* is therefore a "representative" of the defendant within the meaning of S. 47, C. P. Code. (*Achchru Ram, J.*) Chanan Singh *v.* Waryam Singh. 226 I.C. 434=(1946) Lah. (Rul.) 458=A.I.R. 1947 Lah. 175.

——**S. 47**—Party to suit—Person made party to execution proceeding. [*See* Q.D. 1941—1945, Vol. I, Col. 837.] Satya Narayan Banerji *v.* Kalyani Prasad Singh. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

——**S. 47**—*Procedure—Summary dismissal of petition—Legality.*

There is no authority for holding that an application under S. 47, C. P. Code, should not be summarily dismissed. It is always open to a Court to which a petition is presented to consider it on the merits at the time of presentation. The only thing is that the petitioner must be heard on the points raised and if the point is a clear one, the Court may come to a conclusion at once. (*Reuben and Das, JJ.*) Dasrathi Rai *v.* Kali Charan Ghose. 5 D.L.R. (Pat.) 239.

——**S. 47**—*Representative of judgment-debtor—Purchaser of attached property.*

The purchaser of attached property has to be deemed to be a representative of the judgment-debtor under S. 47 of the C. P. Code. 63 M.L.J. 941; 56 Mad. 447, Rel. on. (*Satyanarayana Rao, J.*) Subramaniam Chettiar *v.* Official Receiver of Ramnad. 1949 M.W.N. 8=A.I.R. 1949 Mad. 594=4 D.L.R. (Mad.) 241=(1949) 1 M.L.J. 143.

——**S. 47**—*Representative—Stranger auction-purchaser—Whether representative of judgment-debtor and of decree-holder.*

A stranger auction-purchaser is a representative of the judgment-debtor as well as of the decree-holder. Every time a question is raised as between him and one or other of the parties to the decree it is necessarily a question between him as representative of one side and the other party to the decree; and this is so even when the judgment-debtor and the decree-holder combine against him. If he holds a fraction of the interests of either side it can make no difference that the one who held that fraction before the sale chooses to abandon it after the purchaser's rights have accrued. (*Bose and Mangalmurti, JJ.*) RAMBHAU *v.* NAGARMAL. I.L.R. (1947) Nag. 674=A.I.R. 1948 Nag. 94=1948 N.L.J. 54.

———**S. 47**—*Representative—Sub-tenant, if bound by decree for ejectment of chief tenant.*

A decree for ejectment passed against the chief tenant would be binding on the sub-tenant as he would be his representative, being a person who has derived his interest from the chief tenant. (*Mitter, Ag. C.J. and Sharpe, J.*) JAMINIKANTO *v.* BONOMALI DEY. A.I.R. 1948 Cal. 172.

———**Ss. 47 and 96 and Provincial Insolvency Act (V of 1920), Ss. 37 and 68**—*Right of appeal—Decree against insolvent and two others—Annulment of adjudication and vesting of insolvent's property in Official Receiver under S. 37 of the Provincial Insolvency Act—Petition to execute decree against person of insolvent and property in the hands of the Official Receiver—Order directing execution to proceed—Appeal by insolvent—Maintainability.*

The appellant was adjudicated an insolvent and nearly four years later the adjudication was annulled and his properties were vested in the Official Receiver by an order under S. 37 of the Provincial Insolvency Act. An execution petition was filed against the appellant and two others in execution of a decree in a suit in which all the three were the defendants. The Official Receiver was added as the fourth respondent. The prayers in the execution petition were to attach and sell certain immoveable properties of the appellant which vested in the Official Receiver under S. 37 of the Provincial Insolvency Act and also that a warrant may be issued for the arrest of the appellant. Though a counter-affidavit was filed by the appellant execution was ordered to proceed. On a question whether the insolvent whose adjudication had been annulled could maintain an appeal against that order,

Held, that as the decree-holder chose to make the insolvent a party to the execution petition not only in respect of the prayer for his arrest but also in relation to the prayer for the attachment of his property which had vested in the Official Receiver, there is no reason why the insolvent, a party to the decree sought to be executed, should not have a right to file an appeal against the order made in execution of the decree. (*Bell and Govindarajachari, JJ.*) SUBBARAMIAH *v.* BALARAMI REDDY. 61 L.W. 369=A.I.R. 1949 Mad. 91=1948 M.W.N. 348=(1948) 1 M.L.J. 346.

———**S. 47 and O. 21, R. 92 and Madras Tenants and Ryots Protection Act (XVII of 1946), Ss. 3 and 4**—*Sale before coming into force of Madras Act—Sale awaiting confirmation—Application to stay confirmation under S. 4 of Madras Act—Order rejecting—Legality—Appealability of order.*

The respondent obtained a decree against appellants and others and in execution thereof there was a Court auction sale on 11th September, 1946. The properties were purchased by a stranger and the execution petition was posted for confirmation of sale. Meanwhile the Madras Tenants and Ryots Protection Act (XVII of 1946) had been passed and came into force. The appellants (defendants) deposited two years' rent and applied under S. 4 of the said Act for stay of confirmation of sale. The first Court rejected the application as according to it the sale had already taken place. The sale was confirmed duly and in appeal under S. 47 of Civil Procedure Code the main ground raised was against the order under Act XVII of 1946. The appeal was dismissed as according to the appellate Court also, the sale had been held prior to coming into force of the Act. On the question whether the appeal would lie in view of the want of a provision for appeal under the Madras Act,

Held, (1) S. 4 of Act XVII of 1946 applies only to cases where property has not been sold and hence it is inapplicable to cases where auction sale has been effected but what remains to be done is only confirmation of sale by Court under Order 21, rule 92, Civil Procedure Code.

(2) As the order refusing stay would amount to deprivation of possible rights, the order in question would be a decree as it is one in pending execution proceedings and from this point of view an appeal would lie under S. 47, Civil Procedure Code, either directly against the order refusing stay or at any rate against the final order in execution petition confirming the sale consequent on the dismissal of the petition under S. 4 of the Act XVII of 1946. (1948) 1 M.L.J. 41=L.R. 74 I.A. 264=I.L.R. (1948) Mad. 505 (P.C.), applied. (*Panchapagesa Sastri, J.*) KUNHIKKAVU *v.* THATTAN KESAVAN. 63 L.W. 202=1950 M.W.N. 237=A.I.R. 1950 Mad. 512=5 D.L.R. (Mad.) 237=(1950) 1 M.L.J. 347.

———**S. 47**—*Scope—Dispute between judgment-debtors* inter se.

When a dispute between judgment-debtors *inter se* is such as to affect the decree-holder, it falls within S. 47, C. P. Code. 21 N.L.R. 34, Dist. 4 R. 418, 24 M.L.J. 477, 45 M.L.J. 478 and 1936 L. 116, rel. on. (*Mudholkar, J.*) SHRIRAM NATHUJI *v.* CO-OPERATIVE SOCIETY, KAWALI. I.L.R. (1949) Nag. 708=A.I.R. 1949 Nag. 398=1949 N.L.J. 442.

———**S. 47**—*Scope—Execution of mortgage decree—Question of rateable contribution by different items of mortgaged property.*

The question of rateable contribution by the different items of mortgaged property towards the liquidation of the amount of the mortgage decree, is one of adjustment of equities between the holders of the different items, and is, therefore, a question relating to the execution, discharge or satisfaction of the decree, within the scope of

S. 47, C. P. Code. (*Shevde, J.*) Pandurang *v.* Shrihari. I.L.R. (1948) Nag. 595=A.I.R. 1949 Nag. 155=1949 N.L.J. 74.

———**S. 47**—*Scope—Mortgage-decree—Execution—Plea raising question of automatic reduction of mortgage-debt or claim to set-off against mortgage-debt—If can be raised and decided.*

The executing Court must take the decree as it stands and cannot entertain pleas which are in contradiction of the decree. A plea rising a claim to an automatic reduction of the mortgage-debt or to a right of set-off against the mortgage-debt, is not one relating to the execution, discharge or satisfaction of the mortgage-decree and cannot therefore be entertained or determined by the executing Sourt. (*Imam and Bennett, JJ.*) Sheonarainsah *v.* Deolochankuer. 26 Pat. 97=A.I.R. 1948 Pat. 208.

———**S. 47**—Scope—Mortgage suit—Suit by puisne mortgagee—Prior mortgagee made party—Decree for sale without directing payment of amount due to prior mortgagee on his mortgage before sale—Execution—Objection by prior mortgagee claiming payment of amount due to him before sale of items in his possession as purchaser in execution of his decree or his mortgage—Competency. *See* T. P. Act, Ss. 60 and 101. 27 Pat. 332.

———**S. 47**—*Scope — Question if minor judgment-debtor was properly represented in suit —If can be gone into.*

The question whether a minor judgment-debtor was properly represented in suit is not one which can be investigated in execution proceedings. If a minor judgment-debtor contends that he was not properly represented in suit and was not thus a party to the decree, he cannot come under S. 47, C. P. Code, as if he was a party to the suit. (*Puranik, J.*) Mangal Prasad *v.* Teklal. I.L.R. (1946) Nag. 623=223 I.C. 305=1946 N.L.J. 249=1946 Nag. (Rul.) 115=A.I.R. 1946 Nag. 275.

———**S. 47**—Scope—Usufructuary mortgage—Suit on—Final decree for sale—Execution—Application by judgment-debtor claiming compensation for waste by decree-holder after decree—Competency—Separate suit—Necessity. [*See* Q.D. 1941-1945, Vol. I, Col. 844.] Ramanatha Ayyar *v.* Abdul Salam Sahib. 221 I.C. 522=1946 Mad. (Rul.) 62.

———**S. 47**—Second Appeal—Right of—Execution proceedings. *See* C. P. Code, S. 100. 52 P.L.R. 13.

———**S. 47 (2)**—*Applicability—Conversion of proceeding as suit—When permissible.*

Sub-S. (2) of S. 47, C. P. Code, comes into operation only if the conditions laid down in sub-S. (1) are satisfied, *i.e.,* if there are questions arising between the parties to the suit when the decree was passed or their representatives and those questions relate to the execution, discharge, or satisfaction of the decree. It is only in such cases that the Court may treat a proceeding under this section as a suit or a suit as a proceeding; but in a case where a minor judgment-debtor shown in the decree as a judgment-debtor and as properly represented comes up before the Court and states that he was not a judgment-debtor in the decree in as much as he was not properly represented. S. 47 (1), C. P. Code, does not apply to him as on his own contention he is not a party to the suit, and therefore sub-S. (2) also has no application. Such a person's proceeding cannot be treated as a suit for the purposes of S. 47, C. P. Code. (*Puranik, J.*) Mangal Prasad *v.* Teklal. I.L.R. (1946) Nag. 623=1946 N.L.J. 249=1946 Nag. (Rul.) 115=223 I.C. 305=A.I.R. 1946 Nag. 275.

———**S. 47 (2)**—*Applicability—Conversion of suit into proceeding.*

Under S. 47 (2), C. P. Code, a suit can be converted into a proceeding subject to any objection as to limitation and jurisdiction, only if it is one to which S. 47 is a bar. A suit which is not maintainable on any other account cannot be treated as a proceeding under that section. (*Padhye, J.*) Rukhadu Parbat Singh *v.* Krishnarao. I.L.R. (1948) Nag. 63=A.I.R. 1948 Nag. 147=1948 N.L.J. 24.

———**S. 47 (2)**—*Application treated by Court as suit—Limitation—Limitation Act, Art.* 181.

Where an application filed under S. 47, C. P. Code, is subsequently treated by the Court as a suit under the provisions of S. 47 (2), C. P. Code, there can be no doubt that as regards limitation, the Article of the Limitation Act which applies is Art. 181, which relates specifically to applications and prescribes a period of three years with effect from the date when the right to apply accrues. 54 C. 419, ref. to. (*Edgley and Blank, JJ.*) Basir Ulla *v.* Nabin Chandra Shaha. I.L.R. (1947) 1 Cal. 22.

———**S. 47 (3)**—*Jurisdiction—Decision as to legal representative—Binding character—Wrong person made legal representative—Sale—Validity as against true heir—Erroneous decision—If vitiates sale.*

It is the duty of the executing Court to decide who is the legal representative of the deceased judgment-debtor, and it has jurisdiction to decide the question. If the Court finds and decides, whether rightly or wrongly, that a specified person is the legal representative, the proceedings taken in execution will be legal and the sale will bind the true legal representative unless he takes steps within time to have the sale set aside. The fact that the decision was wrong will not vitiate the execution proceedings and the sale as being without jurisdiction. (*Lokur, J.*) Rayappa Ningappa *v.* Virupaxappa. 48 Bom.L.R. 814=A.I.R. 1947 Bom. 164.

———**S. 47 (3)**—*Question whether any person is representative of party—Duty of executing Court to decide.*

Where two persons institute separate execution proceedings in respect of the same decree, each claiming to be the legal representative of the deceased decree-holder, the question as to who is the real legal representative of the deceased is a question to be decided by the executing Court under S. 47 (3), C. P. Code. (*Lodge, J.*) Sachindra Kumar Chaudhuri *v.* Rahamaddin. 51 C.W.N. 186.

———**S. 48**—Amendment of execution application—Limitation—Application filed within 12 years

—Amendment for remedying defects after 12 years—Permissibility. [*See* Q.D. 1941—1945, Vol. I, Col. 845.] Divakaran Nambudripad *v.* Brahamadathan Nambudripad. I. L. R. (1946) Mad. 117.

———**S. 48 and Limitation Act (IX of 1908), Art. 182**—*Applicability—Decree of Presidency Small Causes Court transferred for execution to an ordinary Civil Court in the moffusil.*

As S. 8 of the Civil Procedure Code expressly excludes the application of S. 48, Civil Procedure Code, to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay, S. 48 would not apply to a decree passed by any of those Courts and the only provision which prescribes a time limit for the execution of such a decree is Article 182 of the Limitation Act which alone will apply. (1911) 21 M.L.J. 777=I.L.R. 36 Mad. 108, approved. (1941) 1 M.L.J. 365, held not correctly decided.

S. 31 of the Presidency Small Cause Courts Act does not attract the operation of S. 48, Civil Procedure Code, because the latter section only provides for a limit of time for execution and does not deal with the procedure for execution. (*Rajamannar, C.J., Satyanarayana Rao and Krishnaswami Nayudu, JJ.*) Gopalaswami Mudaliar *v.* Thiagarajaswami Devasthanam. 63 L.W. 328=A.I.R. 1950 Mad. 504=5 D.L.R. (Mad.) 187=1950 M.W.N. 265=(1950) 1 M.L.J. 437 (F.B.).

———**S. 48**—*Applicability — Decree prohibiting defendant from obstructing village path.*

A decree prohibiting the defendant from putting any obstruction in the village path is one granting permanent injunction, and is not one of the kind of decrees governed by S. 48, C. P. Code. Such a decree cannot be said to have been spent up after expiry of 12 years from the date it was passed. (*Meredith and Ray, JJ.*) Shyam Sunder Prasad *v.* Ramdas Singh. 25 Pat. 397=12 B.R. 466=224 I.C. 37=1946 Pat. (Rul.) 248=A.I.R. 1946 Pat. 392.

———**S. 48**—*Applicability—Last day of the twelve years period expiring on Sunday—Execution petition filed the next day—If barred—Applicability of the principle that a party should not suffer where he is prevented from doing a thing by the act of the Court.*

A party should not suffer for the act of the Court and if a Court is not sitting on the last day when he should do any particular act he will be in time if he does it on the next day when the Court sits. This principle has been recognised by the provisions of the General Clauses Act and also by the express provisions of S. 4 of the Limitation Act.

Held, applying this principle, that where the last day of the twelve years period fixed under S. 48 of the C. P. Code expired on a Sunday on which day the Court was closed and the execution petition was filed on the next day, it was in time. (*Panchapagesa Sastri, J.*) Ratnaswami Padayachi *v.* Kuppuswamy Ayyar. 61 L.W. 573=1948 M.W.N. 615=A.I.R. 1949 Mad. 275=(1948) 2 M.L.J. 234.

———**S. 48**—*Application for execution and transfer of decree filed within 12 years—Application for execution in transferee Court also filed within that period—Order for transferer and certificate of non-satisfaction signed and transmitted to transferee Court beyond 12 years—Execution, if barred.*

S. 48, C. P. Code, requires that the application for execution should be presented within 12 years of the date of the decree. It is the presentation of the application within the time limit prescribed which matters. If the presentation is irregular at the inception and the irregularity is subsequently cured, the application so presented, relates back to the date of presentation. The period of limitation laid down in the section cannot be curtailed by delays which may be caused by the machinery provided for in the C. P. Code, for the transfer of decrees. Where an application for execution and transfer of a decree is filed in the Court which passed the decree within 12 years of the date thereof, and while this application is pending an application for execution of the decree is also filed in the transferee Court within that period, the execution of the decree is not barred under S. 48, C. P. Code, although the order for transfer and the certificate of non-satisfaction of the decree are signed and transmitted to the transferee Court beyond 12 years from the date of the decree. The failure of the Court which passed the decree to send the certificate of non-satisfaction and other relevant papers to the transferee Court within time is a mere irregularity and does not affect the jurisdiction of the latter Court. (*Das, J.*) Ananta Kumar *v.* Surendra Kumar. I.L.R. (1948) 1 Cal. 275=51 C.W.N. 851=A.I.R. 1947 Cal. 424.

———**S. 48**—*Application twelve years after decree to amend execution application by adding receiver as party—Receiver already functioning when execution petition was filed—Amendment, if can be allowed.*

Where twelve years had passed after the passing of a decree a receiver was sought to be brought upon record in the execution application to represent the judgment-debtors already on record, even though the receiver was functioning for the judgment-debtors at the very time when the execution petition was filed, on the question whether the amendment sought could be permitted,

Held: A receiver is only the representative of the judgment-debtor. He does not become the owner, but in order effectively to get at the properties without any danger of the right to do so being challenged, the receiver is also made a party. The fact that he was operating even when the execution petition was filed, and that the decree-holder could have found this out with diligence on his part will only be a circumstance for saddling him with costs when allowing the amendment and will not be a circumstance converting the amendment asked for into a fundamental one, or justifying the refusal of such an amendment.

Case-law reviewed. (***Panchapakesa Ayyar, J.***) Lakshmi Narayanamurthi *v.* Sait Purnachand Chatrabhan. 1950 M.W.N. 774=(1950) 2 M.L.J. 661.

——**S. 48**—*Bar under—Application for appointment of receiver in execution—Receiver appointed—Obstruction to delivery—Execution petition dismissed—Subsequent application to continue execution petition—Competency—Bar of limitation.*

The decree-holder who had obtained a decree in 1929 and whose prior execution petition had been dismissed, filed in 1940 an execution petition for the appointment of a receiver to take possession of the property and deposit the income thereof into Court. The judgment-debtors who were served with notice of the application reported through their pleader that they had no objection to the prayer asked for in the execution petition. The decree-holder paid batta for delivery of the properties to the receiver, but the properties were not delivered as a third party was obstructing delivery. The application for removal of obstruction was rejected on the ground that the decree-holder, was only entitled to the income of an undivided moiety and was not entitled to apply for the appointment of a receiver. Consequent on this, the execution petition itself was "dismissed" by order dated 6th March, 1941. An appeal against the order on the petition for removal of obstruction was also eventually dismissed. On 24th June, 1943, the decree-holder filed an execution application for the revival and continuance of the prior execution petition of 1940 by granting the relief for the appointment of a receiver. On a contention that the application was incompetent and barred under the provisions of S 48, C. P. Code.

Held, that the order dismissing the previous execution petition did not finally dispose of the execution petition and it must be considered to be pending and that the later application could be properly considered to be a mere continuation or revival of the previous application. (*Tyagarajan, J.*) SYEDAMIAN SAHIB *v.* JANAKI AMMAL. 61 L.W. 353=A.I.R. 1948 Mad. 498=(1948) 1 M.L.J. 385.

——**S. 48**—*Computation of period of 12 years—Starting point—Conditional decree—What is—Partnership suit—Final decree for accounts directing payment of deficit court-fee before execution—Payment of court-fee subsequent to decree—Execution—Limitation—Starting point—Date of decree or date of payment of court-fee.*

The period of 12 years under S. 48, C. P. Code, runs from the date of the decree to be executed, *i.e.*, the date on which it is passed. Where the final decree in a suit for accounts of a partnership directs the plaintiff to pay the deficient court-fee stamp before the execution of decree, such a provision does not make the decree in that suit a conditional decree. The decree is capable of execution the moment it is passed provided the plaintiff pays the deficient court-fee. The fact that the plaintiff chooses to put off the payment of the court-fee does not extend the period of limitation so as to entitle the plaintiff to a period of 12 years from the date when he chooses to pay and actually pays the court-fee. It cannot be said of such a decree that it is not capable of execution except on the happening of a contingency, *viz.*, the payment of the deficit in court-fees. The decree being capable of execution on the very day it is passed if the plaintiff chose to pay the amount which he was liable to pay in respect of the deficit in the court-fees, limitation for execution starts on the date of the decree itself and an application presented beyond 12 years of that date, though within 12 years of the date of payment of the deficit court-fee would be out of time and barred. 40 Bom.L.R. 1278, dist.; 1938 All. 539, 21 Pat. 366, rel. on. (*Chagla, C.J. and Dixit, J.*) WALCHAND RAMCHAND *v.* YESHWANT DEORAO. 4 D.L.R. (Bom.) 110=A.I.R. 1949 Bom. 379=51 Bom.L.R. 608.

——**S. 48**—*Computation—Personal decree under O. 34, R. 6—Execution—Starting point of 12 years—Date of personal decree or date of final decree for sale in the mortgage suit.*

Where in a mortgage suit the mortgagee after sale of the mortgaged property resulting in a deficit, obtains a personal decree under O. 34, R. 6, C. P. Code, the period of 12 years prescribed by S. 48, C. P. Code, commences from the date of such personal decree and not from the date of the final decree for sale in the suit itself. 54 I. A. 129; 22 C.W.N. 145 (P.C.), cons.; 40 Mad. 989, foll. 50 Mad. 5, ref.; 15 Luck. 95, rel. (*Ramaswami and Narayan, JJ.*) NAGENDRA PRATAP SINGH *v.* JOHARMAL. A.I.R. 1950 Pat. 491=5 D.L.R. (Pat.) 202.

——**S. 48**—*Criterion date of decree for purposes of S. 48—Executable preliminary decree—Application for execution beyond 12 years of such decree but within 12 years of the final decree—If barred.*

The criterion date of the decree for the purposes of S. 48, C. P. Code, is the date on which the decree becomes operative, namely, that on which the plaintiff is at liberty to file an execution petition to enforce a relief which the Court has granted him.

In a partition suit a preliminary decree was passed on 3rd March, 1932, giving the plaintiff some immediate executable money reliefs and was followed by a final decree on 8th September, 1932, and the plaintiff filed an execution petition for the money reliefs as well as other reliefs on 8th September, 1944, though a prior execution petition of 1942 in respect of the money reliefs was pending. On a contention that the petition filed in 1944 was barred by the provisions of S. 48, C. P. Code.

Held, (1) that it was clearly open to the plaintiff to file an execution petition to enforce the preliminary decree reliefs granted to him on 3rd March, 1932, and so far as such reliefs were concerned, this was the criterion date for commencing the 12 year period for purposes of S. 48, C. P. Code. Hence, the petition filed on 8th September, 1944, was clearly barred under S. 48.

(2) The execution petition in 1944 could not be treated as a continuation of the pending execution petition filed in 1942, for it was filed outside the 12 years prescribed by law and in it the plaintiff had sought other reliefs in addition to those sought in the petition of 1942, but it was

open to the plaintiff to proceed with that pending application. (*Mack, J.*) Lakshminarasinga Rao *v.* Balasubramanyam. 61 L.W. 565=A.I.R. 1949 Mad. 251=1948 M.W.N. 653=(1948) 2 M.L.J. 249.

———**S. 48**—*"Date of the decree"—Partition suit—Decree drafted and signed subsequent to judgment—Period of 12 years—Starting point—Date of judgment or date on which decree is actually drafted and signed.*

"The date of the decree" for purposes of computing the period of twelve years prescribed by S. 48, C. P. Code, is the date of the judgment though the decree may have been drafted and signed on a later date than the judgment. Where under a judgment in a partition suit the adjudication becomes ripe for execution on the date of the judgment in that the respective rights of the parties have been adjudicated and decided on, the date of the judgment is "the date of the decree" for purposes of S. 48, and the mere fact that the formalities to be observed in drafting the decree had yet to be carried out would not postpone the starting point of limitation to the date on which the decree is drawn up and signed. (*Horwill and Koman, JJ.*) Venkataraya Goundan *v.* Mallappa Goundan. 59 L.W. 145 =1946 M.W.N. 147=A.I.R. 1946 Mad. 348=(1946) 1 M.L.J. 163.

———**S. 48 (1)**—*Fresh application—Application for amendment seeking to proceed against new items.*

An application for amendment of a previous application for execution seeking to proceed against new items of property is a fresh application within the meaning of S. 48 (1), C. P. Code. (*Hidayatullah, J.*) Deorao Suryabhanji *v.* Ramchandra Amrutlal. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272.

———**S. 48**—Fresh application—Application to continue execution proceedings against legal representatives of deceased judgment-debtor. [*See* Q.D. 1941-1945, Vol. I, Col. 848.] Hrishikesh Saha *v.* Radha Rani Kar. I.L.R. (1945) 2 Cal. 637=224 I.C. 248=1946 Cal. (Rul.) 218=80 C.L.J. 223=A.I.R. 1946 Cal. 51.

———**S. 48**—*"Fresh application"—Meaning of.*

S. 48 contemplates not a termination of the proceedings in execution as a whole but a termination only of proceedings upon a particular application. Where an application for execution is struck-off or dismissed, because the judgment-debtors are in prison and want time to be heard and it is thought advisable to suspend the execution, an application filed after the striking off of the prior application is not a "fresh" application within the meaning of S. 48, but a continuation of the previous application. (*Davies, C.J.*) Yar Mahomed *v.* Amrumal. I.L.R. (1945) Kar. 339=223 I.C. 402=1946 Sind (Rul.) 153=A.I.R. 1946 Sind 32.

———**S. 48**—*Fresh application or application in revival—Test.*

An application cannot be regarded as one in revival of a previous application unless it is of the same nature. If any relief different from that claimed in the previous one is asked for, or any new property is sought to be attached or sold, it cannot be treated as a mere revival but is a fresh application within the meaning of S. 48, Civil Procedure Code. (*Bose, J.*) Prayagdas Shankerlal *v.* Mt. Indirabai. I.L.R. (1947) Nag. 497=A.I.R. 1948 Nag. 189=1947 N.L.J. 376.

———**S. 48**—Limitation for execution petition—Extension—Minority of decree-holder—Limitation Act, S. 6 and Art. 182. [*See* Q.D. 1941-1945, Vol. I, Col. 848.] Nathu Mal *v.* Jai Karan Das. I.L.R. (1945) Lah. 448.

———**S. 48**—*Period of twelve years—Starting point—Decree to be executed where there has been an appeal and second appeal.*

Where the plaintiff obtained a conditional decree in a suit which was confirmed on appeal subject to a slight modification and second appeals by both parties were dismissed and the decree-holder filed an execution application within twelve years from the date of dismissal of the second appeals,

Held, that as the decree to be executed is that of the appellate Court of final jurisdiction where there has been an appeal, and as the period of 12 years under S. 48 has to be computed from the date of such appellate decree, the application was in time. (*Leach, C.J. and Lakshmana Rao J.*) Nacharammal *v.* Veerappa Chettiar. I.L.R. (1946) Mad. 817=59 L.W. 103=1946 M.W.N. 148=A.I.R. 1946 Mad. 231=(1946) 1 M.L.J. 128.

———**S. 48**—*Period of 12 years—Starting point—Decree for possession and mesne profits—Decree to be eeccuted where there has been an appeal, a second appeal and a Letters Patent Appeal.*

A decree was passed in 1921 for possession and future mesne profits for three years from date of plaint to the date of delivery of possession or until expiry of three years from the date of decree, whichever event was earlier. The matter was carried in appeal, second appeal and again in Letters Patent Appeal. In each Court the appeal was dismissed, the date of the decree in the Letters Patent Appeal being 15th September, 1932. The decree-holder applied on 19th June, 1942, within 12 years from the date of the disposal of the Letters Patent Appeal, to execute the decree by attachment and sale and for recovery of mesne profits up to 1927, the date on which he had obtained possession. On a contention that the application was barred by S. 48, C. P. Code, and that mesne profits could be granted only up to 1924.

Held, that the execution application was within time, as the decree to be executed was the decree passed in the Letters Patent Appeal in 1932 and that the decree-holder was entitled to mesne profits up to 1927, the date on which he obtained possession, it being earlier than the period of 3 years from the date of the decree in the Letters Patent Appeal. (*Horwill, J.*) Thulasi Ammal *v.* Vedavyasachariar. 60 L.W. 144=1947 M.W.N. 173 (2)=A.I.R. 1947 Mad. 359=(1947) 1 M.L.J. 149.

——S. 48—*Scope—Amendment subsequent to date of decree—If postpones starting point of limitation.*

S. 48, C. P. Code, is self-contained and provides for all such contingencies as may operate to postpone the starting point of the period of 12 years. Amongst the contingencies so enumerated in Cl. (*b*) of sub-S. (1) and Cls. (*a*) and (*b*) of sub-S. (2) of the section, an amendment subsequent to the date of the decree does not find place. Therefore, unless the decree either in its original form or in its amended form is construed to be a decree granting an injunction, the section is a bar to the execution of the decree after the expiry of 12 years irrespective of its having undergone a change by its amendment. (*Meredith and Ray, JJ.*) Shyam Sunder Prasad *v.* Ramdas Singh. 25 Pat. 397=224 I.C. 37=12 B.R. 466=1946 Pat. (Rul.) 248=A.I.R. 1946 Pat. 392.

——S. 48—*Scope and effect of—Decree on handnote—Execution barred—Effect—Right if barred.*

Once a decree is obtained on a handnote for moneys due, the rights of the creditor become merged in the decree, and if execution of the decree is barred by limitation, the rights of the creditor are also barred. Limitation in such case bars not merely the remedy but also the right. (*Agarwala, A.C.J. and Meredith, J.*) Rajib Nath Mukherjee *v.* Chota Nagpur Banking Association, Ltd. 27 Pat. 108=2 D.L.R. 497=A.I.R. 1948 Pat. 443.

——S. 48—*Scope—If controlled by S. 14 of Limitation Act.*

S. 48, C. P. Code, is not controlled by S. 14 of the Limitation Act. The period referred to in the former cannot be described as a period of limitation prescribed for any proceeding. (*Henderson, J.*) Makhan Lal Saha *v.* Firm Madan Mohan. 50 C.W.N. 12.

——S. 48—*Scope—If controlled by S. 26 of Punjab Relief of Indebtedness Act.*

S. 48, C. P. Code, prescribes a period of limitation and consequently is not uncontrolled by the provisions of S. 15 of the Limitation Act and of S. 26 of the Punjab Relief of Indebtedness Act which has been drafted on the lines of S. 15 of the Limitation Act. (*Bhandari, J.*) Daulat Ram Vidya Parkash *v.* Gurbakhsh Singh. 50 P.L.R. 294=A.I.R. 1949 E.P. 213=4 D.L.R. (Simla) 156.

——Ss. 48 and 145—*Stay of execution of mortgage decree—Surety bond—Liability of surety—Contingent liability on deficiency in mortgage sale being ascertained—Application to enforce—Time limit—Starting point—Limitation Act (IX of* 1908), *Art.* 181.

In September, 1926, one *M* obtained a preliminary mortgage decree in the Sub-Court, Cuddalore, against three persons. Against that decision the defendants preferred an appeal to the High Court. When the decree-holder applied for the passing of a final decree the defendants filed an application to the High Court for stay of the proceedings. Stay was granted by the High Court on condition of the judgment-debtor furnishing security. In pursuance of the order of the High Court the defendants executed a security bond which provided among other things as follows: "We further agree that if on the execution application of the decree-holder immediately after the disposal of the appeal by the High Court an amount in excess of Rs............should be found due to the decree-holder and if the hypothecated properties do not on sale fetch the amount of which they have been accepted as security we and our legal representatives will be personally liable for the difference between the said execution amount (exclusive of costs) and the value of the security accepted by the Court."

The High Court confirmed the decree of the lower Court in August, 1929, and the final decree was passed on 19th March, 1931. The decree-holder realised a portion of the amount due to him by sale of the property by the year 1941, the last execution order being, dated 21st February, 1941. On 20th February, 1944, the legal representative of the decree-holder, the latter having died in the meanwhile, applied to the Sub-Court, Cuddalore, for transmission of the decree and the security bond to the City Civil Court, Madras, for enforcing the security bond as against the sureties. The latter thereupon contended that as the decree was more than twelve years old by the date of the petition, the execution was barred under S. 48 of the C. P. Code.

Held, that though S. 48 of the Code was applicable for the enforcement of the liability of the surety under S. 145, C. P. Code, inasmuch as under the terms of the surety bond the liability of the sureties was only a contingent liability arising after the mortgaged properties were sold and the deficiency was ascertained, the present application which was filed within 3 years from that date was within time both under S. 48 of the Code and also under Art. 181 of the Limitation Act. (*Rajamannar, O.C.J. and Satyanarayanarao, J.*) Rajam Naidu *v.* Meenakshi Ammal. I.L.R. (1949) Mad. 504=A.I.R. 1949 Mad. 285=4 D.L.R. (Mad.) 27=61 L. W. 552=1948 M.W.N. 561=(1948) 2 M.L.J. 215.

——S. 48 (1) (b)—Compromise of execution case—Stipulation that if judgment-debtor committed default in instalments, original decree to be executed—Execution application filed on default—Limitation. [*See* Q.D. 1941-1945, Vol. I, Col. 851.] Narendra Nath Roy *v.* Heramba Chandra. I.L.R. (1945) 2 Cal. 65.

——S. 48 (1) (b)—*"Subsequent order"—Entry in suit register recording adjustment of decree.*

An entry in the suit register recording on the certification of both parties an adjustment of the decree by a compromise decree passed in a subsequent suit providing for payment of the decretal amount in instalments and for execution in default, amounts to a subsequent order directing payment within the meaning of S. 48 (1) (*b*), C. P. Code. The entry in the suit register showing the modification of the original decree leads to the inference that there must have been some order of the Court, verbal or written, permitting the modification and allowing the same to be recorded in the suit register, and the entry providing for payment by instalments being accepted by Court amounts to an order for payment at recurring periods. (*Akram, C.J. and Shahabuddin, J.*) ALAUDDIN AHMAD *v.* FAKARANNESSA BEGAM. 52 C.W.N. 587.

———S. 48 (1) (b)—*"Subsequent order"—Meaning of—If includes order of Court executing decree.*

The expression "subsequent order" in S. 48 (1) (*b*), C. P. Code, means any order made by a competent Court including a Court executing a decree, and it is not necessary that the order should be made by the Court which passed the decree. (*Grille, C.J. and Sen, J.*) BISMILLAH *v.* JAGANNATH. I.L.R. (1947) Nag. 25=228 I.C. 576=(1947) Nag. (Rul.) 61=1947 N.L.J. 33=A.I.R. 1947 Nag. 101.

———S. 48 (1) (b)—*Subsequent order—Order of executing Court granting time for payment to judgment-debtor.*

A subsequent order mentioned in S. 48, C. P. Code, can be passed by both the original Court as well as the executing Court. An order of the executing Court granting time for payment to the judgment-debtor is a subsequent order, and the decree-holder is entitled to exclude this period in computing the period of 12 years. (*Hidayatullah, J.*) DEORAO SURYABHANJI *v.* RAMCHANDRA AMRUTLAL. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272.

———S. 48 (2)—*Force or fraud—Meaning of.*

It is neither force nor fraud when the judgment-debtor takes advantage of the procedure allowed by law and contests an execution application. There can be no fraud unless there is a mistake as to fact and the other side is misled by it. In a contest in Court of law there is no mistake as to fact when the other side knows the facts and contests them, setting out a different set of facts. He is not misled, and as regards the law, every one is taken to know the law and consequently, whatever legal propositions are not set up, there is no fraud; again, the other side is not misled because he contests and contends that the law is otherwise. (*Bose, J.*) PRAYAGDAS SHANKERLAL *v.* MT. INDIRABAI. I.L.R. (1947) Nag. 497=A.I.R. 1948 Nag. 189=1947 N.L.J. 376.

———S. 48 (2)—*"Fraud"—Meaning of.*

"Fraud" in S. 48 (2) has a very wide meaning and includes any attempt on the part of the judgment-debtor to conceal his property, to deny its ownership and to put forward a mere *benamidar* as the real owner of the property in order to evade execution of the decree. 9 Bom. 318, rel. on. (*Chagla, C.J. and Dixit, J.*) WALCHAND RAMCHAND *v.* YESHWANT DEORAO. I.L.R. (1949) Bom. 634=51 Bom.L.R. 608=A.I.R. 1949 Bom. 379=4 D.L.R. (Bom.) 110.

———S. 48 (2)—*Plea of fraud at late stage—When may be permitted.*

Ordinarily a plea of fraud under S. 48 (2), C. P. Code, cannot be added by way of amendment at a late stage, but in connection with executions where property is prevented from being brought before the executing Court due to the fraud of the judgment-debtor, Courts may permit the plea of fraud to be taken even at a late stage. (*Hidayatullah, J.*) DEORAO SURYABHANJI *v.* RAMCHANDRA AMRUTLAL. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272.

———S. 48 (2) (a)—*Exemption under—Facts to be proved which would entitle a claim for—Execution application beyond twelve years praying for continuation of proceedings in an earlier Execution Petition and asking for sale of certain properties not mentioned in the prior petition—If "fresh application" within the meaning of S. 48 (1)—Court, if has a discretionary power to allow amendment of prior application after expiry of period of limitation.*

The allowance for maintenance of a junior member of the family of the Rajah of Kalahasti was by a decree made a charge on about 400 villages comprised in the Kalahasti zamindari and the final decree passed on 3rd May, 1929, directed the sale of those villages in realisation of the sum decreed in default of payment by the numerous judgment debtors who had acquired interests in the villages charged under subsequent transfers by the Rajah. On 15th January, 1930, the decree-holder applied for execution by Execution Petition No. 20 of 1930 for recovery of the amount decreed by the sale of 21 villages specified in the schedule to the petition and realised more than Rs. 90,000 by the sale of those villages, the last of which was sold in September, 1939. As a sum of Rs. 9,620 still remained due under the decree, the decree-holder made an application, Execution Application No. 379 of 1939, on 1st November, 1939, in the previous proceedings which had not been formally terminated although all the reliefs claimed by the applicant therein had been granted to him. In the fresh application he prayed that the pending prior proceeding (E. P. No. 20 of 1930) might be continued and the recovery of the balance of the decree debt be ordered by the sale of seven new villages specified in that application. It was pleaded in bar of the Execution Application No. 379 of 1939, that it was barred under the provisions of Section 48 of the Civil Procedure Code in that it was more than 12 years from the date of the decree. The decree-holder, however, claimed exemption under clause (*a*) of sub-S. (2) of S. 48 on the ground that the judgment-debtor had prevented him by fraud from executing the decree and that the Execution Application No. 379 of 1939 should not be regarded as a "fresh application" for execution within the meaning of S. 48, sub-S. (1) but should be dealt with as one for amending and continuing Execution Petition No. 20 of 1930 which was still pending.

Held, (*i*) it cannot be held that resistance to execution on legal grounds, however ill-founded, could amount to preventing execution by fraud within the meaning of clause (*a*) of sub-S. (2) of S. 48, Civil Procedure Code. Further it is necessary for the decree-holder, in order to bring himself within the exemption, to prove that execution was prevented in the sense of being actually hindered or checked by the fraud of the judgment-debtor. In the circumstances, as the decree-holder had failed to establish this, he was not entitled to the benefit of the exemption, (*ii*) Under the scheme of execution as provided for in O. 21, Civil Procedure Code, every application requiring the Court to proceed against a particular property, is a substantive application for execution and an application for attachment and sale or for sale without attachment of property B where a previous similar application in respect of property A has succeeded or failed or is still pending, is a fresh application for execution and cannot be treated as one for amending and continuing the prior application although the prayer in the latter application may be worded in that manner. Where no question of limitation arises it is immaterial how the subsequent application is regarded, but when it is made beyond the period of limitation, its real character assumes importance and must be determined, paying more regard to the substance of the matter than to the form of the words used. In the circumstances, it cannot be said that the previous application, Execution Petition No. 20 of 1930 was really pending when Execution Application No. 379 of 1939 was filed. Although the former was not formally terminated, all the villages which the decree-holder required to be sold had been sold and no further relief could be granted on the basis of that petition which must therefore be regarded as no longer pending for the purpose of including by way of amendment new properties sought to be sold for realising the balance of the decree amount. Hence it is difficult to hold that Execution Application No. 379 of 1939 was not a fresh application for execution.

(*iii*) A decree-holder cannot be allowed to amend a previous execution petition by including fresh properties more than twelve years after the date of the decree. Such an application would be "fresh application" for execution within the meaning of section 48 (1), Civil Procedure Code and the Court can have no discretionary power of allowing such an amendment for to do so would plainly contravene the provisions of the section. Sub-S. (2) amply safeguards the decree-holder's right to execute the decree even after the expiry of twelve years in certain cases, and the Court should not allow him in other cases to evade the provisions of the section under colour of amending a previous application so as to include fresh properties which he may wish to proceed against after the expiry of such period. (*Patanjali Sastri and Bell, JJ.*) VENKATA LINGAMA NAYANIM *v.* VENKATA NARASIMHA RAYANIM. I.L.R. (1947) Mad. 525=1947 M.W.N. 737=A.I.R. 1947 Mad. 216=59 L.W. 685=(1946) 2 M.L.J. 383.

———**S. 48 (2) (a)**—Plea of fraud of judgment-debtor—If can be raised for the first time at the appellate stage of execution proceedings. [*See* Q.D. 1941—1945, Vol. I, Col. 852.] VENKANNA v. KOTAYYA. 1946 M.W.N. 38=A.I.R. 1946 Mad. 172.

———**S. 49**—Scope—Transfer of decree—Right of—Liabilities and equities existing against transferor—Enforceability against transferee—Notice—Relevancy. [*See* Q.D. 1941—1945, Vol. I, Col. 853.] SURYANARAYANA *v.* NAGESWARA RAO. I.L.R. (1946) Mad. 3.

———**S. 50**—*Execution against Legal Representatives of Judgment-debtor—Power of Court to direct them to render accounts.*

The Court can, at the instance of the decree-holder, direct the legal representatives of a deceased judgment-debtor to render accounts showing what amounts they have received from out of the estate of the deceased and how they have expended them and if on the taking of accounts any sum is due, they are bound to pay that to the decree-holder. (*Kapur, J.*) DEVI CHAND *v.* RATI RAM. 52 P.L.R. 304.

———**S. 50 (1)**—*Jurisdiction—Execution against legal representatives of deceased judgment-debtor—Power to order—Order by transferee Court—If illegal or irregular only—Objection to order—Competency of.*

Under S. 50, C. P. Code, the Court which passed the decree is the proper Court to order execution against the legal representatives of the deceased judgment-debtor and not the Court to which the decree is transferred for execution. If, however, the transferee Court orders execution against the legal representatives it is not an illegality which goes to the root of the jurisdiction of the Court, but only an irregularity in procedure which may be waived. But if the irregularity is not waived, and it affects the merits of the case, the objection has to be given effect to. 11 Pat. 445; 11 Pat. 580; 19 Pat. 838, dist.; 55 I.A. 227, foll. (*Sinha and Mahabir Prasad, JJ.*) REHI DAMODAR *v.* SONE BASANT. 27 Pat. 848.

———**S. 50**—*Legal representatives of judgment-debtor not brought on record—Sale of property in execution of decree—If affects their shares—C. P. Code, O. 21, Rr. 22 and 60 (as amended by Calcutta High Court)—Effect of.*

O. 21, R. 22, C. P. Code, as amended by the Calcutta High Court by the addition of sub-rule (3) does not do away with the necessity of making an application under S. 50, C. P. Code, to execute the decree against the legal representative of a deceased judgment-debtor. All that the amendment does is that where such an application has been made, the Court will not lose jurisdiction simply because the notice under O. 21, R. 22 has not been issued against the legal representative. S. 50, C. P. Code, cannot be amended by any High Court, and it is imperative under this section if the decree-holder wishes to proceed against the properties of a deceased judgment-debtor to apply to the Court which passed the decree to execute the same against the legal representative of the deceased judgment-debtor. Similarly the amendment of O. 21, R. 90 by the Calcutta High Court does not affect the question of bringing on record of the execution case the legal representative of a deceased judgment-debtor under S. 50, C. P. Code. All that it does is to regulate further the consequences of not issuing a notice under O. 21, R. 22 on the legal representative of a deceased judgment-debtor where an application to bring him on record has already been made. Where, therefore, the legal representatives are not before the Court in accordance with the provisions of S. 50, C. P. Code, their shares in the property will not be affected by a sale in execution of the decree and the sale so far as they are concerned, is void and inoperative. 59 M. 461 (F.B.) and 46 C.W.N. 631, rel. on. (*Blank and K. C. Chunder, JJ.*) Pashupatinath Malia v. Ushapati Misra. A.I.R. 1949 Cal. 299.

———Ss. 50 and 53—*Scope—Decree against father for money in lieu of specific performance—Execution against ancestral property in hands of son—Permissibility.*

S. 53, C. P. Code, is not limited to cases in which execution is being levied for a debt in respect of which a decree has been passed. The words "property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed" in that section must be read as descriptive of the class of property which can be reached in execution, and not as limiting the nature of the debt for which execution can be levied.

Ancestral property, though impartible and governed by the rule of primogeniture, which had been attached during the lifetime of the father in satisfaction of a decree against him for compensation in lieu of specific performance remains liable after his death to execution in the hands of his eldest son who has succeeded by survivorship. The property in the hands of the son is of a character liable under Hindu law for the payment of a decretal debt of a deceased ancestor, and since the particular debt for which execution is being levied is not tainted with immorality, the property is liable in execution under S. 50, C. P. Code. (*Sir John Beaumont.*) Bhim Singh *v.* Sher Singh. 74 I.A. 247=I. L. R. (1947) Nag. 830=52 C.W.N. 109=A.I.R. 1948 P.C. 1=29 P.L.T. 12=50 Bom.L.R. 1=61 L. W. 108=1948 M.W.N. 112=2 D.L.R. 304=1948 N.L.J. 136=1948 A.L.J. 133=50 P.L.R. 95=(1948) 1 M.L.J. 154.

———S. 51—*Arrest—Legality—Suit by sons of judgment-debtor for setting aside dismissal of their claim petition—Consent order that property should not be sold till disposal of suit—Grant of time to judgment-debtor for payment—Failure to pay—Order for arrest, if can be passed.*

Where there was a consent order that the property should not be sold till the disposal of a suit by the sons of the judgment-debtor for setting aside the order dismissing their claim petitions and it was not shown that the judgment-debtor had other property, an order for arrest for failure to pay the decree-debt within the time granted for that purpose cannot be passed. In the circumstances, it cannot be said that the judgment-debtor was shown to have the means to pay the amount of the decree and refused or neglected to pay the same.

It is impossible to say that when time was taken for payment of the amount the judgment-debtor either expressly or impliedly admitted that he was liable to be arrested in case the amount was not paid. Accordingly the judgment-debtor is not estopped from raising the plea that he has not sufficient means to pay the amount of the decree in showing why he should not be arrested. (*Subba Rao and Panchapakesa Ayyar, JJ.*) Paramanandaswami *v.* Shanmugham Pillai. 1949 M.W.N. 294=A.I.R. 1949 Mad. 822=4 D.L.R. (Mad.) 136=62 L.W. 220=(1949) 1 M.L.J. 318.

———S. 51—*Mandatory nature of the provisions of—Compliance with—Necessity—Circumstances.*

In execution of a small cause decree, the petitioner, who is the judgment-debtor, was given notice to show cause why he should not be committed to prison. He appeared and filed a counter but was absent on the date to which the application was posted for disposal. The decree-holder was ordered to pay arrest batta and when that was done an order for arrest was issued. In pursuance of this order the judgment-debtor appeared before the Court and was released on his furnishing security to file an insolvency petition, and the execution petition was dismissed.

On a contention in revision against the order of arrest that there was a non-compliance with the mandatory provisions of S. 51 of the C. P. Code,

Held, that a recital of the reasons for ordering arrest of the judgment-debtor as required by the mandatory provisions of S. 51 of the C. P. Code, was not necessary in the circumstances, as the order eventually passed by the Court was not one that the judgment-debtor should be detained in a civil prison and that the judgment-debtor had nothing to complain of. (*Horwill, J.*) Londa Abbayyee of Pithapuram *v.* Badam Suryanarayana. 1947 M.W.N. 208=A.I.R. 1948 Mad. 9 (1)=(1947) 1 M.L.J. 246.

———S. 51—*Order to arrest without giving reasons—Jurisdiction.*

The Legislature has thought fit to order arrest and detention of civil debtors only where the conditions prescribed in S. 51, C. P. Code, are strictly satisfied. Reasons must be given every time a man is ordered to be arrested, and in every proceeding where he is ordered to be arrested, even if it is on the same day. Where a Court makes an order for arrest without giving reasons, it acts without jurisdiction. (*Panchapakesa Ayyar, J.*) Venkatasubba Rao *v.* Sreeramulu. 1949 M.W.N. 49=A.I.R. 1949 Mad. 470=4 D. L.R. (Mad.) 74=(1948) 2 M.L.J. 648.

———S. 51—*Scope—Receiver in execution—Appointment—If amounts to or alternative to attachment and prohibited by S.* 60 (1) (n)—*T. P. Act, S.* 6 (dd)—*Receiver for inalienable property—If prohibited—Power of Court in execution—Court-fees due to Government—Realisation in execution by receiver—Permissibility.*

Though a mere right to future maintenance as such can neither be attached nor sold, when the maintenance has merged into a decree of Court, it does not follow that relief by way of appointment of a receiver in execution under S. 51, C. P. Code, cannot be granted, though attachment and sale may be prohibited by S. 60 (1) (*n*) and S. 6 (*dd*), T. P. Act. The power to grant relief by way of appointment of a receiver is not a mere substitute for attachment, but is an alternative, independent remedy. It cannot be laid down as a general rule of law that when a property is not alienable in law, a receiver in respect of such property cannot be appointed in execution. It is also well-settled that a mortgage or a charge (*e.g.*, a charge under O. 33, R. 10, C. P. Code) can be realised in execution by the appointment of a receiver. A.I.R. 1930 Bom. 350, diss. A.I.R. 1925 P.C. 176; A.I.R. 1934 All. 605; 39 Cal. 1010; 47 Cal. 418; 56 Mad. 915; A.I.R. 1915 Nag. 98, foll. 40 Mad. 302; 154 I.C. 581, not foll. A.I.R. 1926 P.C. 122; 1927 P. C. 112; 1931 P.C. 160; 12 C.L.J. 130; 12 C.L.J. 147; A.I.R. 1930 Cal. 159, ref.. 1 Lah. 192 (F. B.); A.I.R. 1926 Mad. 565; 1936 Lah. 830; 1942 Oudh 410, rel. on. (*Das and Narasimham, JJ.*) PROVINCE OF ORISSA *v.* VENKATA RANGAMMA. 5 D.L.R. (Cut.) 26=A.I.R. 1950 Orissa 220=16 Cut.L.T. 92.

——**S. 51 (c)**—Judgment-debtors residing outside local limits—Power of Court to issue writ of arrest—Execution of such writ. [*See* Q.D. 1941—1945, Vol. I, Col. 855.] ARRATOON AND Co. *v.* MIMRAJ PURAM MULL. I.L.R. (1944) 2 Cal. 588=A.I.R. 1947 Cal. 262.

——**S. 51, Proviso (b), Explanation**—*Decree for rent—Property exempt from sale under S. 168-A of the B. T. Act—If can be taken into consideration.*

Under S. 51, proviso (*b*), C. P. Code, in calculating the means of the judgment-debtor to pay the debt due under a decree for rent the Court should not leave out of account properties belonging to the judgment-debtor which are exempt from sale in execution of the decree under S. 168-A of the B. T. Act. The explanation attached to the proviso to S. 51, C. P. Code, requires that the Court should leave out of account only property which is exempt from attachment in execution of the decree, and not property which is exempt from attachment and sale. S. 168-A of the B. T. Act limits the prohibition contained in that section to the attachment and sale of any property other than the tenancy in arrears, and a mere attachment without sale does not come within the mischief of that section. (*Mukherjea and Sharpe, JJ.*) MONOHAR LAL *v.* DEBENDRANATH. I.L.R. (1946) 1 Cal. 145=50 C.W.N. 181.

——**S. 51, Proviso, cl. (c)**—*Applicability—Order for payment of an amount in a misfeasance summons against a Director—Execution—Director unable to raise money to discharge the debt—Arrest can be ordered as he was "bound in a fiduciary capacity to account".*

A Director of a company occupies a fiduciary position with regard to the members of the company and he is liable to account to them. Where a Director is ordered to pay in misfeasance proceedings a sum of money, he can be arrested in execution proceedings though he was a pauper and was quite unable to raise the money to discharge the decree. (*Horwill and Balakrishna Ayyar, JJ.*) MALIK *v.* THIRUVENGADASWAMI MUDALIAR. I.L.R. (1950) Mad. 742=A.I.R. 1950 Mad. 208=62 L.W. 784=1949 M.W.N. 689=(1949) 2 M.L.J. 604.

——**S. 52**—*Applicability—Conditions.*

To make S. 52 applicable, it is sufficient to satisfy three conditions. The legal representative must have received some property of the deceased; he must no longer be in possession of it; the Court must be satisfied that he has failed to duly apply that property to discharge the debt of the

deceased. When these requirements are fulfilled the decree may be executed against the legal representative as if it had been passed against him personally. S. 52 does not impose any other fetter on the decree-holder. (*Horwill and Balakrishna Ayyar, JJ.*) SURYANARAYANA *v.* RAJYALAKSHMI DEVI AMMA. 1950 M. W. N. 101=63 L.W. 153=A.I.R. 1950 Mad. 407=(1950) 1 M.L.J. 192.

——**S. 52**—*Decree against executors—Execution against one of them to the extent of testator's assets in his hands—Permissibility.*

Where an executor is in possession of any portion of the estate of the testator either in his capacity as executor or claiming to hold it as a legatee, a decree passed against him and his co-executors in their representative capacity can be executed against him to the extent of the assets in his hands as a "party" against whom a decree has been passed as the legal representative of a deceased person. 42 C.W.N. 65, I.L.R. (1946) Mad. 707 and A.I.R. 1934 Rang. 101, referred to. (*Das Gupta and Mitra, JJ.*) SACHINDRA KUMAR *v.* RAJ KUMAR USHA PROVA DE. A.I.R. 1949 Cal. 690.

——**Ss. 52 and 53**—*Decree against sons in a suit on a promissory note executed by father—Joint family assets in the hands of the sons—If can be proceeded against in execution.*

A decree against the sons of a Hindu father in respect of a sum due on a promissory note executed by the father, passed against the assets of the father in the hands of his sons was sought to be executed under Ss. 52 and 53 of the C. P. Code, and it was contended by the sons that the father did not have any separate properties of his own and that the decree cannot be executed against the joint family properties.

Held, that a decree could be passed not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship and the decree-holder was entitled to proceed against such properties. (*Kuppuswami Ayyar, J.*) SIVARAMIAH *v.* AUDI REDDI. 1947 M.W.N. 275=A.I.R. 1947 Mad. 357=(1947) 1 M.L.J. 239.

——**S. 52**—*Liability to attachment—Produce of estate of deceased judgment-debtor.*

Where the estate of a deceased judgment-debtor in the hands of his heir is liable for the debt, it cannot be said that crops raised by the heir on a portion of the estate will not be liable to be attached in execution of the decree. (*Krishnaswami Nayudu, J.*) SUNDARARAJULU NAIDU *v.* NATESA MUDALIAR. 62 L.W. 779=1949 M.W.N. 705=A.I.R. 1950 Mad. 154=(1949) 2 M.L.J. 593.

——**S. 52**—Nature of decree under—Decree against wrong legal representative—Proper remedy against real legal representative. [*See* Q.D. 1941—1945, Vol. I, Col. 857.] SURAJ MOHAN DAYAL *v.* BHAGWAN DIN. 20 Luck. 517=A.I. R. 1946 Oudh 1.

——**S. 52**—*Scope—Compliance—Strict compliance—Necessity—Frame and contents of decree—Suit against two persons as legal representatives* *of deceased debtor—Compromise by one—Decree based on—If executable against assets in hands of other.*

A decree in order to be executed under S. 52, C. P. Code, against the estate of a deceased person, must contain two things: (1) it must be passed against the deceased's legal representative as such, and (2) it must state that the decretal amount is to be realized by execution out of the property of the deceased debtor. Compliance with the provisions of S. 52 is not a mere matter of form but one of substance. The decree must itself bear sufficient material to indicate that it was intended by the Court to be operative against the estate of a deceased debtor.

Where two persons are originally made defendants and impleaded as legal representatives of the deceased debtor, but the decree is based upon an agreement of compromise with one of the two originally impleaded defendants alone, it cannot be safely stated that it is passed against the consenting party as representing the deceased, enabling the creditor to execute it against the estate of the deceased in the lands of the other defendant. *(Reuben and Ray, JJ.)* MANRANJAN *v.* RANI BRIJRAJ. 25 Pat. 550=A.I.R. 1947 Pat. 365.

———**S. 53**—Applicability—Debts of Hindu father—Liability of sons during father's lifetime. *See* HINDU LAW—DEBTS. 3 D.L.R. (Simla) 29.

———**S. 53**—*Promissory note executed by father—Death of father—Suit against sons—Decree against father's share in joint family estate—Whether can be passed.*

Where the sons of the maker of a promissory note are sued on the note after the death of their father the Court can pass a decree against them so as to render them liable not only to the extent of the father's separate property but also to the extent of his share in the joint family property in their hands. *(Leach, C.J. and Kuppuswami Ayyar, J.)* VENKATASWAMI *v.* TATA REDDY. I.L.R. (1947) Mad. 463=A.I.R. 1947 Mad. 162=59 L.W. 649=1946 M.W.N. 705=(1946) 2 M.L.J. 361.

———**S. 53**—*Property liable under—If limited to property devolving on sons after father's death—Property devolving by partitition before decree—If liable.*

Property mentioned in S. 53, C. P. Code, is not limited to the property which has devolved upon the sons after the death of their father. It includes the property which came to the sons on partition even before the decree was passed. *(Khosla and Teja Singh, JJ.)* PANNA LAL *v.* MT. NARAINI. 3 D.L.R. (Simla) 29=A.I.R. 1949 E. P. 9.

———**S. 53**—*Scope—If affects, or modifies Hindu Law.*

S. 53, C. P. Code, being a rule of procedure and not of substantive law, cannot modify, qualify or even attempt to interpret Hindu Law rules governing the rights of a son or his obligation to pay his father's debts under that law. It, however, prescribes the mode of procedure which a decree-holder has to adopt in order to realise his debt. *(Khosla and Teja Singh, JJ.)* PANNALAL

v. MT. NARAINI. 3 D.L.R. (Simla) 29=A.I.R. 1949 E.P. 9.

———**Ss. 54 and 50**—*Decree for partition transferred to Collector—Death of one of defendants—Jurisdiction of Collector to bring his legal representative on record—Proper procedure.*

A Collector to whom a Civil Court has transferred a decree for partition under S. 54, C. P. Code, cannot order substitution of heirs on record on the death of one of the defendants to the suit. The Collector is in charge of the case, so far as the making of the partition is concerned, that is, the mode of partition, distribution of assets, etc., but he cannot substitute the existing parties and change the decree of the Civil Court. In view of the provisions of S. 50 (1), C. P. Code, the Collector would be encroaching upon the jurisdiction of the Court which passed the decree, if he were to bring the legal representatives of the deceased defendant on record by his own order. The proper procedure would be to ask the decree-holder to apply to the Civil Court to execute the decree against the legal representatives of the deceased defendant by substituting them on record. *(Dastur.)* RAMKRISHNA *v.* LAXMAN. 1950 N.L.J. 426.

———**S. 54 and O. 20 R. 18**—*Decree of Civil Court for partition of estate assessed to the payment of revenue—Further proceedings before the Collector—Nature of.*

S. 54, C. P. Code, is an exception to the ordinary rule of procedure that the Court passing a decree is entitled to execute it. The law prohibits the execution of a decree for partition of an estate assessed to the payment of revenue by the Civil Court. The further proceedings in regard to partition taken by the Collector are not execution proceedings under the decree of the Civil Court. *(Kaul and Chandramani, JJ.)* SAYED ABDUL ALI *v.* MIRZA VIGAR ALI BEG. 23 Luck. 77=A.I.R. 1949 Oudh 37=1947 O.W.N. 595.

———**S. 54**—Jurisdiction—Decree for partition sent to Collector—Jurisdiction of Court to entertain objection to partition effected—Right to modify partition—Remedy of aggrieved party. [*See* Q.D. 1941—1945, Vol. I, Col. 858.] VENKATARAGHAVA RAO *v.* HANUMANTHA RAO. I.L.R. (1946) Mad. 10=1946 Mad. (Rul.) 32 (F.B.).

———**S. 54**—*Jurisdiction—Partition decree—Shares not defined by Civil Court—Batwara officer—Jurisdiction of to define—Order of Batwara officer confirmed by commissioner and embodied in final decree—Interference by Board of Revenue.*

Where the preliminary decree for partition made in a Civil Court does not contain any definition of the shares of the parties, it is open to the Batwara officer effecting partition under S. 54, Civil Procedure Code, to correctly define the shares. Where such a definition of the shares by the Batwara officer is confirmed by the commissioner, and the same is incorporated in the final decree of the Civil Court, it cannot be revised by the Board of Revenue. *(Swansy.)* KAMESHWAR SINGH *v.* SHYAMANAND SINGH. 12 B.R. 132.

———**S. 54**—*Powers of Civil Court—Partition suit—Preliminary decree—Direction to Collector* *to effect partition in particular mode—Jurisdiction to issue.*

S. 54, read with O. 21, R. 18, C. P. Code, authorises the Civil Court only to declare the rights of the parties and places the execution of the decree in the hands of the Collector who is vested with full authority to determine the mode of efecting partition. Once the preliminary decree is passed, the Civil Court becomes *functus officio,* and it has no power thereafter to give any direction to the Collector in what way the partition is to be made. (*Niyogi, J.*) LACHHIRAM JASRAM *v.* NANBA DHANAJI. 1946 N.L.J. 362=224 I.C. 352=1946 Nag. (Rul.) 146=A.I.R. 1946 Nag. 353.

———**S. 60**—*Agreement waiving protection under validity.*

It is not open to a judgment-debtor to waive the protection which S. 60, C. P. Code, gives him, and an agreement or compromise which has that effect is not enforceable in law and is therefore, void. (*Kapur, J.*) HARNAM SINGH *v.* RAMJI DAS. 52 P.L.R. 321.

———**S. 60**—*Annual allowance by way of compensation for forest dues granted along with Jagir —Attachability.*

An annual money allowance by way of compensation on account of forest dues granted along with a *jagir* under *sanad* issued by Government is not exempt from attachment under S. 60, C. P. Code, although the Jagir and the allowance are granted subject to the condition that they being service grants should not be alienated by the grantee or his successors. As the jagir is not burdened with any condition of service, it must be treated as personal property of the holder.

Even on the assumption that the jagir and the allowance are absolutely inalienable the inalienability would attach only to the right to receive the allowances and not to the specific amount as it accrues due every year. The annual payment is made in recognition of a proprietary right which the grantee's ancestors enjoyed and the amount as it accrues due every year would certainly constitute a debt payable by the grantor to the grantee every year even though the amount is payable on a future date. It may be that for a breach of the condition of loyalty the whole jagir as well as the allowances which are liable to be resumed would be liable to be withheld. But until that is done the grantee would be perfectly free to enjoy the amount that he receives every year in any way he chooses. The mere existence of a condition prohibiting alienation of the corpus of an incorporeal right does not affect in any way the disposing power of the grantee over the usufruct arising periodically from it. (*Niyogi, Ag.C.J. and Sen, J.*) BHIWAJI *v.* RAJI CHAINSING. I. L. R. (1947) Nag. 616=A.I.R. 1948 Nag. 194=1947 N.L.J. 517.

———**S. 60**—Applicability—Mortgage decree. [*See* Q.D. 1941—1945, Vol. I, Col. 861.] ALLAH BAKHSH *v.* CHET RAM. I.L.R. (1945) Lah. 373=1946 Lah. (Rul.) 3.

———**Ss. 60 and 115 and Provident Funds Act (XIX of 1925), S. 3**—*Attachment of the Provident Fund—Judgment-debtor a railway employee taking no objection—Railway company as garnishee if competent to raise the objection—Rejection of objection by trial Court—Revision if lies.*

The Provident Fund of the judgment-debtor (a railway employee) is not liable to attachment having regard to the provisions of S. 60, Civil Procedure Code and S. 3 of the Provident Funds Act. Even if the debtor agrees to the attachment of his salary waiving the rights conferred on him by S. 60, Civil Procedure Code, still the attachment is illegal and should be raised as such an agreement is opposed to public policy, void and unenforceable. The railway company as garnishee is entitled to maintain the objection to the attachment of the Provident Fund. The railway company takes the objection as garnishee and not as representing the judgment-debtor and when the objection is rejected it cannot be said that an appeal under S. 47, Civil Procedure Code, will lie and that a revision was not competent. A.I.R. 1933 Lah. 251, not followed. A.I.R. 1944 Lah. 168; A.I.R. 1943 Lah. 268 (F.B.); and I.L.R. (1941) Bom. 415, relied on. A.I.R. 1930 All. 727, referred to.

Where the trial Court on an erroneous view of the law refused to entertain the objection to the attachment it is a failure to exercise jurisdiction vested in it and a revision will lie. (*Chandra Reddi, J.*) M. & S. M. RAILWAY *v.* CHENGALI SYDALLI. 63 L.W. 244=A.I.R. 1950 Mad. 402=5 D.L.R. (Mad.) 193=1950 M. W. N. 108=(1950) 1 M.L.J. 186.

———**S. 60 and O. 21, R. 46**—*"Debt"—Money left with mortgagee for payment to third party—If debt due to mortgagor.*

If a mortgagor leaves some mortgage amount with the mortgagee for payment to a third party the mortgagor cannot be considered to be a creditor of the mortgagee for that amount and the mortgagee cannot be compelled to make payment as it is no more than an agreement to lend money and of such agreements no specific performance can be claimed. As the mortgage amount left with the mortgagee is not a debt due to the mortgagor, it cannot be validly attached in execution of a decree against him, and any payment made by the mortgagee on such invalid attachment is therefore not valid and binding on the mortgagor. 17 L. 270 and 24 L. 746, rel. on. (*Mahomed Sharif and Shahir Ahmad, JJ.*) KHUSHI MAHOMED *v.* MULA SINGH. A.I.R. 1950 Lah. 240=Pak.L.R. (1950) Lah. 587.

———**S. 60**—*Decree in suit prior to 1st June 1937—Judgment-debtor's salary Rs. 52 only—If could be attached—Act IX of 1937—Act V of 1943.*

A teacher of a High School drawing a monthly salary of Rs. 52 was the judgment-debtor in a case filed against him and a portion of his salary was attched on consent order passed in 1938. In the execution stage the Court held that the salary of the teacher was attachable despite the Amending Act V of 1943 which repealed repealing Act IX of 1937. On the question whether under the law as it stands, salaries of private persons in suits filed against them prior to 1st June, 1937, are exempt from attachment up to Rs. 100 or whether such decrees also are to be regulated by the same procedure as decrees obtained subsequent to 1st June, 1937.

Held, that it was consciousness of the inequity of S. 3 of the Act IX of 1937 discriminating as it did between class of judgment-debtors which led to the later amendment by Act V of 1943, in particular S. 3 being repealed.

Therefore no part of the petitioner's (teacher's) salary was attachable on the ground of even a consent order. The anomalies resulting from S. 3 of Act IX of 1937 making invidious distinctions between different classes of low paid employees, may well have been a determining factor in the repeal of the Act, not merely as unnecessary being already incorporated in S. 60, C. P. Code, but also with the object of doing away with S. 3 of the Amending Act IX of 1937 and bring in all judgment-debtors subsequent to Act V of 1943 on the same footing as far as procedure in execution against them is concerned, irrespective of whether decrees were obtained against them in suits prior to or subsequent to 1st June, 1937. *(Mack, J.)* Lakshminarasimhayya *v.* Sri Mahant Prayag Dossjee Varu. 1949 M.W.N. 506=4 D.L.R. (Mad.) 243=A.I.R. 1950 Mad. 114=**(1949) 2 M.L.J. 107.**

———**S. 60**—*"Property"—Security deposited by appellant in respect of costs of respondent in appeal—Attachability in execution of decree against appellant.*

The word "property" in S. 60, C. P. Code, does not mean only proprietorship, but is used in a wider sense as including any right or power in respect of the same. Where a party deposits an amount in Court as security for the costs of an appeal, to enable the respondent to realise his costs which may be awarded to him in case the appeai fails, the effect of such deposit is not to take away entirely the disposing power of the depositor. He still retains a disposing power which he exercises for his own benefit; and the deposit may therefore be attached in execution of a decree against the depositor, as the effect of the attachment is merely to prevent alienation. 53 C.W.N. 832; 58 C.L.J. 222, dist. 41 Mad. 1053, ref. A.I.R. 1940 All. 225; 8 Pat. 478, rel. on. *(G. N. Das and B. K. Guha, JJ.)* Province of West Bengal *v.* Bholanath Sen. 85 C.L.J. 105=A.I.R. 1950 Cal. 174=5 D.L.R. (Cal.) 18.

———**S. 60**—*Security deposit—Attachability—Government Promissory Notes deposited as security for costs of respondent in Privy Council appeal.*

Under S. 60, C. P. Code, Government Promissory Notes deposited by an appellant as security for costs of the respondent in a Privy Council appeal is liable to attachment in execution of a decree against the appellant. The effect of the security deposit is not to take away entirely the disposing power of the depositor. In spite of the fact that the deposit is earmarked for a specific purpose, the depositor still retains a disposing power which he may exercise for his benefit. The extent of the power is dependant on certain contingencies. The fact that the Government Promissory Notes deposited have been endorsed in the name of an officer of Court does not affect the question. The word "property" is used in a wide sense and does not mean only proprietorship but includes any right or power in respect of the same. The effect of the attachment is merely to prevent private alienation and to subject the attached property to claims enforceable under the attachment. A.I.R. 1930 All. 225 (F.B.) and 8 P. 478, rel. on. *(Das and Guha, JJ.)* Province of West Bengal *v.* Banamali Sen. 54. C.W.N. 322.

———**S. 60**—*Provident fund amount—Attachability.*

Moneys standing to the credit of a judgment-debtor in his Provident Fund Account are not exempt from attachment under S. 60, C. P. Code, except where the funds are vested in trustees under rules or cases where there are statutory prohibitions against such attachment. Parties cannot by agreement among themselves alter their personal law or statute law, such as the C. P. Code. *(Agarwala, J.)* Gopal Das *v.* Abdul Jabbar. 1946 P.W.N. 13=A.I.R. 1946 Pat. 430=228 I.C. 478=13 B.R. 226=1947 Pat. (Rul.) 134.

———**S. 60 (1) and Proviso (b)**—*Applicability and scope—Decree giving mortgage lien or charge over implements of husbandry of agriculturist—Sale in execution—If prohibited.*

S. 60, C. P. Code, applies only to money decrees and not generally to all decree. The proviso to the section cannot extend the scope of the section but must limit its application. It could not have been the intention of the legislature to extend the application of the section itself in such a way as to interfere with the law relating to the transfer of immovable property. The section is restricted in its application to money decrees, and the words "attachment and sale" in the section do not apply appropriately to the enforcement of mortgages or liens. Where a judgment-creditor has a decree giving him a mortgage lien or a charge over the implements of husbandry of an agriculturist, S. 60 is no bar to execution by sale of such implements. *(Davis, C.J. and O'Sullivan, J.)* Shambhoo Khimji *v.* Baloch Roze. I.L.R. (1946) Kar. 311=1946 Sind (Rul.) 258=227 I.C. 206=A.I.R. 1947 Sind 32.

———**S. 60 (1)**—Scope—Amending Acts IX of 1937 and V of 1943—Scope and effect of—Private employee—Salary and dearness allowance—Attachability in execution of decree passed in suit instituted before 1st June, 1937. [*See* Q.D. 1941-1945, Vol. I, Col. 865.] Manilal Bhaichand *v.* Mohan Lal. I.L.R. (1945) Bom. 899=223 I.C. 138=1946 Lah. (Rul.) 149=A.I.R. 1946 Bom. 102.

———**S. 60 (1), Proviso (b) and (c)**—*Agriculturist—Cultivation of insignificant area—If sufficient.*

The cultivation of an insignificant area by the judgment-debtor is not sufficient to establish that he is an agriculturist. *(Abdur Rahman, J.)* Raja Shah *v.* Thakur Das Sainditta Mal. 222 I.C. 138=1946 Lah. (Rul.) 149=A.I.R. 1946 Lah. 267.

———**S. 60 (1), Proviso, (b) and (c)**—*Agriculturist—Meaning of—Person tilling and cultivating own land through servants—If "agriculturist."*

The term "agriculturist" as used in S. 60 (1), proviso, Cls. (*b*) and (*c*), C. P. Code, is intended to denote a real tiller of the land strictly and properly so called, and cannot include a person who does not cultivate with his own hands. The protection given by Cls. (*b*) and (*c*) of the proviso should be confined to persons who are personally engaged in tilling and cultivating the land and whose livelihood depends upon the proceeds derived from such tillage and cultivation of the soil. The protection is not available to large landed proprietors even though they may be tilling the land and cultivating it through their servants. (*Macklin and Gajendragadkar, JJ.*) HANMANTRAO ANNARAO *v.* DHRUVARAJ PANDURANGARAO. I.L.R. (1947) Bom. 687=49 Bom. L.R. 867=A.I.R. 1948 Bom. 229.

———**S. 60 (c)**—*Agriculturist judgment-debtor agreeing with his decree-holder as to sale of properties in certain contingencies—Right of judgment-debtor to rely on S. 60 (c) as bar to sale.*

If a judgment-debtor enters into a compromise with the decree-holder upon the footing that the property is liable to be sold, he is in fact making a declaration that he is not an agriculturist and that the property is saleable. After such a compromise it is not open to the judgment-debtor to resile from that position and urge that the property in question is not saleable. (*Pathak, J.*) MAHADEO AGARAHRI *v.* DANUKH MAL. 224 I.C. 284=(1946) A.W.R. (H.C.) 206=1946 A. (Rul.) 368=1946 A.L.W. 473=1946 R.D. 244=A.I.R. 1946 All. 432.

———**S. 60 (1) (c)**—*Waiver of privilege—Mortgage of property by agriculturist—If amounts to.*

The protection conferred by S. 60 (1) (*c*), C. P. Code, is for the benefit of the agriculturist and can be waived by him. When an agriculturist mortgages a house which would otherwise be protected by S. 60 (1) (*c*), he must be taken to have waived the privilege and the house can be sold in execution. (*Bose and Sen, JJ.*) GANPATRAO *v.* A. V. ZINZARDE. I.L.R. (1948) Nag. 530=A.I.R. 1948 Nag. 392.

———**S. 60 (e)**—Applicability—Benefits arising out of contract for delivery of goods even after breach by promissor. *See* PROVINCIAL INSOLVENCY ACT (V OF 1920). S. 28 AND C. P. CODE, S. 60 (*e*). 1949 A.L.J. 17.

———**S. 60 (1) (g)**—*Applicability—"Political pension"—Cash allowance on service lands for which service is commuted into fixed annual payment—If exempt from attachment in execution.*

A cash allowance on service lands for which the service has been commuted into an annual fixed payment does not amount to a "political pension," so as to exempt it from liability to attachment in execution of a decree. (*Macklin and Bavdekar, JJ.*) RAMCHANDRARAO GANGADHARRAO *v.* VITHAL KESHAV. 49 Bom.L.R. 754=A.I.R. 1948 Bom. 143.

———**S. 60 (1) (g)**—*Political pension—Cis-Sutlej jagirs.*

Cis-Sutlej jagirs are political pensions within the meaning of S. 60 (1) (*g*), C. P. Code, and are therefore exempt from attachment and sale. (*Kapur, J.*) HARNAM SINGH *v.* RAMJI DAS. 62 P.L.R. 321.

———**S. 60, Proviso (i)**—*Salary of public servant—Attachability.*

The salary of a public servant, once it has become payable, has to be treated as a debt due to him and is liable to attachment in satisfaction of a decree against him; and it may be attached both before and after it has become actually payable. (*Spens, C.J., Zafrullakhan and Kania, JJ.*) PROVINCE OF PUNJAB *v.* TARA CHAND. 1947 F.L.J. 56=49 Bom.L.R. 697=52 C.W.N. (F.R.) 2=1947 M.W.N. 575=A.I.R. 1947 F.C. 23=(1947) 2 M.L.J. 389 (F.C.).

———**S. 60 (i)**—*Scope—Decree in contravention of on compromise or consent—Legality—Jurisdiction of Court to pass—Public policy—Contract Act, S. 23—"Waiver"—Effect of.*

A public servant or a railway servant whose salary is exempt from attachment under S. 60 (*i*), C. P. Code, cannot contract himself out of this statutory protection. Such a contract is opposed to public policy under S. 23, Contract Act; the principle of waiver does not apply to such a statutory prohibition. Hence a Court has no jurisdiction to pass a decree on compromise or consent providing for payment of the salary of the defendant in contravention of S. 60 (*i*), C. P. Code. Such a compromise is unlawful and void. 43 Bom.L.R. 753; I.L.R. (1942) Mad. 640, foll.; 4 Bom. 25, not foll.; 7 Bom. 530, ref. (*Rajadhyaksha and Jahagirdar, JJ.*) MADRAS AND SOUTHERN MAHRATTA RY. *v.* RUPCHAND JITHAJI & Co. A.I.R. 1950 Bom. 155=51 Bom. L.R. 1024.

———**S. 60 (k)**—Appointment of Receiver to avoid bar under—Permissibility. *See* PROVIDENT FUNDS ACT, S. 3 (1). 54 C.W.N. 254.

———**S. 60 (1) (n)**—*Applicability—Khorposh grant to junior member of impartible estate by holder in lieu of maintenance—Interest of grantee—Nature—Liability to attachment and sale in execution—T. P. Act, S.* 6 (dd).

The interest of a *khorposhdar* in immovable property which is granted to him by the holder of the impartible estate of which the *khorposhdar* is a junior member, in lieu of maintenance is not a bare right of future maintenance or an incorporeal right. Such right, in the absence of proof of any special or peculiar custom in the family, is an absolute right in the property assigned by way of maintenance and is transferable. S. 60 (1) (*n*), C. P. Code and S. 6 (*dd*), T. P. Act, have no application to such a case and do not prohibit the attachment and sale of such an interest in execution of a decree against the *khorposhdar.* (*Meredith and Roy, JJ.*) RAMPRASAD *v.* MOTIRAM. 25 Pat. 705=A.I.R. 1947 Pat. 404.

———**S. 60 (1) (n)**—*Beneficiary's right in wakf property—Attachability—Principle underlying—T. P. Act (IV of* 1882)—*S.* 6 **(dd)**—*Right to future maintenance.*

There is a general principle of law that only *present* rights can be dealt with as property and not inchoate, future rights which have not yet accrued, such as *spes successionis,* a right to future rent or a future right to maintenance. Such rights may or may not be realised in the future. It is in accordance with public policy that such rights which are generally created for the maintenance or personal enjoyment of the grantee ought to be inalienable. Obviously such rights are not attachable or saleable under S. 60 (1) (*n*), C. P. Code.

Where the beneficiaries get an allowance under a wakf deed which speaks of *kharch parwarish* and *parwarish* and *guzare ke waste,* and the nature of the allowance granted to the beneficiaries appears to be that of mere maintenance, the right given to the beneficiaries is merely a right to receive a certain amount of money periodically during their life time for maintenance. Such a right is merely "*a right to* future maintenance" within the meaning of S. 6 (*dd*) of the T. P. Act and also within the meaning of S. 60 (1) (*n*), C. P. Code, and it follows that it is neither attachable nor saleable in execution of a decree. (*Wali Ullah and Sankar Saran, JJ.*) Zahinuddin Husain *v.* Anokhey Lal. 1950 A.L.J. 386.

———S. 60 (1) (n)—Scope—Appointment of Receiver for collection of maintenance due under decree—Power of Court to make in execution. *See* C. P. Code, S. 51. 16 Cut.L.T. 92.

———S. 60 (1) (n)—*Scope—Arrears of maintenance—Attachability.*

The prohibition against attachment in respect of maintenance contained in S. 60 (1) (*n*), applies only to future maintenance and not to arrears of maintenance. 38 Cal. 13, rel. on. (*Das and Narasimham, JJ.*) Province of Orissa *v.* Venkata Rangamma. 5 D.L.R. (Cut.) 26=A.I.R. 1950 Orissa 220=16 Cut.L.T. 92.

———S. 63—*Applicability—Requisites.*

S. 63, C. P. Code, applies only where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one. Where a valid attachment is made only by one Court, and an attachment by another Court is void, the section has no application. (*Puranik, J.*) Radhawallabh Kabra *v.* Dwarkadas. I.L.R. (1946) Nag. 400=1946 N.L.J. 329=1946 Nag. (Rul.) 94=222 I.C. 652=A.I.R. 1946 Nag. 170.

———S. 63 and O. 21, R. 49—*Charging order—If amounts to attachment.*

For the purposes of S. 63, C. P. Code, a charging order under O. 21, R. 49 should be deemed to be an attachment. (*Din Mahomed, Ram Lall and Cornelius, JJ.*) Ajudhia Pershad Ram Pershad *v.* Sham Sunder. I.L.R. (1947) Lah. 417=229 I.C. 307=(1947) Lah. (Rul.) 168=A.I.R. 1947 Lah. 13 (F.B.).

———Ss. 63 and 73—*Rateable distribution of assets—Power of Court of superior jurisdiction—Condition pre-requisite.*

The Court that wants to decide the question of rateable distribution, if it wants to proceed under S. 63 read with S. 73, C. P. Code must be the Court that has attached the property. Then alone that Court gets the jurisdiction to decide all claims

relating to rateable distribution, but if the Court of superior jurisdiction has not attached any property, which is a condition pre-requisite under the terms of S. 63 to clothe that Court with jurisdiction to call for assets from the Courts of lower grades and distribute the assets, the Court of superior jurisdiction cannot be approached for distribution. The only Court that has then to be approached for rateable distribution is the Court which holds the assets, and under S. 73, C. P. Code, before the receipt of such assets, an application must be made to the Court for execution of a decree for payment of money passed against the same judgment-debtor—a decree which has not yet been satisfied. It is then that the Court will distribute the assets. (*Puranik, J.*) Radhawallabh Kabra *v.* Dwarka Das. I.L.R. (1946) Nag. 400=1946 N.L.J. 329=1946 Nag. (Rul.) 94=222 I.C. 652=A.I.R. 1946 Nag. 170.

———Ss. 63 and 64 and Madras Co-operative Societies Act (VI of 1932)—*Rules under, R. XXII* (20) (a)—*"Private transfer"—Sale under an award at the instance of a Co-operative Society—Sale in contravention of rule—Not a nullity.*

A sale in execution of an award under the Madras Co-operative Societies Act (which has the force of a decree) at the instance of a Co-operative Society is not a "private transfer" within the meaning of S. 64 of the Code, and that section will not save the rights of a prior attaching decree-holder.

The absence of an enabling provision like sub-S. (2) of S. 63 of the Code in rule XXII (20) (a) of the rules made under the Co-operative Societies Act does not necessarily imply that a sale in contravention of the rule is a nullity. (*Rajagopalan, J.*) Thathi Naicker *v.* Co-operative Society, Kundala Puthur. 1949 M.W.N. 259=A.I.R. 1949 Mad. 649=(1949) 1 M.L.J. 393.

———Ss. 63 and 38—*Superior Court calling up execution proceedings from inferior Court—Power to sell attached property.*

A Subordinate Judge, first class, has power to call up execution proceedings from the Court of a Subordinate Judge, second class, and sell the attached property. Even if such an action on his part is an excess of power, it is not open to the judgment-debtor to challenge his jurisdiction if he submits to his jurisdiction by presenting applications under S. 47 and O. 21, R. 90, C. P. Code. (*Din Mahomed, Ram Lall and Cornelius, JJ.*) Ajudhia Pershad Ram Pershad *v.* Sham Sunder. I.L.R. (1947) Lah. 417=229 I.C. 307=(1947) Lah. (Rul.) 168=A.I.R. 1947 Lah. 13 (F.B.).

———Ss. 63 (2) and 73—*Sale by inferior Court of property already attached by superior Court—Right of latter Court to call for the sale proceeds with a view to rateably distribute them—S.* 63 (2), *if limits the right of distribution.*

Where an inferior Court sells property which has been attached by a superior Court at an earlier date, the latter Court is entitled to call for the sale proceeds from the former Court for the purposes of rateable distribution. There is no need to construe Cl. (2) of S. 63, C. P. Code, in a way which will limit the right of rateable distribution. (*Verma and Bennett, JJ.*) Vishnu Ram *v.* Bank of Bihar. I.L.R. (1946) All. 346=225 I.C. 317=1946 A.L.W. 469=1946 A. W.R. (H.C.) 31=A.I.R. 1946 All. 291.

———**S. 64**—*Applicability—Private sale after order releasing property from attachment and before that order is set aside on appeal—Validity.*

Where an order for releasing property from attachment is set aside, the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order of release. It is immaterial whether the order releasing the property from attachment is set aside as the result of a suit under O. 21, R. 63, C. P. Code, or as the result of an appeal or an order in revision. If it is set aside the effect is to make the property still subject to the attachment and to restore the state of things which had been disturbed by the order of release. Accordingly, a private sale of the property by the judgment-debtor after the order releasing the property from attachment and before the appellate order setting aside that order, is void as against the purchaser in the execution sale, in view of the provisions of S. 64, C. P. Code, as the property must be regarded as being under attachment during that period. 25 C. W. N. 544; 21 W.R. 435; 34 A. 490; 42 A. 39 and 48 A. 698, rel. on. 16 C.W.N. 332; 56 C. 416; 7 R. 201 and 22 I.A. 129, Dist. (*Harries, C.J. and Sen, J.*) Sushila Bala Dasi *v.* Guest Keen Williams, Ltd. I.L.R. (1949) 1 Cal. 177.

———**S. 64 and O. 21, R. 57**—*Attachment before judgment—Execution petition for sale of attached property "struck off"—If a dismissal for default—Effect on attachment before judgment—Private sale of attached property in the meanwhile and subsequent sale of same in execution of decree in suit in which it was attached—Execution sale, if prevails over earlier private sale—Attachment of undivided share in ignorance of prior partition—Attachment, if can be deemed to be of the share of the judgment-debtor.*

Where there was an attachment before judgment, on an application to execute the decree passed in the suit the order was "defendant's notice returned unserved for want of proper address and residence. Petition may be renewed with correct address. Struck off. Attachment will subsist". Subsequently another execution petition was filed for the sale of the attached property, which was ordered and the decree-holder purchased the property and the sale was confirmed. But the same property had been in the meanwhile purchased under a private sale. On a question as to which sale would prevail,

Held, in the circumstances, that the attachment before judgment had not ceased to exist and the sale in pursuance of the attachment must prevail over the private sale. (*Panchapagesa Sastri, J.*) Tirumalai Aiyangar *v.* Arunachala Thevar. 1949 M.W.N. 195=A.I.R. 1949 Mad. 823=4 D.L.R. (Mad.) 148=(1949) 1 M.L.J. 436.

———**S. 64 and O. 21, R. 54 and O. 38, R. 7**—Interim order for attachment before judgment passed by High Court—Notice of motion containing bare endorsement as to grant of interim attachment, served on defendant by attorney's clerk—Such service, if effects attachment—Alienation of property after such service—Validity—Calcutta High Court Original Side Rules, Chap. XVII, Rr. 18 and 45. [*See* Q.D. 1941-1945, Vol. I, Col. 880.] Monohar Lal Banerji *v.* Bengal Immunity Co., Ltd. I.L.R. (1945) 1 Cal. 601.

———**S. 64 and O. 21, R. 54 (3) (All.)**—*Transfer in good faith prior to actual attachment but after an order for attachment—If affected by S. 64—O. 21, R. 54 (3) (All.) repugnant to S. 64.*

For purposes of S. 64, C. P. Code, it cannot be held that an attachment has been made unless and until all the provisions of O. 21, R. 54, C. P. Code, have been complied with. The provisions contained is sub-R. (3) of R. 54 of O. 21, C. P. Code, is not only inconsistent with the provisions of sub-R. (2) of the same rule but is also repugnant to S. 64 in that it provides for an attachment being effective before it has actually been made, whereas S. 64 provides for certain results to accrue only where the attachment has actually been made. Accordingly, a *bona fide* purchaser in good faith though he might have been aware of an order of attachment would be protected if the purchase was made before the actual attachment. (*Brand and Yorke, JJ.*) Pokhpal Singh *v.* Kanhaiya Lal. I.L.R. (1946) All. 788=223 I.C. 599=1946 A.L.W. 161=1946 O. W.N. (H.C.) 153=1946 A.L.J. 187=1946 A. (Rul.) 300=1946 A.W.R. (H.C.) 393=A.I.R. 1946 All. 438.

———**S. 65 and O. 21, R. 94**—*Auction-purchase in execution—Title when passes.*

According to S. 65, C. P. Code, it is the confirmation of the sale that passes the title and the auction-purchaser becomes the owner of the property from the date of the sale. Under O. 21, R. 94 the vesting of title is not made dependant on the issue of the sale certificate. (*Malik, J.*) Ram Sri *v.* Jai Lal. 227 I.C. 147=(1946) A. W.R. (H.C.) 528=1946 All. (Rul.) 530=1947 A.L.W. 25=1947 O.W.N. (H.C.) 11=A.I.R. 1947 All. 171=1947 A.L.J. 159.

———**S. 65**—*Auction sale—Vesting of title—Point of time—Sale certificate—Necessity.*

Under S. 65, C. P. Code, title vests in the purchaser after the confirmation of the sale *from the date of the sale.* It is not necessary that the sale certificate should be actually obtained; it is not a document of title but is only evidence of title. 176 I.C. 774, Rel. on. (*Mushtaq Ahmad and Desai, JJ.*) Gopal Singh *v.* Hukam Singh. A.I.R. 1950 All. 644.

———**S. 65 and O. 21, Rr. 90 and 92**—*Execution sale set aside but restored in appeal—Title when vests—Sale held after setting aside of first sale and before restoration on appeal—What passes under—Later sale under mortgage decree—Rights of purchaser.*

Where an execution sale is set aside on application under O. 21, R. 90, C. P. Code, but is subsequently restored on appeal, the sale must be deemed to have vested the title in the purchaser from the date on which the sale was held, and the position is as if the first sale had never been set aside. If between the date of the sale being set aside and its restoration on appeal, another sale is held and a third person purchases the property, the purchaser at the latter sale does not acquire anything by his purchase the title having been vested in the first purchaser already.

If, however, a sale of the same property takes place after the first sale is set aside, in pursuance of proceedings in execution started before the first sale under a mortgage decree, different considerations would arise. The first sale, held during the pendency of the proceedings in execution of the mortgage decree cannot affect the title acquired by the purchaser at the sale under the mortgage decree. Till this sale is confirmed, the first purchaser would have a right to redeem the property, but once it became final and was confirmed, there would remain no right of redemption. 20 Cal. 25; 58 Cal. 136; 1942 Cal. 290; 22 All. 168; 1933 Nag. 211, ref. (*Shearer and Reuben, JJ.*) Mt. Moti Kuer *v.* S. M. Usman. 27 Pat. 1132=4 D.L.R. (Pat.) 39=A.I.R. 1949 Pat. 304.

———**S. 65**—*Purchaser—Right of—When accrues—Date of sale or date of confirmation.*

The property purchased at an execution sale vests in the purchaser under S. 65, C. P. Code, from the time of the sale and not from the time of its confirmation or becoming absolute. (*Beevor, J.*) Kanhu Charan Ramanuj Das *v.* Mangaraj Padhan. 13 Cut.L.T. 36=A.I.R. 1948 Pat. 71.

———**Ss. 65 and 68**—*Sale of insolvent's property by Collector—Vesting of title in purchaser—Date of sale or its confirmation—Provincial Insolvency Act, S. 60.*

In the case of a sale of an insolvent's property by the Collector, the property vests in the purchaser from the date of the sale and not from the date of its confirmation by virtue of S. 65, C. P. Code. It cannot be urged that this section applies only in the case of sales arising in the execution of a decree and can have no application to sales which arise in any other manner. When the powers conferred by the Code are used in the matter of sales arising otherwise than in execution of a decree all the incidents of the C. P. Code apply. Further when the Insolvency Act directs that in certain circumstances sales are to be held by the Collector in the manner in which the Collector carries out such sales in the execution of decrees it follows that the vesting of the property in the purchaser should be deemed to antedate to the time of the sales as much as it does in the case of a Collector executing a decree. (*Grille, C.J.*) Ramkrishna Balwant *v.* Satwa Kondo. I.L.R. (1948) Nag. 610=A.I.R. 1949 Nag. 127=1948 N.L.J. 312.

———**S. 65**—*Title to property sold—When vests in purchaser—Sale by judgment-debtor after Court sale and before confirmation—Effect of.*

Under S. 65, C. P. Code, title vests in the auction-purchaser not from the date when the sale is confirmed but from the date when the sale is actually held, provided the sale is subsequently confirmed. An assignment of the property sold by the judgment-debtor to another between the date of sale in execution and the date of its confirmation would not affect the right or title of the auction-purchaser. (*Manohar Lall and Das, JJ.*) Jamuna Devi *v.* Mangal Das. 25 Pat. 13=226 I.C. 350=12 B.R. 729=1946 Pat. (Rul.) 374=A.I.R. 1946 Pat. 306.

———**S. 66**—*Applicability—Certified purchaser before 1908—Suit against person claiming under him alleging that the purchase was made benami for plaintiff—Maintainability.*

A suit cannot be maintained against a certified purchaser or any one claiming through him on the ground that the purchase was made on behalf of the plaintiff whether the purchase was made before 1908 or afterwards. 47 Cal. 1108, not foll.; 7 M.L.J. 290; 21 Mad. 7; 28 M.L.J. 251 and (1915) 3 L.W. 86, rel. on. (*Horwill, J.*) Chinna Basamma *v.* Veeradhi Veerappa. 1949 M.W.N. 260=A.I.R. 1949 Mad. 656=(1949) 1 M.L.J. 398.

———**S. 66**—*Applicability — Principles—Suit based on agreement subsequent to auction sale—Whether barred.*

The following principles can be extracted from a review of case-law of on S. 66, C. P. Code: (1) S. 66 must be construed strictly as it encroaches upon the rights of the true owner remembering that benami transactions are only being discouraged by the legislature but are not being made illegal. (2) Where a true owner recovers possession or has always been in possession and he bases his relief in the suit (other than that of possession or confirmation of possession) upon a title obtained by the purchase, the provisions of S. 66 have no application. (3) The real owner, if he is in possession, can always resist a suit by the certificate auction-purchaser as a plaintiff. (4) The real owner is entitled to maintain a suit for specific performance of an agreement by the ostensible owner to transfer the property to him provided such an agreement is made after the auction purchase. (5) Where the true owner has dispossessed the certificate holder and is adversely in possession for over 12 years, he can maintain a suit for recovery of possession even against the certificate purchaser because his claim is now based upon a different title and it is immaterial for him to allege or prove that he was the real owner at the date of the auction sale.

Plaintiff who was the real owner of a property purchased at a court auction sale in the name of the defendant as benamidar was in possession of the property since the delivery of possession. He subsequently negotiated for the sale of that property and had the sale deed executed by the defendant, as the sale certificate stood in his name, on his agreeing to hand the sale consideration to him after it was paid before the Registrar into the hands of the defendant. In a suit to recover that money,

Held, that the suit was not barred by S. 66, C. P. Code, as it was based upon an agreement subsequent to the auction sale. (*Manohar Lall and Ramaswami, JJ.*) Sheoshankar Prasad *v.* Mahabir Prasad. 26 Pat. 505=A.I.R. 1948 Pat. 350.

——**S. 66 (1)**—Contract by benamidar after purchase at Court sale to convey property to beneficial owner—Suit by beneficial owner—If barred. [*See* Q.D. 1941-1945, Vol. I, Col. 885.] PREM SUKH GULGULIA *v.* HABIBULLA. I.L.R. (1945) 2 Cal. 375.

——**S. 66**—*Scope—Certified purchaser in possession—Suit by real owner for possession alleging benami purchase and alleging dispossession by defendant shortly before suit—Maintainability.*

S. 66, C. P. Code, in as much as it runs counter to a well-established principle of equity must be strictly construed. S. 66 is more a weapon of defence than a weapon of offence. It is a section which the certified purchaser can avail himself of in defence against a suit for possession by the real owner. He cannot avail himself of this section in order to file a suit against the real owner who is in possession. He may even file a suit for a declaration that he is not the real owner but that some one else is.

A suit by the real owner against the certified purchaser on the ground that the plaintiff was in possession but was recently dispossessed by the defendant who was his benamidar at the Court sale is barred by S. 66, C. P. Code. 31 Bom. L.R. 1393 (P.C.), dist.; 23 All. 175; 23 Cal. 699; 12 Pat. 616, ref. (*Chagla, C.J.*) RANCHHODDAS BHIKARDAS *v.* MANGA BHIKA. 52 Bom. L.R. 286=A.I.R. 1950 Bom. 277.

——**S. 68**—Jurisdiction of Collector—Order by executing Court staying sale—When takes effect—Sale by Collector in ignorance and before communication of order to Collector—If null and void. *See* EXECUTION—SALE. 52 Bom.L.R. 294.

——**S. 68**—*U. P. Government Notification dated 8th October,* 1934—*Decree against grove-holder—Execution by sale of grove-holder's interest—Jurisdiction of Civil Court—Procedure.*

"Agricultural land" in U. P. Government Notification, dated 8th October, 1936, issued under S. 68, C. P. Code, means land which is let or held for agricultural purposes or as grove land or for pasturage. The interest of a grove-holder in a grove is clearly covered by the expression "any interest in such land" in the Notification. A Civil Court cannot therefore sell a grove in execution of a decree against the holder of the grove in view of the Notification read with S. 68, C. P. Code, as the interest of the grove-holder can be sold only by the Collector to whom the execution has to be transferred. (*Malik, J.*) INDRASAN DALSINGAR *v.* CHAUDHARY. 224 I.C. 462=1946 A.L.J. 241=1946 A.L.W. 292=1946 A.W.R. (H.C.) 409=1946 A. (Rul.) 398=A.I.R. 1946 All. 483.

——**S. 70 (1)**—*C. P. Rules, R.* 15—*Order of Financial Commissioner in revision—Jurisdiction of Civil Court.*

An order passed by the Financial Commissioner in exercise of his powers of revision under R. 15 of the rules framed by the Provincial Government under S. 70 (1), C. P. Code, against an order of the Collector, is final and Civil Courts have no jurisdiction to interfere with it. By the rules framed by the Provincial Government a precise and self-contained code of appeal is provided in regard to the orders passed in the proceedings before the Collector and the jurisdiction of the Civil Courts has been excluded by implication. (*Bose and Mangalmurti, JJ.*) THANSING TIKARAM *v.* BHANULAL. I.L.R. (1947) Nag. 815=1947 N.L.J. 483=A.I.R. 1948 Nag. 14.

——**S. 70 (1) (b)**—*Powers of Collector—Dismissal and restoration of execution application—Revenue Book Circulars III-*8, *R.* 12.

Though R. 12 of Revenue Book Circulars III-8 invests the Collector with all the powers of the civil Court executing a decree, the powers are not entirely co-terminous with those of the civil Court. He cannot amend the C Form nor can he cancel the C Form and draw one up for himself. He cannot review the orders of the civil Court attaching the property and he cannot hear objections under O. 21, R. 58, C. P. Code. The Collector's powers commence at the stage a C Form is drawn up and he cannot go behind the C Form and his action can have no operation on anything which is prior to the C Form.

There is no provision in the rules enabling the Collector to dismiss an execution case in default. There is nothing to prevent the Collector from terminating proceedings before him and reporting the matter to the civil Court. But dismissing an application for execution, which is not before him, is an entirely different matter. Therefore, such an order of the Collector must be interpreted as merely signifying his inability to proceed with the case. There is nothing to prevent the Collector from resuming the proceedings before he has reported the matter to the civil Court. The termination of the proceedings by him has not the result in law which O. 21, R. 57, C. P. Code, contemplates, and his restoration of the proceedings to the file is permissible under his inherent powers which he derives from S. 151, C. P. Code. The Collector need not issue notice to the judgment-debtor before restoring the case to the file, if the proceedings were terminated by him in the absence of the judgment-debtor. (*Grille, C.J. and Hidayatullah, J.*) DAWOOLAL *v.* KHEDAPRASAD. I.L.R. (1948) Nag. 631=A.I.R. 1949 Nag. 160.

——**S. 72 and (Mad.) Civil Rules of Practice, R. 199**—*Leave to bid—Principles that should guide Court in granting.*

When leave to bid is asked for by a decree-holder the question to be considered is whether it will be to the advantage of every one concerned that leave to bid ought to be given. The power to grant leave to bid must be cautiously exercised and unless the Court is satisfied from the circumstances shown in the affidavit that otherwise an advantageous sale could not be obtained, no such leave should be granted. Where the affidavit in support of an application for leave to bid merely states that if leave to bid is not given the property might be sold for a low price and petitioner is likely to suffer loss by reason of that, it is not enough to justify any Court to exercise its mind and come to the conclusion that an order for permission to bid asked for may be granted. (*Krishnaswami Nayudu, J.*) VARADARAJULU

Pillai *v.* Gendapodi Nanniar. 63 L.W. 225=A.I.R. 1950 Mad. 392=(1950) M.W.N. 111=(1950) 1 M.L.J. 111.

———**S. 73**—*Applicability—Money realised by receiver appointed in execution—If assets held by Court liable to rateable distribution.*

Rateable distribution under S. 73, C. P. Code, cannot be confined to cases in which assets are realised by sale or by some other process of execution. The appointment of a receiver is one of the modes of execution sanctioned by law, and where a receiver appointed in execution proceedings has realised moneys by granting leases of coal mines of a village of the judgment-debtor, the money in the hands of the receiver are assets held by a Court for purposes of S. 73, and can be rateably distributed under S. 73. 26 Cal. 772, foll. 12 Pat. 772; 18 Pat. 404, rel. on. (*Agarwala, C.J. and Narayan, J.*) Kaluram *v.* Shyam Sunder. A.I.R. 1949 Pat. 128=27 Pat. 816.

———**Ss. 73 and 63**—Rateable distribution of assets—Power of Court of superior jurisdiction—Condition pre-requisite. *See* Civil Procedure Code, Ss. 63 and 73. 222 I.C. 652.

———**S. 73**—*Receipt of assets—Crucial date.*

Where in pursuance of an order passed by a superior Court, assets realized in execution of a decree of a subordinate Court are transferred to the superior Court, the assets are deemed to be received within the meaning of S. 73, C. P. Code, by the transferee superior Court when they are actually received by that Court. 1927 Bom. 247, relied on. (*Mack, J.*) Melarkode Bank, Ltd. *v.* Damodaraswami Naidu. 1949 M.W.N. 658 =A.I.R. 1950 Mad. 34=(1949) 2 M.L.J. 403.

———**S. 73**—*"Same judgment-debtor"—Construction—Decree against Hindu father and sons—Second decree against father alone—Assets realised by sale of joint family property in execution of first decree—Right of holder of second decree to rateable distribution in entire assets.*

Where one creditor has obtained a decree for money against a Hindu father and his undivided sons and another creditor has obtained a decree for money against the father alone but not against the sons, and assets are realised by attachment and sale of the joint family property of the father and his sons in execution of the first decree, the holder of the second decree is entitled to rateable distribution under S. 73, C. P. Code, not only in the assets representing the father's share of the sale proceeds but in the entire assets, when his decree is passed against the father as manager of the joint family or when his sons are under a pious obligation to pay off their father's debts. (*Sen, Weston and Gajendragadkar, JJ.*) Mulchand Kesaji *v.* Shiddappa. 48 Bom.L.R. 571=A.I.R. 1947 Bom. 18=228 I.C. 530=1947 Bom. (Rul.) 112=I.L.R. (1947) Bom. 120 (F.B.).

———**S. 73 and O. 21, R. 49**—*"Same judgment-debtor"—Meaning of—Separate creditor decree-holder and partnership creditor decree-holder—Right to rateable distribution—Partnership Act, S. 49.*

The words "same judgment-debtor" in S. 73, C. P. Code, must be interpreted so as to give effect as far as possible to the principles embodied in O. 21, R. 49, C. P. Code, and S. 49 of the Partnership Act. Those words indicate not only an identity of the individual but also an identity of the interest or character or capacity of the individual. The individual may be the same, but if he has different interests or characters or capacities in different decrees, then the decree is not against "the same judgment-debtor".

Thus, when a separate creditor decree-holder attaches and sells the separate property of his judgment-debtor who happens to be a partner in a firm and the sale proceeds are paid into Court and become assets held by the Court the partnership creditor decree-holder, even if he applied for execution of his decree against that firm or the partners in that firm as such before receipt of such assets, will not be entitled to participate in the rateable distribution of those assets, because his application was not against the "same judgment-debtor" within the meaning of S. 73 of the Code. In the converse case, namely, when a partnership creditor decree-holder gets the assets representing partnership property into Court the separate creditor decree-holder against any of the partners who applied for execution before receipt of assets cannot claim rateable distribution of those assets. (*Das, J.*) Pacific Bank, Ltd. *v.* Thakur Singh Kalsi. I.L.R. (1945) 1 Cal. 153=A.I.R. 1949 Cal. 396.

———**S. 73 (1)**—Right to apply—Holder of order under S. 186 (1) of Companies Act. [*See* Q. D. 1941—1945, Vol. I, Col. 893.] Lyallpur Bank, Ltd. *v.* Ramji Das. 1946 A.W.R. (P.C.) 42=1946 O.A. (P.C.) 42.

———**(as adapted by A.L.O., 1937), Ss. 78 and 80**—*Notice of suit in case of Provincial Government—Service on Collector—Sufficiency and validity.*

S. 79, C. P. Code, as adopted by the Adaptation Laws Order, 1937, applied to all claims by or against the Crown, whether the suit could be brought under S. 179 of the Constitution Act, 1935, or not. It contained the general provision prescribing the manner of bringing suits by or against the Crown. S. 80, as adopted makes no distinction between a suit instituted against the Secretary of State under S. 79 (*c*), as adapted and one under S. 179 of the Constitution Act. In either the notice under S. 80 must be served on a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government. A notice served on the Collector of the District concerned in the case of a Provincial Government is not a valid notice. 47 Bom. 785; 46 C.W.N. 18, dist.; 52 Cal. 783; I.L.R. (1947) Mad. 36; 6 P.L.T. 415, foll.; A.I.R. 1949 Pat. 416, ref. (*Jha, C.J. and Reuben, J.*) Ram Ranbijaya Prasad Singh *v.* State of Bihar. A.I.R. 1950 Pat. 557.

———**Ss. 79 and 80 (as amended on the passing of Government of India Act, 1935)**—*Suit against Secretary of State after notice—Subsequent amendment by substituting the Governor-General in Council as defendant—No fresh notice under S. 80—Maintainability of suit.*

A notice of suit under S. 80, C. P. Code, was given on behalf of a dismissed chief signaller to the various authorities, if the reliefs claimed therein were not granted within two months. A suit was filed against the Secretary of State for India represented by the Collector of Tanjore. On an objection that after the passing of the Government of India Act, 1935, the Governor-General in Council and not the Secretary of State was the proper party, the plaintiff asked for and obtained permission to amend his plaint. But he did not serve a fresh notice under S. 80, C. P. Code. On a question as to the maintainability of the suit without fresh notice,

Held, that as the notice relied on stated that the suit would be filed against the Secretary of State for relief against him and there was no reference in it to the Governor-General in Council, the suit as amended was unsustainable. The fact that the officials on whom the notice is actually to be served are the same makes no difference. S. 80, C. P. Code, is express and explicit and admits of no implications or exceptions and it imposes a statutory and unqualified obligation on the Court. (*Leach, C.J. and Lakshmana Row, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* KRISHNASWAMI PILLAI. I.L.R. (1947) Mad. 36=227 I.C. 538=1947 Mad. (Rul.) 27=1946 F.L.J. 16=1946 M.W.N. 224=A.I.R. 1946 Mad. 366=(1946) 1 M.L.J. 267.

———**S. 80**—*"Act done in discharge of official duty"—Meaning of.*

A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. A kick administered by him is not an act which lies within the sphere of his official duty. (1948) 2 M.L.J. 6, foll., I.L.R. (1939) Nag. 419 and 31 N.L.R. 297, not foll. (*Mudholkar, J.*) VISHNU *v.* SMITH PEARSE. I.L.R. (1949) Nag. 232=A.I.R. 1949 Nag. 362=4 D.L.R. (Nag.) 91.

———**S. 80**—*Applicability—Act of the defendant in the exercise of his authority as a District Magistrate.*

Where the act of the defendant complained against though not in the discharge of his public duty purported to be in the exercise of his authority as District Magistrate, the provisions of S. 80, C. P. Code, would be attracted to the case. (*Harries, C.J. and Mukherjea, J.*) NIAZ MOHAMMAD KHAN *v.* ALFRED MORRIS. 52 C.W.N. 494=I.L.R. (1948) 2 Cal. 310.

———**S. 80**—*Applicability—Act done by public officer in bad faith—Notice, if necessary.*

If an act done by a public officer is apparently an official act, its character as such will not be changed by allegation that it was done in bad faith or that it had not that character which it purports to have. A headman of a village appointed under Bihar Act VI of 1943 who files malicious petitions against a person accusing him of certain offences, purports to act as a public officer, and a notice under S. 80, C. P. Code, ought to be given to him before a suit is filed against him in respect thereof. 41 M. 792, A.I.R. 1941 Pat. 385 and 53 A. 44, referred to. 24 P. 519, 19 P. 433 and 61 I.A. 171, Dist. (*Manohar Lall and Ramaswami, JJ.*) JAGESHAR *v.* MAHABHARATH. 4 D.L.R. (Pat.) 225=A.I.R. 1950 Pat. 32.

———**S. 80**—*Applicability—Agreement to refer dispute to arbitration—Application to file—Notice under S. 80—Necessity—Arbitration Act, Ss. 20 (2) and 41 (a).*

S. 80, C. P. Code, applies only to suits. The section has to be strictly construed; it does not apply to an application under S. 20 (2) of the Arbitration Act to file in Court an agreement to refer disputes to arbitration. No notice under S. 80 is therefore necessary in respect of such an application. (*Davis, C.J.*) RAMCHAND & SONS *v.* GOVERNOR-GENERAL IN COUNCIL. I.L.R. (1946) Kar. 463=A.I.R. 1947 Sind 147.

———**S. 80**—*Applicability—"Public officer"—"Purporting to be done . . . . in his official capacity"—Test to be applied.*

S. 80, C. P. Code, protects a public officer in respect of any act purporting to be done by such public officer in his official capacity. Two conditions are clearly necessary for the section to apply: (1) he must be a public officer; (2) he must purport to act in his official capacity. The correct approach is not by an insistence on the name of the permanent post which the officer in question holds under the Government. The act must purport to be done in his official capacity. Generally whether a person performing under an invalid statute the duties of an office is an officer *de facto* depends on whether there can be said to be an office of which the duties are to be performed. The test is different under the definition of public officer contained in S. 2 (17), Cr. P. Code. 75 I.A. 41; (1944) F.C.R. 195; 34 Bom. 583; 36 Cal. 28; 28 Lah. 22; 39 Mad. 781; 17 Pat. 706; 20 Pat. 417; A.I.R. 1935 All. 106; A.I.R. 1945 Lah. 81; A.I.R. 1950 Pat. 32, ref. (*Reuben and Jamuar, JJ.*) RAMESHWAR PRASAD SINGH *v.* MD. AYYUB. A.I.R. 1950 Pat. 527=5 D.L.R. (Pat.) 193.

———**S. 80**—Applicability — Receiver — Suit against—Notice—Necessity—"Purporting to be done. . . . in his official capacity"—Meaning of—Failure to pay dues—Suit—Notice of suit. [*See* Q.D. 1941—1945, Vol. I, Col. 897.] SURENDRA *v.* JAGAT. A.I.R. 1946 Pat. 81=13 B.R. 164=228 I.C. 236=1947 Pat. (Rul.) 92.

———**S. 80**—*Applicability—Suit for injunction restraining defendant from committing acts in future.*

S. 80, C. P. Code, applies not only to suits which relate to mandatory injunctions in respect of acts which had already been performed but also to suits in which prohibitory injunctions in respect of threatened acts are asked for. (*Abdur Rahman, Mahajan and Marten, JJ.*) SUBEDAR SHINGARA SINGH *v.* CALLAGHAN. I.L.R. (1947) Lah. 22=225 I.C. 414=A.I.R. 1946 Lah. 247 (S.B.).

———**S. 80**—*Applicability and scope—Suit for malicious prosecution against private individual and village munsif—No notice served under S. 80—Suit, if bad as a whole—Procedure.*

In a suit for malicious prosecution against a private person and the village munsif, it being alleged that the former was a mere tool in the hands of the latter who was an enemy of the plaintiff, and that both the defendants were actuated by malice, if it is found that what the village munsif did was done in the discharge of his duty as village munsif, the suit cannot be dismissed *in toto* on the ground of want of notice under S. 80, C. P. Code. Since a suit against the 1st defendant without impleading the second defendant would be maintainable, the suit can proceed against the first defendant and no difficulty would arise by striking out the second defendant from the action. (*Meredith, J.*) KANGANNA *v.* RAMALINGAM SABUDHI. 13 Cut.L.T. 44=A.I.R. 1948 Pat. 117.

———**S. 80**—*Contents of notice.*

Notice under S. 80, C. P. Code, need not be practically a copy of the plaint. It should be such as to give substantial information to the Government as to the basis of the claim and the relief which the plaintiff seeks. It is not incumbent upon the plaintiff to give in detail all the forms in which he would seek relief. 14 P. 283, referred to. (*Bose, J.*) SOMESWAR BANERJEE *v.* UNION OF INDIA. 85 C.L.J. 364.

———**S. 80**—*Contents of notice—Description of defendant—Exact style—If to be stated.*

It is not necessary that the notice under S. 80, C. P. Code, should mention the exact style under which the defendant is to be impleaded. It is sufficient if it is clear against whom the suit is to be filed, and in the case of a suit against the Central Government the notice has to be delivered to or left at the office of the Secretary to that Government. (*Reuben, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* AMILAL MARWARI. 1946 P.W.N. 137=230 I.C. 274=13 B.R. 421=1947 Pat. (Rul.) 303=A.I.R. 1947 Pat. 81.

———**S. 80**—*Contents of notice—Description of plaintiff—Business address and not place of residence given.*

The object of serving notice under S. 80, C. P. Code, is to give the Government sufficient warning of the case which is going to be instituted against it so that the Government may, if it so wishes, settle the claim without litigation or afford restitution without recourse to a Court of law. A liberal construction should be put upon the section. The notice is sufficient if it substantially fulfils its object in informing the Government or the public officer of the nature of the suit to be filed. It must not be construed as if it is a pleading and it need not set out all the details or facts of the case which the plaintiff intends to prove.

Under the section, all that is needed is that the plaintiff must be described in such a manner that he can be identified without any difficulty so that the Government may deal with him, if so advised. It will be pushing technicality to absurd limits if the Court has to dismiss a suit because the plaintiff who is a businessman has given his business address and not his place of residence in the notice. (*Chatterjee, J.*) BHUPAL CHANDRA DUTT *v.* GOVERNOR-GENERAL OF INDIA. 52 C.W.N. 808.

———**S. 80**—*Contents of notice—Error in notice with reference to date of railway receipt—Cause of action based on loss of goods despatched through railway.*

Where the cause of action is based upon loss by way of shortage in weight of goods despatched through the railway administration under a railway receipt a *bona fide* error in the notice under S. 80, C. P. Code, with reference to the date of the railway receipt, the number of the railway receipt being quite accurate, is not fatal to the suit. 1946 M. 73, Dist. (*Imam, J.*) MAHOMED FAROOQ *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1949 Pat. 93.

———**S. 80**—*Contents of notice—Notice not giving parentage of plaintiff and not stating exact amount as claimed subsequently in plaint—If invalid.*

A notice of suit under S. 80, C. P. Code, need not mention the parentage of the plaintiff or the exact amount of the claim in the suit as essential conditions of its validity; the fact that the parentage of the plaintiff is not given or that the amount mentioned in it does not tally with the amount subsequently claimed in the plaint would not invalidate the notice as it cannot be said that the requirements of S. 80 are not legally complied with. 40 Cal. 508, Dist. (*Sinha and Ramaswami, JJ.*) GOVERNOR-GENERAL IN COUNCIL *v.* KASIRAM MARWARI. 4 D.L.R. (Pat.) 24=A.I.R. 1949 Pat. 268=29 P.L.T. 477.

———**S. 80**—*Delivery of notice—Mention in plaint—If necessary.*

Where a plaint contains a statement that a notice under S. 80, C. P. Code, was sent by registered post, and the registration receipt and acknowledgment due are on the record as exhibits in the case, the statement must be read to mean not only that the notice was sent by registered post but it had been delivered. The actual use of the word "deliver" in the plaint is not necessary. (*Imam, J.*) MAHOMED FAROOQ *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1949 Pat. 93.

———**S. 80**—Nature of provision—Notice of suit not served on public officer—Duty of Court—Failure of parties to raise objection—Effect of—Findings on merits—If *res judicata.* [*See* Q. D. 1941—1945, Vol. I, Col. 899.] HIRALAL MURARKA *v.* MANGTULAL. I.L.R. (1944) 2 Cal. 513=A.I.R. 1947 Cal. 221.

———**S. 80**—*Non-service of notice—Waiver.*

Where the defendant who is a public officer and not the Secretary of State does not object to the maintainability of the suit against him on the ground of non-service of a notice under S. 80, C. P. Code, he must be deemed to have waived the objection. (*G. N. Das, J.*) CHARU CHANDRA HAIT *v.* SNIGDHENDU PROSAD. 52 C. W. N. 212=A.I.R. 1948 Cal. 150=2 D.L.R. 407=I. L.R. (1948) 2 Cal. 77.

———**S. 80**—*Notice acknowledged by "Secretary, Railway Board"—Suit against Central Government—Section, if complied with.*

The receipt of the notice was acknowledged on behalf of the "Secretary, Railway Board". It did not appear he was a "Secretary to the Central Government" within the meaning of S. 80 (*a*), C. P. Code. In a suit against the Central Government, *Held,* that the provisions of S. 80, C. P. Code, had not been strictly followed. (*Marten, J.*) KUMAR BROS., LAHORE *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1949 Lah. 165.

——**Ss. 80 and 86**—*Notice and sanction—If necessary for suit against Jodhpur Railway—Fresh notice after merger—Necessity.*

A plaintiff suing the Jodhpur Railway has to give notice under S. 80, C. P. Code and also obtain sanction under S. 86, C. P. Code. After the merger a fresh notice would have to be given. (*Divatia, C.J. and Chhalpar, J.*) ISMAIL HAJI OSMAN *v.* GONDAL RY., ETC. 5 D.L.R. (Sau.) 16.

——**S. 80**—Notice—Period of two months—Computation—Exclusion of date of service or notice. [*See* Q.D. 1941—1945, Vol. I, Col. 901.] PROVINCE OF BENGAL *v.* MIDNAPORE ZEMINDARY CO., LTD. 80 C.L.J. 178.

——**S. 80**—*Notice as required by—Right to—If can be waived—Plea of estoppel and implied waiver—Onus—Suit filed in wrong Court—Defendant raising only the question of want of jurisdiction—Suit subsequently filed in the proper Court—Defendant raising plea of want of proper notice at that stage—If estopped from raising it.*

There is no reason why the notice required to be given under S. 80, C. P. Code, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that the notice is required; if in the particular case he does not require that protection and says so, he can lawfully waive his right. There is no inconsistency between the proposition that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided.

Where the plaintiffs contend that the defendants have waived their right to the notice, or alternatively, are estopped from saying that they did not, the burden lies on the plaintiffs to establish the facts upon which they rely for raising the implication or creating the estoppel.

The suit was originally instituted in the Court of the District Munsiff against the Government of the Province of Madras and a Municipal Council. Notice under S. 80 was given only on behalf of one of the plaintiffs. The defendants raised only the question of want of jurisdiction of that Court. They were successful and a suit was subsequently filed in the Court of the Subordinate Judge. The defendants at that stage raised the plea of want of proper notice. The plaintiffs contended that the defendants had waived their right to proper notice of the suit, or alternatively are estopped from contending that no proper notice was given.

Held, that the plaintiffs had not established any facts upon which the defendants must be deemed to have waived proper notice or are estopped from asserting want of proper notice. There is no reason why the defendants should not raise the plea of want of proper notice. The plaintiffs were in error throughout in instituting a suit which S. 80 prohibited. The defendants were under no duty to them to point out their error. They might have been negligent in their own interest in not raising the plea at an earlier stage. But negligence cannot give rise to an estoppel unless there is a duty to care. (*Lord Simonds.*) VELLAYAN CHETTIAR *v.* THE PROVINCE OF MADRAS. 74 I.A. 223=I.L.R. (1948) Mad. 214=2 D.L.R. 274=1947 A.L.J. 576=60 L.W. 630=1947 M.W.N. 679=49 Bom.L.R. 794=52 C.W.N. 27=A.I.R. 1947 P.C. 197=(1947) 2 M.L.J. 208 (P.C.).

——**S. 80**—*Notice—Recital in plaint as to service of—Defect in—If goes to the root of the matter—Procedure to be followed by Courts in such a case.*

Where in a plaint it is recited that the notice under S. 80, C. P. Code, was served by a registered postal notice with an acknowledgment due upon the secretary to the Governor-General in Council, the defect, if any, does not go to the root of the plaintiff's right to sue. As such the Court can only pass an order under O. 7, R. 11, C. P. Code, in such a case and cannot dismiss the suit. (*Ray, J.*) KANAILAL *v.* GOVERNOR-GENERAL FOR INDIA IN COUNCIL. 3 D.L.R. (Pat.) 72=A.I.R. 1948 Pat. 164.

——**S. 80**—*Notice to Government—Terms of—Validity.*

The terms of S. 80, Civil Procedure Code, are explicit and mandatory and cannot be waived. It requires that the notice should state the name, the residence, etc., of the plaintiff, the cause of action, and the relief prayed for.

Where goods were sent through a railway but the delivery was not made and the plaintiff therefore sued the Government claiming damages after sending a notice to the Secretary, Governor-General of India in Council, Department of Railways, New Delhi, on an objection that the notice was not a proper one according to S. 80, Civil Procedure Code,

Held, under the circumstances, the notice under S. 80, Civil Procedure Code, was a proper one. (1946) 1 M.L.J. 267 and (1946) 2 M.L.J. 65, dist.; A.I.R. 1949 Pat. 416, foll. (*Panchapagesa Sastry, J.*) SUBRAHMANYAM *v.* UNION OF INDIA. 1950 M.W.N. 787=(1950) 2 M.L.J. 656.

——**S. 80**—*Notice—Requirements of—Error in the matter of designation as Secretary of State—Effect—Notice received by authority empowered to receive notices addressed to the Governor-General in Council and acted upon—Sufficiency.*

Where although the name of the Secretary of State was inadvertently given at the head of the notice, yet it was treated by the Governor-General in Council as notice to him and action was taken in the same way as if the notice had been addressed to the Governor-General in Council, it is sufficient compliance with the requirements of S. 80, C. P. Code, because the Governor-General in Council was in fact given notice. It must be held that the notice was given to the Governor-General in Council notwithstanding an error in the matter of designation. (1946) 1 M.L.J. 267, dist. (*Horwill, J.*) GOVERNOR-GENERAL IN

COUNCIL *v.* KRISHNA SHENOY. 1950 M.W.N. 684=63 L.W. 1173=(1950) 2 M.L.J. 506.

———**S. 80**—*Notice under—Right of waiver—Plea of want of notice—Estoppel by conduct.*

It is competent for the authority, for whose benefit the right to notice under S. 80, C. P. Code, has been provided, to waive that right. All objections regarding the maintainability of a suit for want of notice under S. 80, C. P. Code, are to be taken at the earliest opportunity and if that is not done at the proper time and the plaintiff is prejudiced, it will not be open to the defendant to raise the plea of want of notice at a very late stage of the case. He would be deemed to have waived the notice and may be estopped by his conduct from pleading the want of notice. 40 C. 503 and 1947 P.C. 197, foll.; 51 B. 725 (P.C.), Expl. (*Bose and Sen, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHEORAMJEE. I.L.R. (1949) Nag. 875.

———**S. 80**—*Notice under on behalf of one plaintiff—Suit, if can' be instituted by him and another.*

S. 80 of the C. P. Code according to its plain meaning requires that there should be "identity of person who issues the notice with the person who brings the suit". Hence where a notice as required by the section is given on behalf of only one person a suit cannot be instituted by that person and another on the strength of such notice. To hold otherwise would be to admit an implication or exception for which there is no justification. (*Lord Simonds.*) VELLAYAN CHETTIAR *v.* THE PROVINCE OF MADRAS. 74 I.A. 223=I.L.R. (1948) Mad. 214=2 D.L.R. 274=1947 A.L.J. 576=60 L.W. 630=1947 M.W.N. 679=49 Bom.L.R. 794=52 C.W.N. 27=A.I.R. 1947 P.C. 197=(1947) 2 M.L.J. 208 (P.C.).

———**S. 80**—*Notice under—Validity—Clerical mistake in giving the number of the Railway receipt which forms the cause of action.*

Whenever a plaintiff mentions one cause of action in the notice and sues on a different cause of action, he is bound to fail. Where in a suit by a person who was entitled to obtain delivery of a consignment on the basis of a railway receipt endorsed in his favour by the consignor, the notice under S. 80 gave the wrong number of the Railway receipt. *Held,* that the requirements of S. 80 in regard to stating the cause of action had not been complied with. (*Desai, J.*) DOMINION OF INDIA *v.* ROOPCHAND. 1950 A.L.J. 595=5 D.L.R. (A.) 365=1950 A.W.R. 657.

———**S. 80**—Notice—Wrong description of subject-matter of suit—Renders notice defective. [*See* Q.D. 1941-1945, Vol. I, Col. 902.] MEENAKSHI AMMA *v.* PROVINCE OF MADRAS. 223 I.C. 456=1946 Mad. (Rul.) 143=A.I.R. 1946 Mad. 73.

———**S. 80**—*"Official capacity"—Acts of convening and holding Court-Martial.*

It cannot be disputed that a military officer cannot refuse to convene a general Court-Martial and the members of the Court-Martial who are also military officers cannot refuse to function as a Court-Martial under the Army Act, when ordered so to do by a competent authority. The fact that they had no right in law to act is beside the point. The act of convening a Court-Martial and the act of holding a Court-Martial are therefore purported to be done in official capacity. A suit against the military officers in respect of such acts would consequently fall within the ambit of S. 80, C. P. Code, and could not be instituted without complying with its provisions. (*Abdur Rahman, Mahajan and Marten, JJ.*) SUBEDAR SHINGARA SINGH *v.* CALLAGHAN. I.L.R. (1947) Lah. 22=225 I.C. 414=A.I.R. 1946 Lah. 247 (S.B.).

———**S. 80**—*Public officer—Liquidator—Suit for declaration that contributory order passed by him is illegal—Notice—Waiver.*

The Liquidator of a Co-operative Credit Society is a public officer and a notice to him in the manner prescribed by S. 80, C. P. Code, is an essential pre-requisite for the institution of a suit against him for a declaration that a contributory order passed by him against the plaintiff is null and void.

A plea of want of notice should be taken at the earliest opportunity for the simple reason that it goes to the root of the case. If the Liquidator files a full and complete written statement on merits and even joins issues with the plaintiff on the point of court-fees and fights them up to the High Court and then files an additional written statement putting forward the plea of want of notice for the first time, he should be deemed to have waived his rights to a notice under S. 80, C. P. Code. (*Pollock and Sheode, JJ.*) WASANT SHRIPAT *v.* G. M. KHANDEKAR. I.L.R. (1948) Nag. 216=2 D.L.R. 765=A.I.R. 1949 Nag. 25=1948 N.L.J. 212.

———**Ss. 80 and 2 (17) (c)**—*"Public officer"—Members of Court-Martial.*

The members of a Court-Martial convened under the Army Act are public officers as defined by S. 2 (17) (*c*), C. P. Code. (*Abdur Rahman, Mahajan and Marten, JJ.*) SUBEDAR SHINGARA SINGH *v.* CALLAGHAN. I.L.R. (1947) Lah. 22=225 I.C. 414=A.I.R. 1946 Lah. 247 (S.B.).

———**S. 80**—*Receiver impleaded in suit—Notice—If and when necessary.*

It is true that a Receiver is a public officer within S. 80, C. P. Code. But where the complaint of the plaintiff is not in respect of any act done by him acting in his official capacity and he is impleaded in the suit merely because he is in possession of the property in dispute, notice under the section is not necessary. 41 C.W.N. 322 and 44 C.W.N. 74, ref. to. (*Das and Guha, JJ.*) PALANIBALA DEBI *v.* KALIPADA CHAKRAVARTY. 54 C.W.N. 960.

———**S. 80**—*Scope and construction.*

S. 80, C. P. Code, may be divided into two parts. The first part deals with the service of notice in writing and the second part with a rule of procedure as to what the plaint should contain. The mandatory words prefixed to the first part cannot be read as prefatory to the second part of the section. While the one part affects the plaintiff's right to sue, the other relates to a matter of procedure. The second part may be classed with certain rules of procedure as to the contents of a plaint prescribed in O. 7 of the C. P. Code. (*Ray, J.*) KANAILAL *v.* GOVERNOR-GENERAL FOR INDIA IN COUNCIL. 3 D.L.R. (Pat.) 72=A.I.R. 1948 Pat. 164.

——**S. 80**—*Scope—"Act purporting to be done" in official capacity—Future or threatened acts, if excluded.*

Quaere: Whether future or threatened acts are outside the scope of S. 80. 54 I.A. 338; 61 I.A. 171; 35 Bom. 362; 37 Bom. 243; 40 Bom. 392; 44 Bom. 555; 36 Cal. 28; 44 Cal. 219; 28 Lah. 23; 50 Mad. 239, ref. (*Reuben and Jamuar, JJ.*) RAMESHWAR PRASAD SINGH *v.* MD. AYYUB. A.I.R. 1950 Pat. 527=5 D.L.R. (Pat.) 193.

——**S. 80**—*Scope—If superseded by O. 27-A —Absence of notice and failure to implead Government—If cured by notice under O. 27-A.*

O. 27-A, C. P. Code, which has been inserted in the C. P. Code, and which provides for machinery by which the state may intervene in any suit in which a substantial question of Constitutional law is involved is not intended to supersede S. 80, C. P. Code. The failure to implead the state in a suit where the state is a necessary party and to give the notice prescribed by S. 80, cannot and will not be cured because the Advocate-General gets a notice under O. 27-A, C. P. Code, and can apply to make the State a party. (*Reuben and Jamuar, JJ.*) RAMESHWAR PRASAD SINGH *v.* MD. AYYUB. A.I.R. 1950 Pat. 527=5 D.L.R. (Pat.) 193.

——**S. 80**—*Scope—Non-compliance — Effect—Duty of Court—Plea not raised in written statement—Waiver—If can be implied.*

The provisions of S. 80, C. P. Code, are express, explicit and mandatory and admit of no implications or exceptions. No question of waiver of notice under S. 80 can therefore arise. A plea of want of a proper or valid notice can therefore be allowed to be raised for the first time at the hearing. Where the defendant does not in his pleading deny the allegation of due service of notice under S. 80, he will not subsequently be allowed to adduce evidence to show that S. 80 has not been complied with. He can rely on the notice itself, and the Court having the notice before it cannot if it shows that the requirements of S. 80 have not been complied with, ignore this fact. If the Court finds non-compliance with the section, it must refuse to entertain the suit, whether the point has been raised by the defendant or not. (*Reuben, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* AMILAL MARWARI. (1946) P.W.N. 137=230 I.C. 274=A.I.R. 1947 Pat. 81=13 B.R. 421=1947 Pat. (Rul.) 303.

——**S. 80**—***Scope—Notice given by father—Suit after father's death by son on notice by father—Maintainability.***

A notice of suit given by a person under S. 80, C. P. Code, cannot, after his death subsequent to the notice, be availed of by his son or other legal representative who actually brings the suit. 25 All. 187; A.I.R. 1930 Bom. 367. (*Jagannadhadas, J.*) HARIHAR MAHAPATRA *v.* HARI OTHA. A.I.R. 1950 Orissa 257=5 D.L.R. (Cut.) 12.

——**S. 80**—*Service of notice—Suit against Central Government—Notice to whom to be addressed and on whom to be served.*

In the case of a suit against the Central Government, the notice under S. 80, C. P. Code, is to be served on the Secretary to that Government. A notice addressed to the Secretary and served on him is a valid notice. It is not necessary that it should be addressed to the Governor-General, Federation or Dominion of India. 9 F.L.J. 16, dist. (1947) Pat. 81, foll. (*Manohar Lall and Mahabir Prasad, JJ.*) BHOLARAM SHIBDHAN *v.* GOVERNOR-GENERAL IN COUNCIL. 28 Pat. 292=4 D.L.R. (Pat.) 92=A.I.R. 1949 Pat. 416.

——**S. 80**—*Suit against Central Government relating to railway—Notice sent to Secretary of Railway Board instead of General Manager—Receipt by latter—Burden of proof—Evidence Act, Ss.* 106 *and* 114.

S. 80, C. P. Code, clearly lays down that in the case of a suit against the Central Government where it relates to a railway, the notice under the section must be sent to the General Manager of the Railway. A notice sent to the Secretary of the Railway Board instead of the General Manager is not a valid notice, and the General Manager cannot be called upon to state when he received the notice. S. 114, Evidence Act, can have no application because it cannot possibly be presumed that a wrong addressee would immediately forward the communication to the person who by statute is bound to receive it. The addressee might or might not act and there can be no presumption under S. 114. S. 106 of the Evidence Act also does not shift the onus on the General Manager. If, therefore, there is no evidence before the Court that the General Manager received the notice within time, the suit is liable to be dismissed. (*Harries, C.J.*) SANDHYA TRADING CO. *v.* GOVERNOR-GENERAL IN COUNCIL. A.I.R. 1950 Cal. 426.

——**S. 80**—*Suit against B. N. Ry. for damages for loss of goods in transit—Failure to give notice under S. 80, C. P. Code, on the Governor-General in Council—Effect—Notice under S. 77, Railways Act—If dispenses with notice under S. 80, C. P. Code.*

Where a suit is filed against the B. N. Ry. for damages for loss of goods in the transit, the omission to serve upon the Governor-General of India in Council notice under S. 80 of the C. P. Code, is fatal to the suit. The rule of procedure laid down in S. 80 is mandatory and explicit and admits of no implications. The service of a notice under S. 77 of the Railways Act will not dispense with the necessity for service of notice under S. 80 of the C. P. Code. The object of a notice under S. 77 of the Railways Act is to prevent stale and presumably dishonest claims for compensation being put forward when after lapse of time, it would be difficult, if not impossible, for the Railway administration to trace the transaction and adduce proper evidence in connection therewith. S. 80, C. P. Code, on the other hand aims at giving an opportunity to the public officer concerned an opportunity to reconsider the matter and to settle the claim, if necessary without recourse to litigation. (*Mukherjea, J.*) JAMAL

Noor Mahomed *v.* Governor-General in Council. I.L.R. (1946) 2 Cal. 316=225 I.C. 193=A.I.R. 1947 Cal. 26=1946 Cal. (Rul.) 327.

———**Ss. 80 and 115**—*Suit against Provincial Government after notice under S. 80—Prayer for amendment of plaint introducing new cause of action inconsistent with the original one—If can be allowed—Interference in revision with order allowing amendment—Principles.*

A suit against the Provincial Government (after the necessary notice under S. 80, C. P. Code), as originally framed was for a declaration that the acquisition by the Government of certain ground and premises belonging to the plaintiff was illegal, *mala fide.* unreasonable, *ultra vires* and without jurisdiction and for granting a permanent injunction restraining the defendant from proceeding with the said acquisition or from taking possession of the said property. Pending the suit, an application was made to amend the plaint by the addition of a new paragraph to the effect that since the institution for the use of which the original acquisition had been intended had ceased to exist as an entity on account of its dissolution there was no further necessity for the acquisition at all and therefore the defendant should not take any further steps in relation to the said acquisition. The amendment was allowed. In revision, on a contention that as the amendment introduced a new cause of action, it could not be allowed without the imperative prerequisite of a notice under S. 80, C. P. Code.

Held, that as the amendment allowed had introduced a fresh cause of action which was outside the scope of the suit as originally framed and inconsistent with the allegation made earlier, the trial Judge was not justified in allowing the amendment as admittedly no previous notice had been served on the Government informing them of this new cause of action.

Held, further, that as the lower Court had acted with material irregularity in the exercise of jurisdiction, the High Court had the power to interfere in revision and set right the matter. (*Govinda Menon, J.*) The Province of Madras *v.* R. B. Poddar Firm. 1948 M.W.N. 704=61 L. W. 781=A.I.R. 1949 Mad. 214=(1948) 2 M.L.J. 423.

———**S. 80 and O. 7, R. 2 (d)**—*Suit against a Railway Company for damages—Taking over of Railways by Government of India—Amendment of plaint by addition of Governor-General in Council as a party to suit—Notice to Governor-General in Council under S. 80, C. P. Code, essential for maintainability of suit.*

On the 6th June, 1944, the respondent sued the South Indian Railway Company, Limited, for damages for short delivery of goods consigned to him. But on the 1st of April, 1944, the Government of India had taken over the South Indian Railway, and relief, if at all, could only be granted against the Governor-General of India in Council. The respondent applied for leave to amend his plaint by adding the Governor-General of India in Council as the second defendant. His application was granted but he gave no notice under S. 80, C. P. Code, to the Governor-General in Council.

Held, that (*i*) the suit was not maintainable without notice being served upon the Governor-General in Council under S. 80 of C. P. Code. (*ii*) O. 7, R. 2 (*d*) of the C. P. Code applies to a case where the suit appears from the statements in the plaint to be barred by law and cannot apply to a case like this. (*Leach, C.J. and Lakshmana Rao, J.*) The Governor-General of India in Council *v.* Raghunandan Shenoy. 59 L.W. 391=1946 M.W.N. 462=(1946) 2 M.L.J. 65=I.L.R. (1947) Mad. 258=229 I.C. 512=1947 Mad. (Rul.) 169=A.I.R. 1947 Mad. 64.

———**S. 80**—*Suit against two defendants—Suit not properly constituted against one of them for want of notice—Claim against the other—If can be decreed.*

Where the claim against one of the two defendants against whom a suit has been instituted can be severed from the claim against the other, it is competent to the Court to decree the claim against the person against whom it has been properly constituted and dismiss the suit against the other because no notice was given to him under S. 80, C. P. Code. (*Bose and Sen, JJ.*) Secretary of State for India in Council *v.* Sheoramjee. I.L.R. (1949) Nag. 875=5 D.L.R. (Nag.) 81.

———**S. 80**—*Suit against several defendants including Government—Absence of notice to Government under S. 80—Effect—Whole suit—If to be dismissed—Right to give up Government and proceed against other defendants only.*

In the case of a suit instituted against several defendants including the Government, where relief is asked for against all the defendants including the Government, and the plaint in which categorically mentions a cause of action which involves a Government Officer, if notice of suit under S. 80, C. P. Code, has not been given to the Government, the plaint as a whole has to be rejected and not merely in part as against the Government only. It is not open to the plaintiff to get over the difficulty at a late stage by saying that he would give up the Government and confine his relief against the other defendants only. A.I.R. 1936 Pat. 339; A.I.R. 1948 Pat. 16, dist.; 51 Bom. 725 (P.C.); A.I.R. 1941 Pat. 461, foll. (*Jagannadhadas, J.*) Harihar Mahapatra *v.* Hari Otha. 5 D.L.R. (Cut.) 12=A.I.R. 1950 Orissa 257.

———**S. 80**—*Suit on behalf of trust against Government—Notice not specifying nomes and addresses of trustees—Suit, if competent.*

The provisions of S. 80, C. P. Code, are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. As there is no provision in the Code enabling the trustees to sue in the name of the trust, a suit on behalf of a trust against the Government must be filed by the trustees as plaintiffs. If no notice under the section was given to the Government specifying their names and addresses, the condition precedent to the filing of the suit is not fulfilled and the suit is incompetent. (*Sir Madhavan Nair.*) Government of the Province of Bombay *v.* Pestonji Ardeshir Wadia. 76 I.A. 85=53 C.W.N. 489=I.L.R. (1949) Bom. 110=62 L.W. 444=A.I.

R. 1949 P.C. 143=4 D.L.R. (P.C.) 187=1949 M.W.N. 407=51 Bom.L.R. 635=(1949) 2 M. L.J. 161 (P.C.).

———S. 80—*Waiver of notice by defendant—Competency.*

S. 80, C. P. Code, is mandatory in character, but the mandatory nature of the section is no bar to the defendant waiving the notice under the section. It is open to the defendant to waive the benefit of S. 80, *i.e.*, his right to a proper notice. There is no inconsistency between the facts that the provisions of S. 80 are mandatory and that they may be waived by the authority for whose benefit they are provided. 74 I.A. 223, rel. (*Reuben and Jamuar, JJ.*) PROVINCE OF BIHAR *v.* KAMAKSHYA NARAIN SINGH. 5 D.L.R. (Pat.) 90=A.I.R. 1950 Pat. 366=31 P.L.T. 93.

———S. 80—*Waiver of notice by defendant—Competency—Plea of want of notice—Estoppel by conduct.*

It is competent for the authority, for whose benefit the right to notice under S. 80, C. P. Code, has been provided, to waive that right. All objections regarding the maintainability of a suit for want of notice under S. 80, C. P. Code, are to be taken at the earliest opportunity and if that is not done at the proper time and the plaintiff is prejudiced, it will not be open to the defendant to raise the plea of want of notice at a very late stage of the case. He would be deemed to have waived the notice and may be estopped by his conduct from pleading the want of notice. 40 C. 503 and A.I.R. 1947 P.C. 197, foll.; 51 B. 725 (P.C.), Expl. (*Bose and Sen, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHEORAMJEE. I.L.R. (1949) Nag. 875=5 D.L. R. (Nag.) 81.

———S. 82—*Applicability—Decree against Dominion of India for breach of contract or negligence of Railway—Decree not fixing time for its satisfaction—Executability.*

The words "such act as aforesaid" in S. 82 (1), C. P. Code, refer to the acts mentioned in the earlier sections, and there can be no doubt that this section would govern a decree against the Dominion of India for breach of contract or negligence of a Railway. The section requires that the decree should have on the face of it a time limit for its satisfaction. If, therefore, no time is stated in the decree within which it was to be satisfied, the decree as it stands cannot be executed. A.I.R. 1948 Pat. 179, referred to. (*Harries, C.J. and Sarkar, J.*) DOMINION OF INDIA *v.* GOSTO BEHARI. 5 D.L.R. (Cal.) 70=A.I.R. 1950 Cal. 247=54 C.W.N. 749.

———S. 82—*Scope—Non-compliance—Effect—Decree not specifying time for satisfaction—If void—Executability—Refusal by executing Court to execute—Propriety.*

S. 82, C. P. Code, is mandatory and requires that the decree against the Crown should specify a time limit within which it shall be satisfied. Where the decree does not specify such a time limit the decree is incomplete, though not void or erroneous. It is not executable until the conditions of the section are fulfilled. The executing Court would be acting correctly if it refuses to

execute such a decree. (*Ray, J.*) GOVERNOR-GENERAL-IN-COUNCIL *v.* PIRAMAL MARWARI. 2 D. L.R. 176=A.I.R. 1948 Pat. 179.

———S. 83, Explanation—*Person resident in foreign country in temporary occupation of enemy army—If "enemy"—Right to sue to British Indian Court—Defence of India Rules, Rr. 2 and 97.*

An enemy army in temporary occupation of a foreign country, *e.g.*, Penang cannot be said to the "Government" of that country, so as to make a person residing in such country an alien enemy who is prohibited by S. 83, Civil Procedure Code, from suing in any British Indian Court. Such a resident cannot be said to be an "enemy" within the meaning of R. 97 of the Defence of India Rules read with R. 2. (*Leach, C.J. and Lakshmana Rao, J.*) CHEM ABBHEONG *v.* PACKIRI MAHOMED ROWTHER. I.L.R. (1946) Mad. 768=1946 M.W.N. 288=59 L.W. 169=A.I.R. 1946 Mad. 328=(1946) 1 M.L.J. 222.

———S. 86—*Function and power of Court under—Sanction of Crown representative for suit against prince—Power of Court to go behind certificate and investigate into facts as to existence of conditions for grant of sanction for suit.*

Under S. 86, C. P. Code, the test for the Court in a suit against a sovereign prince, as to whether the said prince was rightly impleaded before it, is the existence of the consent of the Crown representative duly certified by the signature of the political secretary. It is no part of its function to try by its process the question of fact whether any of the conditions required for the giving of his consent existed or not, or even the question whether it had appeared to the Crown representative that one or more of them did exist. The certified consent is in all ordinary cases conclusive evidence that it did so appear, and it is not for the Court to go behind the certificate or to entertain an objection on the ground of absence of the conditions requisite for the grant of sanction by the Crown representative, in the absence of special circumstances justifying an investigation into the facts. The Court should not ordinarily try for itself what S. 86 has left to the Crown representative to ascertain. (*Lord Radcliffe.*) GOVINDRAM GORDHANDAS *v.* MAHARAJA OF GONDAL. 77 I.A. 156=54 C.W.N. 419=A.I. R. 1950 P.C. 99=1950 A.L.J. 270=63 L.W. 434=52 Bom.L.R. 450=(1950) 2 M.L.J. 1 (P. C.).

———Ss. 86 and 87—*Proper frame of suit against Prince or Ruling Chief.*

The words "in the name" in S. 87 of the C. P. Code are very suggestive and they clearly indicate that, where a Prince or Ruling Chief has to be sued, it is his State that has to be arrayed on the defendant's side and the suit shall be taken as one against the Prince or the Ruling Chief himself. (*Mushtaq Ahmad, J.*) BINDESHWARI AHIR *v.* BISHWANATH SINGH. 1950 A.W.R. 321=A.I.R. 1950 All. 421.

———S. 86 (5)—*Scope.*

S. 86 (5), C. P. Code, contemplates a rival claim to be put forward against the ruling chief; but the only limitation is that the person who is the plaintiff in the suit must be a tenant of the ruling chief and the suit must relate to the lands which he holds under him. If both these conditions are fulfilled, S. 86 is no bar to the suit against the ruling chief. (*Ahmad, J.*) Bir Bikram Kishore *v.* Abdul Kamal. A.I.R. 1949 Dacca 16.

———S. 87—*Form of suit against Sovereign Prince or Ruling Chief.*

According to S. 87, C. P. Code, where a Sovereign Prince or Ruling Chief has to be sued it is his State that has to be arrayed on the defendant's side and the suit shall be taken as one against the Prince or Ruling Chief. (*Mushtaq Ahmad, J.*) Bindeshwari Ahir *v.* Bishwanath Singh. 1950 A.W.R. 321=A.I.R. 1950 A. 421.

———S. 91—*Applicability—Village pathway—Unauthorised obstructions on.*

S. 91 of the C. P. Code is not applicable to the case of an obstruction on a village road which is used by the villagers as means of passage. Unless it is proved to be a public pathway there, there would be no public nuisance and S. 91 will not apply. (*Ghulam Hasan, C.J.*) Harihar Prasad *v.* Shambhu Dat. 22 Luck. 279=1947 O.W.N. 142=230 I.C. 334=1947 Oudh (Rul.) 136=1947 O.A. (C.C.) 183=1947 A.W.R. (C. C.) 183=A.I.R. 1947 Oudh 204.

———S. 91—*Obstruction to passage in village forming part of longer highway—Suit by residents of village—Maintainability.*

In a suit for injunction the allegations in the plaint were that a passage ran through the village of the plaintiffs on either side of which there were residential houses, that the defendant by extending his house had encroached upon the passage, that the plaintiff's right of passage and their right to take carts and processions over the route had been obstructed in consequence thereof and also the water flowing through the village over the path had been stopped on account of the defendant's acts. There was also a further allegation that the passage in question was connected with other villages so that people from outside the village also used to pass through it from one end or the other.

Held, that the passage in question from the point of view of the plaintiffs and their co-residents of the village was essentially a village pathway and not a public thoroughfare, and that therefore the suit was maintainable without proof of special damage or without the consent of the Advocate-General under S. 91 (1), C. P. Code. The obstruction being on a village path in which though the residents of that particular locality were commonly interested, each had a special right which was protected by sub-S. (2) of S. 91, C. P. Code, irrespective of the class of cases covered by sub-S. (1). 1938 Cal. 366, 1933 A. 919, 15 C. 460 (F.B.), 1939 A.L.J. 821, 1923 Cal. 622, 1930 Cal. 286, 1941 Pat. 249 and 1937 Pat. 620, ref. 6 A.L.J. 499, 33 A. 287 and 22 A.L.J. 568, Dist. (*Mushtaq Ahmad, J.*) Faqir Chand *v.* Sooraj Singh. A.I.R. 1949 All. 467.

———S. 91 and O. 1, R. 8—*Obstruction to village pathway—If public nuisance—Suit in representative capacity for removal of obstruction—Proof of special damage—If essential—Village pathway—Representative suit -Maintainability.*

It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance. without the sanction of the Advocate-General under S. 91, C. P. Code, and even without proof of special damage.

Very often Courts have to deal with the infringement of the rights of the residents of a village or a section of a communty in pathways, wells and banks of rivers and so on. Infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of S. 91, C. P. Code or S. 268, I. P. Code. A member of such class can file a representative suit under O. 1, R. 8, C. P. Code, for relief in respect of infringement of such rights. Case-law discussed. (*Satyanarayana Rao, J.*) Subbamma *v.* Narayanamurthi. 62 L.W. 126=1949 M.W.N. 38=A.I.R. 1949 Mad. 634=4 D. L.R. (Mad.) 109=(1949) 1 M.L.J. 56.

———S. 91—*Scope—Representative suit on behalf of Hindu community—Consent of Advocate-General—If necessary.*

Under S. 91, C.P.Code, the consent of the Advocate-General is required only for a suit for a declaration of a public right, but an action brought by a particular section of the public is an exception to the general rule. Therefore a suit by a Hindu as a representative of the Hindu community for a declaration of their right to take a procession along a certain public road and for an injunction restraining the defendants from obstructructing the procession, is maintainable without the consent of the Advocate-General. (*Niyogi, J.*) Governor-General in Council *v.* Awadhoot Balwant. I.L.R. (1946) Nag. 246=223 I.C. 486=1946 Nag. (Rul.) 127=1946 N.L.J. 223=A.I.R. 1946 Nag. 228.

———S. 91 and O. 1, R. 8—*Suit by plaintiff for declaration of a right of way across a public street—No special damage proved—Sanction of Advocate-General—Whether necessary — Maintainability of suit.*

In a suit by the plaintiff for a declaration of his right of way across a public street and for a direction to the defendant to remove certain obstructions and for a permanent injunction restraining defendant from obstructing plaintiff from using the public street as such, the contention of the defendants was that in such a suit the consent of the Advocate-General under S. 91, Civil Procedure Code, in the absence of proof of special damage to plaintiff was necessary and that as no such sanction was obtained the suit itself was not maintainable.

Held, that once it is appreciated that the infringement of the rights of the residents of the village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of.

In this view the case cannot be considered as one of public nuisance within S. 91, Civil Procedure Code, and the sanction of the Advocate-General is not required. Nor is it necessary to compel a person that suffers from such a wrong to have recourse to O. 1, R. 8, Civil Procedure Code, which is after all an enabling section. (*Raghava Rao, J.*) MURUGESA MUDALY *v.* ARUNAGIRI MUDALY. (1950) 2 M.L.J. 770.

———S. 91—*Suit in respect of public nuisance—Plaintiff pleading special damage—Consent of Advocate-General not obtained—Suit, if maintainable.*

A suit seeking relief in respect of public nuisance is maintainable although sanction of the Advocate-General has not been obtained as required by S. 91, C. P. Code, if the plaintiff proves special damage. Special damage is that damage which by reason of a nuisance would be suffered by some individual beyond what is suffered by him in common with other persons affected by that nuisance. Where the plaintiff has pleaded that he would on account of proximity of his house to the land in dispute suffer in respect of light and air a damage and inconvenience beyond what is suffered by him in common with other persons of the locality, his suit cannot be thrown out *in limine* on the ground that it is not maintainable for want of a plea of special damage. I.L.R. (1942) 1 Cal. 533 and 19 Pat. 208, referred to. 46 A. 470 and 53 B. 187, rel. on. (*Padhye, J.*) KHIRSINGH *v.* BRIJ LAL. I.L.R. (1949) Nag. 94=A.I.R. 1949 Nag. 314=1949 N.L.J. 499.

———S. 91 (1)—*Suit in a representative capacity in respect of an obstruction to a village cart track—Proof of special damage—Necessity.*

Where the plaint filed in a suit in a representative capacity by some of the villagers in respect of an obstruction to the village cart track leaves no manner of doubt that according to the plaintiffs the path is a *quasi* public type in which only the people of the particular village and the adjoining villages are interested, the plaintiffs could very well frame their suit in accordance with the provisions of O. 1, R. 8, C. P. Code. The principle governing such a case is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss. No special damage need be proved in such a case. It will suffice if it is shown that a particular section of the public has been deprived of certain advantages which it has enjoyed so long (*Sinha and Mukharji, JJ.*) DALGOBINDA MAHATHA *v.* KHATU MAHATHA. 29 P.L.T. 165=A.I.R. 1948 Pat. 183.

———S. 92 and O. 22, R. 9—*Abatement of suit under S. 92—Bar of fresh suit.*

Where a suit under S. 92 of the C. P. Code has been allowed to abate as against a defendant by the plainntiffs therein there is nothing in law which can bar either the idol or the present trustees from bringing a fresh suit. (*Verma and Hamilton, JJ.*) RAMCHARAN LAL *v.* SRI NARSINGHJI MAHARAJ. I.L.R. (1946) All. 305=222 I.C. 463=1946 A. (Rul.) 171=1946 A.L.J. 94=1946 A.L.W. 15=1946 O.W.N. (H.C.) 15=1946 A.W.R. (H.C.) 61=A.I.R. 1946 All. 254.

———S. 92—*Applicability—Denial of trust by defendant—Sanction—Necessity.*

Where the defendant denies the alleged trust, he could not be held to be a trustee and must therefore be held to be a trespasser or third party and S. 92, C. P. Code, would not apply to such a suit and sanction would not be necessary for such a suit. (*Misra and Raghubar Dayal, JJ.*) KHURSHED JAHAN BEGU *v.* QAMQAM ALI. 21 Luck. 539=A.I.R. 1947 Oudh. 17=226 I.C. 235=1946 O.W.N. 261=1946 A.W.R. (C.C.) 187=1946 Oudh (Rul.) 240=1946 O.A. (C.C.) 187.

———S. 92—*Applicability—Public charitable trust—Trustees recognised—Suit for proper accounting and for receiver—Suit if falls within S. 92—Advocate-General's previous sanction—Necessity.*

Where a plaintiff on behalf of all persons interested in a fund prayed *inter alia* for a declaration that the defendants being the trustees of a trust, they should render true and proper accounts and to forward the funds collected to proper destination and for the appointment of a receiver, on the question whether the suit fell within S. 92, C. P. Code,

Held: as the suit is not for recovery of property from strangers or persons who according to the plaintiffs have no right to be in possession of the trust properties and moreover as the prayers are for correct accounting, etc., from trustees recognised by the plaintiff, the case would fall under Cls. (*d*) and (*h*) of S. 92 and the previous sanction of the Advocate-General would be necessary for its institution and in the absence of it would not be maintainable. (*Rajamannar, C.J. and Somasundaram, J.*) ABDUL RAZACK SAHIB *v.* ABDUL HAMED SAIT. 63 L.W. 750=1950 M.W.N. 616=5 D.L.R. (Mad.) 347=(1950) 2 M.L.J. 282.

———S. 92—*Applicability—Public trust—Temple constructed by subscriptions or donations by worshippers—If public.*

There is nothing to prevent worshippers of a private temple from giving donations or subscriptions for improving temple property or for constructing a temple. Hence evidence tending to show that a temple was constructed by worshippers who contributed or subscribed to the expenses does not lead to the conclusion that the temple is a public temple or a trust created or existing for a public purpose of a charitable nature falling within S. 92, C. P. C. (*Thadani, J.*) GURMUKHSINGH *v.* LALUSINGH. I.L.R. (1946) Kar. 358=1946 Sind (Rul.) 246=227 I.C. 61=A.I.R. 1947 Sind 74.

———S. 92—*Applicability—Suit against trustee* de son tort—*If maintainable.*

The scope of a suit under S. 92, C. P. Code, is no doubt strictly limited to matters set out therein and it cannot be converted into a suit for possession against a stranger or trespasser, but a suit will lie against trustees *de son tort*, provided they do not claim to hold adversely to the trust but purport to be administering the trust. I.L.R. (1946) Nag. 518, appr. (*Bose and Sen, JJ.*) NANHOOBEG *v.* GULAM HUSSAIN. I.L.R. (1950) Nag. 50=1950 N.L.J. 545.

———S. 92—*Applicability—Suit for possession of property by idol.*

S. 92, C. P. Code, is limited to suits which claim one or other of the reliefs set out in the section. It does not apply to suits against third parties and strangers and certainly not to a suit in which an idol sues for possession of its property or property which it claims. (*Bose, J.*) KISAN BHAGWAN *v.* SHREE MAROTI SAUNSTHAN. I.L.R. (1947) Nag. 819=1947 N.L.J. 527=A.I.R. 1947 Nag. 233.

———S. 92—*Applicability—Suit for removal of de facto trustee.*

A suit under S. 92, C. P. Code, lies for removal of a *de facto* or constructive trustee. (*Grille, C.J. and Puranik, J.*) ABDUL RAHIM KHAN *v.* FAKIR MAHOMED SHAH. I.L.R. (1946) Nag. 518=1946 N.L.J. 511=A.I.R. 1946 Nag. 401.

———S. 92—*Applicability and scope—Suit instituted with sanction—Subsequent addition of party without sanction—Effect—Suit, if bad.*

Where a suit brought with the leave of the Advocate-General is subsequently amended by the addition of a new defendant without such leave, the suit is vitiated by such addition without sanction.

If a suit is amended by the introduction of a new party or in some other substantial manner the suit is not identical with the suit as it was at its commencement. (*Blagden, J.*) JESSINGSHAL JAGJIYANDAS *v.* JIVAT LAL PRATAPSI. 49 Bom.L.R. 428=A.I.R. 1947 Bom. 487.

———S. 92—*Applicability—Trust partly public and partly private—Maintainability of suit.*

A suit under S. 92, C. P. Code, is competent although a trust is partly for private charities and partly for public, if a substantial part of the trust is for public purposes and the matter is otherwise covered by the section. I.L.R. (1939) Kar. 325, appr. (*Bose and Sen, JJ.*) NANHOOBEG *v.* GULAM HUSSAIN. I.L.R. (1950) Nag. 50=1950 N.L.J. 545.

———S. 92—Bona fide *suit—Duty of Court to satisfy itself.*

Though a trustee has to account for the infrom the trust properties care should be taken to see that outsiders and designing persons do not abuse the process of law. Where a suit brought under S. 92, C. P. Code, is found to be not for the purpose of advancing the objects of the trust but to put pressure upon the trustee to give up possession of the trust property to the plaintiffs, the Court should not lend support to such men. (*Kaul and Kidwai, JJ.*) SARASWATI *v.* RAJA RAM. 1948 O.W.N. 114=A.I.R. 1948 Oudh 255=1948 A.W.R. (C.C.) 85.

———S. 92—*Decree in scheme suit—Effect—Right of person not a party to the suit to agitate his claim in respect of the institution and its properties.*

A decree in a scheme suit under S. 92, C. P. Code, has the effect of preventing any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the scheme.

Where thrre is an obstruction when the trustees seek to obtain delivery of possession and the removal of the obstructor is ordered, it is not open to such obstructor to sue for a declaration of his rights in respect of the institution and its properties. (*Gentle, C.J. and Patanjali Sastri, J.*) KHAJA HASSANULLA KHAN *v.* ROYAL MOSQUE TRUST BOARD. I.L.R. (1948) Mad. 257=A.I.R. 1948 Mad. 134=60 L.W. 438=1947 M.W.N. 658=(1947) 1 M.L.J. 395.

———S. 92—*Duty of Court.*

In suits under S. 92, C. P. Code, the Court has a duty, once it finds that it is a trust for public purposes to consider what is best in the interests of the public. (*Lord Thankerton.*) RAM DULARY *v.* RAM LAL. I.L.R. (1946) Kar. (P.C.) 17=1946 A.W.R. (P.C.) 9 (2)=1946 O.W.N. 116=1946 A.L.W. 93=1946 O.A. (P.C.) 9 (2)=222 I.C. 521=12 B.R. 332=1946 M.W.N. 195=59 L.W. 262=1946 P.C. (Rul.) 109=A.I.R. 1946 P.C. 34 (P.C.).

———S. 92—*Form and scope of sanction—Sanction for suit claiming specified relief—Suit claiming other reliefs—Competency.*

Where permission is granted by the Advocate-General for the institution of a suit under S. 92, C.P. Code, the suit need not be confined to the particular relief mentioned in the application for sanaction. No special form of sanction is contemplated by S. 92, nor does it contemplate that the Advocate-General should specify the relief or reliefs in respect of which the leave is granted. The various clauses of S. 92 only indicate the nature of the suit for which sanction has to be obtained. If a *prima facie* case has been once made out, any relief or reliefs which the nature of the case may require may be claimed in the suit, provided they are for the protection of the trust and in furtherance of its objects. (*Misra and Kaul, JJ.*) MANAGING COMMITTEE OF SYED SALAR ENDOWMENT, BAHRAICH *v.* MAHOMED AHSAN 21 Luck. 222=225 I.C. 45=1946 Oudh (Rul.) 210=1946 A.W.R. (C.C.) 127=1946 O.A. (C.C.) 127=A.I.R. 1947 Oudh 22=(1946) O.W.N. 160.

———S. 92—*Judgment in suit under—Binding nature of.*

Per *Malik, C.J.*—Where there is a public trust and the District Judge has appointed a person as a trustee in a suit brought against the then trustee, to my mind, it is not open to a third party to claim that the District Judge should not have appointed the person so appointed by him but should have appointed some others who had a better claim. To that extent a decree under S. 92, C. P. Code is binding not only on those who are parties to the suit but also on others.

Per *Desai, J.*—A judgment in a suit under S. 92, C. P. Code appointing a particular person as mutawalli would be a *judgment-in-rem.* It would be so because it confers a status on a particular person against the whole world. (*Malik, C.J. and*

Desai, J.) Anjuman Islamia *v.* Latafat Ali. 1950 A.L.J. 776=A.I.R. 1950 A. 109.

——S. 92—*Jurisdiction—Foreign trust—Suit for accounts and for recovery of moneys—Misappropriated by trustee—Jurisdiction of High Court—Administration of trust property—Forum—Letters Patent (Bom.), Cl. 12.*

The High Court has jurisdiction to entertain and try a suit against a trustee for accounts of his management of the trust property belonging to a charity to be administered in a foreign state. The Court in the exercise of its jurisdiction will compel the trustee of the foreign trust who has made defalcations to restore the original trust property as also property which is not the original trust property but is the result of its sale proceeds. The Court has also jurisdiction to order accounts to be taken and to order payment of moneys due on the foot of that account, so that the moneys belonging to the trust may be recovered and preserved. But the administration of that property must be left to the foreign Court in whose jurisdiction that property is situate, and the High Court will not make the slightest attempt to determine how that property is to be administrated. (*Desai, J.*) Bhagwandas Ranchoddas Madi *v.* Natwarlal Maganlal. I.L.R. (1949) Bom. 620=51 Bom.L.R. 471=A.I.R. 1949 Bom. 351.

——S. 92—*Jurisdiction of Court—Breach of trust alleged but not proved.*

If a breach of trust is alleged in the plaint that is sufficient to confer jurisdiction under S. 92, C. P. Code. If once a Court has jurisdiction, it is not necessary that a breach of trust should be proved before the reliefs contemplated by S. 92, C. P. Code, or any of them is granted. (*Kidwai and Chandiramani, JJ.*) Radha Krishna *v.* Lachhmi Narain. 23 Luck 193=1948 O.W.N. 179=A.I.R. 1948 Oudh 203.

——S. 92—*Liability to account—Moneys not belonging to institution—Right to claim account.*

In a suit under S. 92, C.P. Code, the defendant cannot be made liable to account for moneys which do not belong to the institution. (*Sir John Beaumont.*) Swaminarayan Jethalal *v.* Devendraprasadji. 225 I.C. 554=12 B.R. 568=1946 P.C. (Rul.) 195=1946 A.L.J. 382=1946 O.A. (P.C.) 171=1946 A.W.R. (P.C.) 171=A.I.R. 1946 P.C. 100=I.L.R. (1946) Kar. (P.C.) 87=81 Cr.L.J. 306 (P.C.).

——S. 92—*Nature of suit—How determined.*

It is the allegations in the plaint that determine the nature of the suit and the jurisdiction. The defendant's denial in the pleadings will not in any way affect the nature of the suit under S. 92, C. P. Code. (*Grille, C. J. and Puranik, J.*) Abdul Rahim Khan *v.* Fakir Mahomed Shah. I.L.R. (1946) Nag. 518=1946 N.L.J. 511=A.I.R. 1946 Nag. 401.

——S. 92—*Powers of Advocate-General—Sanction of amendment of plaint—Validity.*

Under S. 92, C. P. Code, the Advocate-General has no power to sanction an amendment of a plaint by addition of defendants. Only a Court can do that. (*Bose and Sen, JJ.*) Nanhoobeg *v.* Gulam Husain. I.L.R. (1950) Nag. 50=1950 N.L.J. 545.

——S. 92—*Proper parties—Stranger to the trust.*

As a general rule a stranger to the trust is not a necessary or a proper party to a suit under S. 92, C. P. Code. But where he has received or is in possession of trust funds or property handed to him in breach of the trust, of which he is aware, he is in the position of a constructive trustee of the property belonging to the trust and he can be made a party to a suit under S. 92 relating to that trust. (*Madeley and Walford, JJ.*) Raghavendra Pratap Singh *v.* Ram Lal Dass. 22 Luck. 151=A.I.R. 1948 Oudh 31=231 I.C. 48=1947 O.W.N. 259=1947 O.A. (C.C.) 107=1947 A.W.R. (C.C.) 107.

——S. 92—Public religious or charitable trust—Settlement deed—Bequest of funds for performance of festival of deity and charity—Direction to pay maintenance to specified relatives out of surplus income—Effect—Trust for charity or gift to relatives subject to charge for charity—Part of charity to be performed outside British India—Jurisdiction. *See* Trust—Beneficiary. (1946) 1 M.L.J. 181.

——S. 92—*Public trust—Wakf for public purposes—Test—Classification as wakf-al-al-aulad—Significance of—Beng. Wakf Act, S. 6 (11).*

The question whether a particular *wakf* comes within the definition of a *Wakf-al-al-aulad* in S. 6 (11) of the Bengal Wakf Act is of no significance whatever, in determining whether it is a wakf for public purposes or not within the meaning of S. 92, C. P. Code. In considering a *wakf* of a mixed character, it will not do always to apply an arithmetical test and try to find out whether a certain percentage of a given income is allotted to admittedly public purposes. What has got to be looked at is the governing purposes of the endowment. If there are genuine provisions made for public charity, there can be no reason to hold that the public are not sufficiently interested in it to be able to maintain a suit under S. 92. Whether the public are sufficiently interested in the endowment to be able to maintain a suit for its protection or for any of the other reliefs mentioned in that section concerning the endowment, will undoubtedly depend upon the nature and extent of the interest which the public may claim to possess in it. From that point of view, a mere arithmetical standard may not always be found to be a safe or sound rule to act upon. (*Biswas and Blank, JJ.*) Hatem Ali Howladar *v.* Commissioner of Wakfs, Bengal. I.L.R. (1948) 1 Cal. 241.

——S. 92—*Removal of trustees—Grounds of—What plaintiff has to make out.*

Where removal of the trustees for misconduct or breach of trust is prayed for, the test to be applied is to find out whether the acts or omissions complained of disclose conditions which render intervention necessary in order to save the trust property. Errors of judgment or miscarriage of discretion are not enough. There must be want of fidelity or dishonest and corrupt motives or deliberate or wilful neglect or deliberate misfeasance. (*Misra and Kaul, JJ.*) Managing Committee of Syed Salai Endowment, Bahraich *v.* Mahomed Ahsan. 21 Luck. 222=225 I.C. 45=A.I.R. 1947 Oudh 22=(1946) O.W.N. 160=1946 O.A. (C.C.) 127.

——**Ss. 92 and 93**—*Sanction by competent authority—Power of review—Enquiry by Court—Scope of.*

The powers vested by Ss. 92 and 93, C. P. Code, are not judicial and the rules which apply to the finality of judgments in Courts of law do not obtain here. All the Court is concerned to see is whether there is a valid sanction by a competent authority. It cannot go behind the sanction and enquire whether the sanctioning authority had heard the parties or changed its mind. But of course it can enquire into the competency of the authority to act under those sections. (*Bose and Sen, JJ.*) Nanhoobeg *v.* Gulam Hussain. I.L.R. (1950) Nag. 50=1950 N.L.J. 545.

——**S. 92**—*Scheme decree—Modification of scheme—Application for—Maintainability—Inherent power to alter or modify—C. P. Code, S. 152—O. 20, R. 3—If bars application for modification.*

Although a scheme framed by the High Court under S. 92, C. P. Code, contains no provision or clause giving liberty to apply for a modification of the scheme, the High Court has inherent jurisdiction to modify the scheme under S. 151, C. P. Code, in proper cases on application made to it in that behalf, if circumstances have arisen which make it desirable for it to be altered, if it does not work beneficially, and for the purpose of doing justice and preventing an abuse of the process of the Court. O. 20, R. 3, C. P. Code, cannot be held to be a bar to such an application for modification. (*Macklin and Bavdekar, JJ.*) Gangaram Govind *v.* Vinchurkar. I.L.R. (1947) Bom. 466=49 Bom.L.R. 757=A.I.R. 1948 Bom. 146.

——**S. 92**—*Scheme—Framing of—Power of Court to remove person nominated as head of Math by will by his predecessor in office—Trust for a public purpose—Test.*

In settling a scheme for the administration of a charitable trust involving the appointment of trustees or managers, the Court is bound to secure persons whom it regards as suitable. Hence it cannot be contended that the Court has no jurisdiction to remove a person nominated as the head of a Math by will by his predecessor when it is found as a fact that that person has by his conduct shown himself unfit for such position.

Where the evidence establishes beyond doubt that certain properties were either originally given, or were dedicated by a Swami to the purposes of a Math, which is a charitable or religious institution to which anybody was at liberty to go at any time to worship the Swami and take food there, the trust is plainly one for public purposes. (*Sir John Beaumont.*) Shidharudhaswami *v.* B. G. Divate. 1948 A.L.J. 435=A.I.R. 1948 P.C. 214=61 L.W. 722=51 Bom.L.R. 1=1949 D.L.R. (P.C.) 32=(1948) 2 M.L.J. 450 (P.C.).

——**S. 92**—Scheme under—Variation or overriding of—Competency. [*See* Q.D. 1941-1945, Vol. I, Col. 916.] Suraj Gir *v.* Bramh Narain. I.L.R. (1946) All. 107=223 I.C. 593=1946 A. (Rul.) 298=A.I.R. 1946 All. 148.=1945 A.L.J. 485.

——**S. 92**—*Suit against Acharya of temple—Property found to belong to wife of prior Acharya—Hairs of latter not known—Declaration that it is private property of defendant—Propriety—Proper declaration.*

Where in a suit under S. 92, C. P. Code, it is found that certain items of property do not belong to the institution and that they were the property of the wife of a prior Acharya, whose stridhan heirs are unknown, the Court should only declare that the property does not form part of the property of the institution on behalf of which the suit is brought. A declaration that it is the private property of the Acharya should not be made as it goes too far. (*Sir John Beaumont.*) Swaminarayan Jethalal *v.* Devendraprasadji. I.L.R. (1946) Kar. (P.C.) 87=81 C.L.J. 306=224 I.C. 554=1946 P.C. (Rul.) 195=1946 A.L.J. 382=1946 O.A. (P.C.) 171=1946 A.W.R. (P.C.) 171=12 B.R. 568=A.I.R. 1946 P.C. 100 (P.C.).

——**S. 92**—*Suit by worshippers for declaration that temple is public wakf—Defendant pujari pleading that it was his private jagir—Subsequent suit for his removal on the basis of this plea—If competent.*

The worshippers of a temple sued for a declaration that the temple with the land attached thereto was a public wakf, and the defendant pujari pleaded that they were his private jagir and that the income derived therefrom was his private income. The suit was decreed by the Court holding that the temple and the land attached thereto were public wakf properties. In a subsequent suit by the worshippers for the defendant's removal from the post of pujari, it was alleged that the assertion of a private claim and the denial of the existence of a public trust by the defendant in the previous suit was sufficient in themselves to justify his removal.

Held, that it was open to the defendant to defeat the plaintiff's claim by all means in his power and the fact that he chose a particular means would not entitle the plaintiffs to bring a fresh suit against him. (*Bhandari and Achhru Ram, JJ.*) Ramji Lal *v.* Pitam Chand. 3 D.L.R. (Simla) 12=A.I.R. 1948 East Punj. 18.

——**S. 92**—*Suit for relief not covered by section——Matter covered by section—Whether can be litigated.*

If a plaintiff is entitled to a particular relief independently of S. 92, C. P. Code, he can seek it outside that section, and in doing so can litigate matters which would also arise in a suit under S. 92. But a plaintiff cannot evade the provisions of S. 92 by asking for a relief which is not covered by that section and then evade its provisions by litigating matter *which is foreign to the relief sought* and which would be covered by that section had the suit been framed otherwise. (*Bose, J.*) Kisan Bhagwan *v.* Shree Maroti Saunsthan. I.L.R. (1947) Nag. 819 =1947 N.L.J. 527=A.I.R. 1947 Nag. 233.

———S. 92—*Suit for removal of defendants as not validly appointed trustees and for appointment of new trustees—Plaint alleging that one of plaintiff is sole trustee.*

A suit for the removal of defendants on the ground that they are not property appointed trustees and for appointment of new trustees, comes within the scope of S. 92, C. P. Code, although the plaint alleges that one of the plaintiffs is a sole surviving trustee and it is open to him to bring a regular suit for the vindication of his personal rights.

It is as much a breach of trust for a person not entitled to act as trustee to meddle with trust property as it is for a properly appointed trustee not to manage the property. (*Kidwai and Chandiramani, JJ.*) Radha Krishna *v.* Lachhmi Narain. 23 Luck. 193=1948 O.W.N. 179=A.I.R. 1948 Oudh 203.

———S. 92—*Suit to declare that plaintiff* gadesar *of plaint property—No allegation or proof that property is trust property of public or charitable nature—Reference to arbitration—Validity.*

A suit in which the plaintiff prays for a declaration that he is the *gadesar* of a property which is neither alleged nor proved to be a trust property created or existing for a public purpose of a charitable or religious nature, is not a suit falling within S. 92, C. P. Code, because neither the subject-matter nor the reliefs claimed are such as are contemplated by S. 92, C. P. Code. Hence a reference to arbitration in such suit is not invalid or prohibited. (*Thadani, J.*) Gurmukhsingh *v.* Lalusingh. I.L.R. (1946) Kar. 358=1946 Sind (Rul.) 246=227 I.C. 61= A.I.R. 1947 Sind 74.

———S. 92—*Suit under—Declaratory relief against third party—If can be granted.*

Though a declaratory relief *simpliciter* against a third party cannot be properly granted in a suit under S. 92, C. P. Code, yet some of the reliefs properly claimed in such a suit, such as declarations as to nature of the property, may be implicit and inevitable. (*Madeley and Walford, JJ.*) Raghavendra Pratap Singh *v.* Ram Lal Dass. 22 Luck. 151=1947 O.W.N. 259=1947 O.A. (C.C.) 107=231 I.C. 48=A.I.R. 1948 Oudh 31=1947 A.W.R. (C.C.) 107.

———S. 92—*Suit under—Who can file—Nature of their interest.*

After the deletion of the word "direct" in S. 92 of the C. P. Code of 1908, it is no longer necessary that a person should have a direct interest to enable him to institute a suit and the amendment has widened the class of persons entitled to file a suit under the section. By omitting the word "direct" and at the same time giving the right of suit only to persons interested, the Legislature must have intended not to give the right of suit only to those who had some direct interest, *e.g.*, those who were connected with the management or who had special interest greater than that of others who had interest in the trust, but at the same time to restrict the right of suit so that only those who had a real interest in the present and not merely a sentimental interest in future like that of mere coreligionist could file a suit. This was with the obvious object not to allow those who were in charge of public trusts to be harassed by litigation at the instance of busy bodies who had no real or personal interest in the trust. Case-law discussed. (*Malik, C.J. and Desai, J.*) Farman Ali Khan *v.* Mohd. Raza Khan. 1949 A.L.J. 453=5 D.L.R. (A) 70=A.I.R. 1950 A. 62.

———S. 93—*Appointment of authority—General appointment, if sufficient—Need for authority to be invested in each case with right to exercise powers of Advocate-General—Authority not invested with power in particular case refusing sanction—Sanction accorded by Advocate-General on fresh application—Validity—Legal Department Manual, R. 179.*

The person appointed under S. 93, C. P. Code, has not only to be appointed for purpose of exercising the powers under S. 92, C. P. Code, but must also be invested with the right to exercise the powers of the Advocate-General in each particular case, and those powers include not only a right to accord sanction but also the right to withhold it. An order appointing him generally is not sufficient. If the authority appointed generally under S. 93 was not invested with authority to deal with a particular case, his order refusing sanction for the institution of a suit is *ultra vires,* and it is competent for the Advocate-General to accord sanction on a fresh application made to him. R. 179 of the Legal Department Manual, 1941, is merely a departmental instruction to the two authorities not to enerain a fresh application when either has already dealt with the matter. There is nothing more than the tender of advice to the two as to how they should proceed. It cannot control the statutory powers of the Advocate-General nor fetter his discretion. (*Sen, J.*) Puranmal *v.* Jagannath. I.L.R. (1948) Nag. 846=A.I.R. 1949 Nag. 183=4 D.L.R. (Nag.) 18=1948 N. L.J. 434.

———S. 93—*Appointment of authority—General appointment to act in all cases—Validity.*

Under S. 93, C. P. Code, the Provincial Government has to invest the Collector with authority afresh *in each case* to exercise the powers conferred upon the Advocate-General under S. 92, C. P. Code, and a general appointment to act in all cases as they arise will not do. 53 A. 910 (P. C.) and 53 A. 990 (P.C.), rel. on. (*Bose and Sen, JJ.*) Nanhoobeg *v.* Gulam Hussain. I.L. R. (1950) Nag. 50=1950 N.L.J. 545.

———S. 93—*Collector exercising powers of Advocate-General—Previous sanction of Local Government in respect of particular suit—Necessity for.*

Under S. 93, C. P. Code, the Collector of a District can exercise the powers of an Advocate-General given under S. 92, C. P. Code, but in order that the Collector may be competent to exercise those powers it is necessary that he should act with the previous sanction of the Local

Government authorising him to exercise those powers in respect of *that particular suit*. (*Mitter and Chunder, JJ.*) G. SARKER *v.* NRIPENDRA NATH DHAR. I.L.R. (1949) 1 Cal. 240 =52 C.W.N. 831.

———S. 93—*Previous sanction of Provincial Government—Whether necessary in each case—Proof of such sanction.*

Under S. 93, C. P. Code, the Collector or other officer appointed must in every case obtain the provisions sanction of the Provincial Government. This means that a general sanction is not sufficient and previous sanction must be obtained for each case. A sanction of this type has to be strictly proved because in the absence of a proper sanction the suit is without jurisdiction. The Court will not draw a presumption under S. 114 of the Evidence Act that all due formalities of law must have been complied with. (*Grille, C.J. and Hidayatullah, J.*) LACHMANDAS GOBARDHANDAS *v.* NARAYANDAS. I.L.R. (1948) Nag. 281=A.I.R. 1948 Nag. 357=1948 N.L.J. 314.

———Ss. 94 (e), 151 and O. 21, R. 58 (2)—*Power of Court in claim suit to stay sale in execution of decree in a suit against third party.*

A Court can under S. 94 (*e*), O. 21, R. 58 (2), and S. 151, C. P. Code, stay a sale in execution of a decree in a suit against a third party pending the disposal of a suit filed under O. 21, R. 63, C. P. Code, by a claimant to the properties brought to sale against the claim order.

[Order for stay made on condition of the petitioner giving adequate security for possible loss to the decree-holder.] (*Panchapakesa Ayyar, J.*) H. S. VODAYAR *v.* VIJAYA BANK, LTD. 63 L.W. 968=1950 M.W.N. 687=(1950) 2 M.L.J. 492.

———S. 95—*Separate enquiry under in small cause suits—If necessary—Procedure to be followed.*

In Small Cause Suits an independent inquiry regarding claim for compensation for wrongful attachment before judgment is not necessary and the evidence on the point can be taken in the course of the suit proceedings. No separate enquiry under S. 95, C. P. Code, is called for in such suits. (*Mehta, J.*) FAIZULLA BAI *v.* CHUNNILAL. 5 D.L.R. (M.B.) 26.

———S. 96—*Appeal — Maintainability—Suit decreed in its entirety against one defendant and dismissed against others—Appeal by plaintiff without impleading that defendant for a decree against other defendants.*

A plaintiff whose suit has been decreed in its entirety against one defendant cannot appeal against the decree without impleading that defendant on the sole ground that the other defendant against whom the suit had been dismissed should also be held liable for his claim. (*Bannerji, J.C.*) SADHU RAM *v.* MOHD. ALI. A.I.R. 1950 H.P. 30.

———S. 96—Appeal — Maintainability — Test Court giving findings on points in controversy—Appealability. *See* C. P. CODE (V OF 1908), Ss. 2 (2) and 96. (1947) 2 M.L.J. 523.

———S. 96—*Order directing preparation of final decree in a partition suit—Appealability.*

An order passed in a partition suit giving directions for the preparation of a final decree cannot by itself be treated as a decree and the C. P. Code does not allow an appeal against such an order. (*Kaul, J.*) PHANINDRA NATH *v.* LABANYA MAYEE. 1950 A.W.R. 280.

———S. 96—*Right to appeal—Decree in favour of plaintiff on unamended plaint—Order refusing prayer for amendment of plaint.*

A party may appeal from a decree if he is prejudicially affected by the decree complained of. If the plaintiff's prayer for the amendment of his plaint is refused and a decree is passed in favour of the plaintiff upon the plaint as it stands, it is extremely doubtful if it can be said that the decree prejudicially affects the plaintiff. (*Sen, J.*) NANILAL DEY *v.* KANAKLATA DASI. I.L.R. (1949) 1 Cal. 76=54 C.W.N. 37.

———S. 96—*Right of appeal—Test.*

The test for determining whether a person has got a right of appeal is whether any part of the decree affects his interest adversely. If the answer to the question is in the affirmative, he will have a right of appeal. It is a question of fact to be determined in each case according to its peculiar circumstances. Where the existence of this right is in doubt, the benefit ought to go to the appellant. 62 C. 701 and A.I.R. 1926 Cal. 1113, rel. on. (*Thadani Ag. C.J. and Ram Labhaya, J.*) SURENDRA DAS *v.* BHOLA PRASAD KAIRI. A.I.R. 1950 Assam 22.

———S. 96—*Suit dismissed against defendant—Adverse finding not incorporated in decree—Defendant's right to appeal against decree.*

A defendant has the right to appeal notwithstanding that the suit has been dismissed as against him, if he is aggrieved by the decree. The question whether he is aggrieved by the decree is a question of fact to be determined in each case according to its peculiar circumstances. In order to find out whether a defendant is aggrieved by a decree dismissing the suit against him, it is not merely the form but the substance of the decree and the judgment that should be looked into. Where the point adversely decided to such a defendant is directly and substantially in issue and where it will operate as *res judicata* in subsequent proceedings, the defendant should have the right of appeal against the decree though the particular finding is not embodied or incorporated in the decree. 9 C.W.N. 584, foll. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) BHUBINDRA NARAYAN *v.* TARUPRIYA DEBYA. A.I.R. 1950 Assam 119.

———S. 96 (3)—*Agreement by parties to abide by decision of Court after local inspection—Appeal from decision—If lies.*

Where the parties to a suit after producing some oral evidence agree that the Court should decide the suit after inspecting the spot and that they would be bound by its decision, such an agreement implies that the decision is to be accepted as final and there is to be no right of appeal to another forum. (*Falshaw, J.*) KARTAR SINGH *v.* GURDITTA. 50 P.L.R. 189.

——S. 96 (3)—*Applicability—"Consent decree"—Meaning of—Appeal, when barred.*

The cases in which an appeal is barred under S. 96 (3), C. P. Code, are those in which the decree is passed on consent of the parties. It is not necessary for the application of S. 96 (3) that there should have been a compromise duly recorded under O. 23, C. P. Code. But there must be consent of the parties to the particular decree. The fact that the parties make certain admissions of fact and even express their view of the law, would not make the decree a consent decree, when they leave the decision to the Court and do not intimate either expressly or impliedly that they would accept that decision. Hence an appeal is not barred in such a case under S. 96 (3). (*Kidwai and Chandiramani, JJ.*) PAHLAD PANDE *v.* JWALA PRASAD PANDE. I.L.R. (1949) A. 604=4 D.L.R. (Luck.) 32.

——S. 96 (3)—*Scope—Suit under S. 92—Compromise decree—Appeal—Bar of.*

S. 96 (3) clearly and absolutely bars any appeal from a decree passed on consent or compromise, including a decree on compromise in a suit under S. 92, C. P. Code. (*Bennett and Beevor, JJ.*) IDRISHAIDER *v.* HEMAYAT HUSSAIN. 26 Pat. 83=A.I.R. 1948 Pat. 97.

——S. 97—*Appeal filed against preliminary decree—Final decree passed pending appeal—Appeal, if maintainable.*

The passing of a final decree subsequent to the institution of the appeal against the preliminary decree will not affect the maintainability of the appeal. There is no provision in the Code making an appeal filed against the preliminary decree infructuous if an appeal against the final decree is not filed. (*Grille, C.J. and Sen, J.*) MADHAORAO PAIKAJI *v.* EKNATHRAO. I.L.R. (1947) Nag. 412=A.I.R. 1949 Nag. 56=1947 N.L.J. 258.

——S. 97—*Scope—Direction in preliminary decree for accounts—Failure to appeal—Claim to take accounts as final decree contrary to decision—Maintainability.*

It is the duty of a party aggrieved by a direction in a preliminary decree for accounts passed by the Courts to appeal against it; if he does not do so, he cannot be permitted afterwards to go behind the direction in question at the time of the taking of the accounts, S. 97, C.P. Code, is a bar to such a course. (*Davis, C. J. and Thadani, J.*) RIJHUMAL *v.* RIJHUMAL. I.L.R. 1945 Kar. 368=223 I.C. 50=1946 Sind (Rul.) 134=A.I.R. 1946 Sind 28.

——S. 98—*Applicability—Appeal in High Court—Difference of opinion between two Judges of Division Bench—Procedure—Letters Patent—(Pat.).*

S. 98 has no application to an appeal heard by a Bench of two Judges of a High Court, who differ on a question of law arising in the appeal. The relevant enactment applicable to such a case is the Letters Patent of the High Court. 11 Pat. 772, rel. on. (*Manohar Lall, J. On difference of opinion between Maredith and Bennett, JJ.*) RAJNARNIN *v.* SALIGRAM. 27 Pat. 332.

——S. 99—*Applicability—Defect or irregularity not affecting merits or jurisdiction of Court—Non-compliance with O. 3, R. 1—Decree on basis of plaint presented by person having no authority—If liable to reversal on appeal.*

Failure to comply with the provisions of O. 3, R. 1, C. P. Code, would not affect the jurisdiction of the Court, so as to entail a reversal of the decree in appeal, but would only be an irregularity which could be cured with the permission of the Court. A Court receiving a plaint from a person who has no authority to present it is not deprived of jurisdiction to pass a decree on the plaint on that ground. The defect or irregularity does no affect the merits of the case or the jurisdiction of the Court, and the decree therefore is not liable to be reversed in view of S. 99, C. P. Code. 1944 Bom. 201; 1945 A.M.L.J. 24, Dist. 1927 Bom. 44; 1929 Lah. 478; 18 I.C. 526; 1931 All. 507, rel. on. (*Sri Ram Labhaya, J.C.*) URBAN CO-OPERATIVE BANK *v.* ABDUL RAZAQ. 1949 A.M.L.J. 14=4 D.L.R. (A.M.) 44.

——S. 99—*Curability under—Failure of Court staff to carry out amendment of plaint ordered by Court.*

Where, owing to the failure of the Court clerical staff the amendment of the plaint ordered by the Court is not carried out, the party concerned should not be made to suffer and the defect can be cured by resort to S. 99, C. P. Code.. (*Lal, J.M. I and Haider, J.M. II.*) KASHI PATI TEWARI *v.* RAM KHELAWAN SINGH. 1948 R.D. 397 (2)=1948 A.W.R. (Rev.) 302.

——S. 99—*Irregularity in transfer owing to administrative order—Curability.*

Where an irregularity in the matter of a transfer is owing to an administrative order, the irregularity is curable under S. 99, C. P. Code. (*Atma Charan, J.C.*) BENI GOPAL *v.* DAMODAR DAS. A.I.R. 1950 Ajmer 33=5 D.L.R. (A.M.) 41.

——S. 99—*Misjoinder—Absence of prejudice—Curability.*

Where parties do not appear to have been prejudiced in any manner by an alleged misjoinder of defendants or causes of action, the defect if any is completely cured by S. 99, C. P. Code. (*Lal, J.M. I and Haider, J.M. II.*) RAM CHANDER SINGH *v.* RAGHUNANDAN AHIR. 1949 R.D. 91.

——S. 99—Plaint not signed by all plaintiffs—Curing to defect. *See* C. P. CODE (V OF 1908), O. 6, R. 14 AND S. 99. (1948) 1 M.L.J. 227.

——S. 99—*Scope—Appeal—Vakalat on behalf of insane party bearing thumb mark of a person other than insane person—Next friend signing vakalat—Acceptance by vakil—Next friend representing insane person in proceedings—Decree in such appeal, if void.*

Where it turns out that a vakalat on behalf of a party to an appeal under a disability (insanity) bore the thumb mark not of the lunatic but of another person, it cannot be said that the whole proceedings are invalid and that the decree passed in the appeal, is void and of no effect, when there was a next friend on behalf of the insane person who also signed the vakalat and represented the insane person in the appeal. At the most it is only an irregularity not affecting the merits. (*Paramasiviah and Medappa, JJ.*) Mahomed Azeez *v.* Kamalabayamma. 53 Mys H.C. R. 111=3 D.L.R. (Mys.) 75.

———S. 100—SECOND APPEALS.

Adverse possession, finding as to.
Custom.
Damages.
Discretionary relief.
Error of law.
Finding of fact.
Mixed question of law and fact.
New plea.
Question of fact. *See* C. P. Code, S. 100 —Finding of fact.
Question of law.

———S. 100—*Adverse possession—Finding as to —Interference.*

A finding with regard to a party's adverse possession is a finding on a mixed question of fact and law. It is a question of fact, no doubt, whether such a party has been actually in possession of the property for a certain period, but it is essentially a question of law, as to whether, on the evidence on the record, or, on the facts admitted between the parties, such possession could be regarded to be adverse. 42 A. 152 (P.C.), 54 A. 628 and 1931 All. 323, rel. on. (*Mushtaq Ahmad, J.*) Nizamuddin *v.* Mangal Sen. A. I.R. 1949 All. 699=1949 A.W.R. 488.

———S. 100—*Adverse possession—Finding as to interference in second appeal.*

The question of adverse possession is a mixed question of law and fact and not a pure question of fact. The decision as to what are the elements necessary, in view of the special features of a particular case, in order to attribute the character of possession to the claimant's acts of possession is a question of law; and if the Courts of fact have misdirected themselves as to these elements, they must be considered as having committed an error of law, and the High Court can interfere in second appeal. (*Meredith and Ray, JJ.*) Dipnarain *v.* Pundeo. 1946 P.W.N. 37=25 Pat. 412=229 I.C. 482=1947 Pat. (Rul.) 239=13 B.R. 338=A.I.R. 1947 Pat. 99.

———S. 100—*Adverse possession—Proof—Question as to—If one of law or fact.*

The question whether adverse possession has been proved is a mixed question of law and fact. (*Sen, J.*) Bai Ganga *v.* Baheram Shah Dalal. 49 Bom.L.R. 90=A.I.R. 1947 Bom. 300.

———S. 100—*Appreciation of evidence—View of appellate Court as to credibility of witness—Power of High Court in second appeal.*

It is not for the High Court in second appeal to say that a particular witness should or should not have been believed by the lower appellate Court. (*Sinha and Rai, JJ.*) Serajul Huda *v.* Bibi Sayeedan. 5 D.L.R. (Pat.) 249.

———S. 100—*Custom—Concurrent finding as to existence of—Interference in second appeal.*

Questions of the existence of ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom, and then determining whether, those facts so found satisfy the requirements of law. This latter is a question of law—not fact. There can be an interference with concurrent findings of two Courts on such a matter to find out if the evidence is sufficient to prove the custom alleged. To establish custom the finding must be that an ancient custom such as modifies the law existed in the locality. Moreover, where there is no pleading as to alleged custom evidence as to it should not be let in at all. (*Leach, C.J. and Lakshmana Rao, J.*) Brahadeeswara Mudaliar *v.* Rajagopal Pillai. 59 L.W. 469=1946 M.W.N. 591=A.I. R. 1947 Mad. 71=231 I.C. 365=(1946) 2 M.L. J. 173.

———S. 100—*Custom—Existence or reasonableness of custom.*

A question of the existence or reasonableness of a custom is a question of law. (*Chakravartti, J.*) Jamila Khatun *v.* Kesherta Mohan Biswas. 82 C.L.J. 169=51 C.W.N. 179.

———S. 100—Custom—Finding that custom set up had ceased to exist. [*See* Q.D. 1941-1945, Vol. I, Col. 926.] Abdul Alim *v.* Hayat Mahomed. A.I.R. 1946 Oudh 188.

———S. 100—Damages—Amount awarded—High Court's power to interfere in second appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 936.] Lala Punna Lal *v.* Kasturichand Ramaji. 224 I.C. 523=1946 Mad. (Rul.) 194=A.I.R. 1946 Mad. 147.

———S. 100—*Damages—Principle on which to be assessed is question of law—Quantum of damages is a question of fact.*

The principle on which damages are to be assessed is a matter of law though the quantum to be awarded once the principle is determined is one of fact. (*Bose, J.*) Abdul Samad *v.* Mohammad Ramzan. 225 I.C. 235=1946 N.L.J. 684 =A.I.R. 1946 Nag. 392.

———S. 100—*Discretionary relief—Interference —Relief against forfeiture under lease—Grant of —Interference in second appeal.*

It is admittedly a matter of discretion whether the lower Court will or will not grant relief to a lessee against forfeiture under S. 114, T. P. Act; and provided the principles on which it acts are not wrong, no Court of second appeal will interfere with the exercise of discretion. (*Macklin and Rajadhyaksha, JJ.*) Ladhuram Manormal *v.* Chimniram Dongardas. 48 Bom.L.R. 608=A.I. R. 1947 Bom. 86=230 I.C. 67=1947 Bom. (Rul.) 232.

———S. 100—*Error of law—Lower Court wrongly entertaining appeal which does not lie—Second appeal.*

Obiter: Where a subordinate Court wrongly entertains an appeal when it has no jurisdiction to do so, a second appeal lies against that Court's order. 9 pat. 685; 5 P.L.J. 97; 7 P.L.T. 264; 17 P.L.T. 815, ref. (*Reuben, J.*) Baidya Nath Banerji *v.* Himangsu Bala Bose. A.I.R. 1950 Pat. 90.

———S. 100—Error of record—Presumption of correctness of entry in record of rights wrongly raised—Finding based on—Finality—Interference.

See Bihar Tenancy Act, Ss. 103-B (3) and 107 (2). A.I.R. 1950 Pat. 293.

———S. 100—*Finding of fact—Benami character of sale-deed—Point fully and carefully dealt with by trial Court—Appellate Court definitely accepting finding but not giving reasons fully—It vitiates finding—O. 41, R. 31.*

The judgment of an appellate Court should contain the grounds on which its decision of the case is based. The parties are entitled to a consideration by the appellate Court of the evidence on the points raised and the decision thereon with the grounds therefor. It is not sufficient for the appellate Court to state in general terms that it agrees with the reasoning of the trial Court; although in a judgment of affirmance, it is not necessary for the appellate Court to repeat all that has been said by the first Court, there must be a sufficient discussion showing that the appellate Court has applied its own mind to the evidence. But when the point has been dealt with by the trial Court very fully and carefully, and the appellate Court accepts the finding of the trial Court (on a plea of benami) and definitely accepts the finding of the trial Court that a sale-deed was *benami* or *farzi* only, such a finding is binding in second appeal and cannot be interfered with merely because the appellate Court has not fully set out its reasons for its decision on that point. (*Reuben and Jamuar, JJ.*) Suraj Prasad *v.* Ram Charitar Singh. A.I.R. 1950 Pat. 298.

———S. 100—*Finding of fact—Finding against plea of permissive possession.*

When two Courts find against a plea of permissive possession, it only means that the defendant is in possession in his own right. This is a point of fact decided by the lower Courts and cannot be questioned in second appeal. (*Ali Ahmad Khan, J.C.*) Girdhari Lal *v.* Gopilal Sejmal. 5 D.L.R. (Bhop.) 1.

———S. 100—*Finding of fact—Finding arrived at by placing onus on wrong party—Interference by High Court.*

A finding of fact arrived at as the result of placing the burden of proof on the wrong side is not conclusive in second appeal, and the High Court is competent to interfere with such a finding in second appeal. (*Sinha and Mukherji, JJ.*) Asoke Chandra *v.* Chota Nagpur Banking Association, Ltd. 2 D.L.R. 939=A.I.R. 1948 Pat. 247.

———S. 100—*Finding of fact—Finding arrived at by throwing burden of proof on wrong party—Finality.*

A finding of fact reached by the lower Court by throwing the burden on the wrong party is not conclusive in second appeal, as the finding is the result of an error of law. (*Beevor, J.*) Banchhanidhi Kar *v.* Udekar Sahu. 14 Cut.L.T. 51=A.I.R. 1949 Pat. 214.

———S. 100—*Finding of fact—Finding as to ancestral character of land—Finding based on construction of revenue record.*

A finding as to the ancestral character of land which is based upon the perusal, construction and piecing together of a large number of revenue records, cannot be regarded as a finding of fact. A.I.R. 1949 P.C. 7, referred to. (*Harnam Singh, J.*) Ala Singh *v.* Bachan Singh. 52 P.L.R. 407.

———S. 100 and Limitation Act (IX of 1908), S. 14—*Finding of fact—Finding as to due diligence—Interference in second appeal.*

The finding of a lower appellate Court that a plaintiff did not act with due diligence is *prima facie* a finding of fact and as such binding in second appeal. (*Ghulam Hasan, J.*) Ram Adhin *v.* Gulzari Singh. 21 Luck. 350=222 I.C. 355=1946 Oudh (Rul.) 67=1946 O.W.N. 24=1946 A.L.W. 24=1946 A.W.R. (C.C.) 10=1946 O.A. (C.C.) 10=A.I.R. 1946 Oudh 116.

———S. 100—*Finding of fact—Finding as to existence of transactions of account—Finality in second appeal.*

A finding about the existence of certain transactions of account between parties is one of fact and cannot be challenged in second appeal. (*Das, J.*) Har Sahay Mull *v.* Gokul Chand. 12 B.R. 789=A.I.R. 1947 Pat. 273=227 I.C. 36.

———S. 100—*Finding of fact—Finding as to payment.*

The finding that the plaintiff has not been repaid his dues is a finding of fact conclusive in second appeal. (*Agarwalla, J.*) Gouri Shanker Umanath *v.* Mangal Mahton. 223 I.C. 324=1946 Pat. (Rul.) 201=12 B.R. 392=A.I.R. 1946 Pat. 440.

———S. 100—*Finding of fact—Finding as to disruption of joint status.*

A finding come to by the Court of appeal below that though there was no partition by metes and bounds, there was a complete cessor of commensality between the brothers and that they were in separate possession as tenants-in-common is essentially a finding of fact and cannot be reopened in second appeal. (*Manohar Lall and Das, JJ.*) Amir Mahton *v.* Sheopujan Missir. 25 Pat. 1=221 I.C. 683=1946 Pat. (Rul.) 78=12 B.R. 218=A.I.R. 1946 Pat. 231.

———S. 100—*Finding of fact—Finding as to local usage of giving residents a right to transfer homes—**Binding nature.***

A finding by a lower appellate Court that there is a local usage giving the residents a right to transfer their houses is binding on the second appellate Court. (*Malik, J.*) Moondari *v.* Sankatha. 223 I.C. 482=1946 A. (Rul.) 289=1946 A.W.R. (H.C.) 100=1946 A.L.W. 443=A.I.R. 1946 All. 384.

———S. 100—*Finding of fact—Finding based on evidence—Interference in second appeal.*

Where a finding of fact is based on evidence on the record it cannot be disturbed in second appeal. (*Kaul, J.*) Gaya Prasad *v.* Gulab Chand. 1950 A.W.R. 16.

———S. 100—*Finding of fact—Finding based on evidence—Power of High Court to interfere.*

The High Court in second appeal is not entitled to interfere with findings of fact of the lower appellate Court, if there is evidence in support of such finding. A.I.R. 1950 (P.C.) 28, rel. (*Sinha and Rai, JJ.*) Serajul Huda *v.* Bibi Sayeedan. 5 D.L.R. (Pat.) 249.

———S. 100—*Finding of fact—Finding based on no evidence—Finality.*

A finding of fact which is really based on no evidence (*e.g.*, finding of possession merely on the presumption that possession follows title) cannot be accepted as binding in second appeal. (*Das, J.*) Mohan Jha *v.* Shivadayal Prasad. A.I.R. 1950 Pat. 293.

———S. 100—*Finding of fact—Finding not based on evidence—Finality.*

A finding of fact which is arrived at on certain observations in an order which are not evidence, is a finding not based on evidence, and is not conclusive; and the High Court can therefore disregard it. (*Reuben and Jamuar, JJ.*) Suba Dusadh *v.* Shiva Prasad. A.I.R. 1950 Pat. 302.

———S. 100—Finding of fact—Finding not supported by facts but based on conjectures and surmises—Finality. *See* Appeal—Interference. I.L.R. (1949) Cut. 534.

———S. 100—*Finding of fact—Finding based on surmise and inference not warranted by evidence on record—Finality.*

A Court of justice is not entitled to draw inferences which are not warranted by the evidence on record. If it draws such inference and bases its conclusions on surmises, it acts illegally and its findings even on facts, cannot be conclusive in second appeal. (*Sinha and Mukherji, JJ.*) Asoke Chandra *v.* Chota Nagpur Banking Association, Ltd. 2 D.L.R. 939=A.I.R. 1948 Pat. 247.

———S. 100—*Finding of fact—Finding based on erroneous principle of law—Interference.*

A finding of fact based on an erroneous principle of law and arrived at in disregard of material evidence is not a finding immune from interference in second appeal. (*Chakravartti and Ellis, JJ.*) Prodyot Kumar Sen Gupta *v.* Nagendra Kumar. 52 C.W.N. 72.

———S. 100—*Finding of fact—Finding by both Courts below that alterations in document were made without executant's knowledge and consent—Finality.*

A finding concurrently arrived at by both the Courts below, to the effect that certain alterations in a document were made without the knowledge and consent of the executant of the deed, is one of fact, and cannot be challenged in second appeal. (*Grille and Sen, JJ.*) Pachkodi *v.* Krishnaji. I.L.R. (1946) Nag. 796=226 I.C. 568=1946 Nag. (Rul.) 258=1946 N.L.J. 622=A.I.R. 1947 Nag. 145.

———S. 100—*Finding of fact—Finding in pre-emption suit that exchange is in fact sale.*

A finding that a transaction is given the appearance of an exchange only for the purpose of defeating the right of pre-emption and that it is in fact a sale, is a finding of fact when it is not based exclusively upon the interpretation of the deed of transfer but is also based upon a consideration of the facts and circumstances surrounding the transaction.

The fact that the conclusions drawn by the Courts below from the particular facts and circumstances are not reasonable, is not a sufficient ground for interfering with the finding in second appeal. (*Cornelius, J.*) Masih Hassan *v.* Allaha Diya. A.I.R. 1947 Lah. 320.

———S. 100—*Finding of fact—Finding of lower appellate Court as against that of trial Court—Finality.*

The High Court in second appeal is bound not by the finding of the trial Court but by that of the lower appellate Court on a question of fact, when there is nothing to show that that finding is vitiated in any way. (*Abdur Rahman, J.*) Administrator, Corporation of Lahore *v.* Sampuran Singh. 226 I.C. 425=1946 Lah. (Rul.) 457=A.I.R. 1947 Lah. 172.

———S. 100—Finding of fact—Finding that building was not erected for convenient occupation of holding—C. P. Tenancy Act, S. 2 (5) (*d*). [*See* Q.D. 1941-1945, Vol. I, Col. 930.] Ganeshprasad *v.* Nandanlal. A.I.R. 1946 Nag. 131.

———S. 100—*Finding of fact—Finding that holding was held on cash rental—Finality.*

A finding of fact that a holding was held on a cash rental and not on a *bhasli basis* arrived at on evidence, cannot be reopened in second appeal. (*Fazl Ali, C.J. and Pande, J.*) Tahal Mahto *v.* Lachoo Mahto. 25 Pat. 84=(1946) P.W.N. 15=A.I.R. 1946 Pat. 298=12 B.R. 385.

———S. 100—*Finding of fact—Finding that no wall raised—Finality.*

A finding by the lower appellate Court that no wall had been raised is one of fact and cannot be assailed in second appeal. (*Abdur Rahman, J.*) Administrator, Corporation of Lahore *v.* Sampuran Singh. 226 I.C. 425=1946 Lah. (Rul.) 457=A.I.R. 1947 Lah. 172.

———S. 100—*Finding of fact—Finding that person adopted was not son but step-son of widow giving him in adoption—Finality.*

A finding that an adopted son was not the son but the step-son of a widow who gave him in adoption is a finding of a fact, and is not open to challenge in second appeal. (*Grille, C.J. and Puranik, J.*) Haribhan *v.* Ajabrao Ramji Ingale Kunbi. I.L.R. (1946) Nag. 978=1947 N.L.J. 133=228 I.C. 173=1947 Nag. (Rul.) 40=A.I.R. 1947 Nag. 143.

———S. 100—*Finding of fact—Finding that purpose of tenancy was agricultural—Interference in second appeal with concurrent findings.*

A finding that the purpose of tenancy was agricultural is one of fact and the High Court will not in second appeal, interfere with the concurrent finding of the lower Courts on the point. (*Hindley, J.*) Asrabuddin *v.* Abul Fazal. 225 I.C. 337=A.I.R. 1947 Cal. 139.

———S. 100—*Finding of fact—Fraud and misrepresentation—Finding that allegation of fraud and misrepresentation is not proved—Interference.*

A finding that the plaintiff has failed to prove the fraud and misrepresentation alleged by him as a ground for setting aside a consent decree, is a finding of fact, which must be accepted as binding in second appeal. (*Lokur, J.*) Motilal Shivnarayan *v.* Vishwanath Waman. 48 Bom.L.R. 786=A.I.R. 1947 Bom. 133.

———S. 100—*Finding of fact—Intention of parties—Sale deed—Passing of title—Time of—Intention of parties as to when title should pass—Concurrent findings—Finality.*

Although, normally, in the case of a transfer by a registered deed, title passes on registration, yet if the language of the deed shows that it was the intention of the parties that title should pass only later at some other time, then mere registration does not suffice to pass the title. What the intention of parties in such case is, is a question of fact. Where on a construction of the deed, both the lower Courts, taking also the surrounding circumstances into consideration, have come to the conclusion that it was the intention of the parties that title should pass to the vendee on the date of execution of the document, such findings arrived at concurrently, are conclusive and will not be upset by the High Court in second appeal. A.I.R. 1920 Pat. 774; 1934 Pat. 68; 1947 Pat. 1, foll. (*Agarwala, C.J.*) Baldeo Sahu *v.* Dukhi Kuer. 5 D.L.R. (Pat.) 127.

———S. 100—*Finding of fact—Interference.*

A finding of fact by the lower appellate Court for which there is sufficient material before it, cannot be disturbed in second appeal. (*Fazl Ali, C.J. and Pande, J.*) Ganauri Mahton *v.* Lachoo Mahton. 25 Pat. 84=12 B.R. 385=223 I.C. 297=1946 Pat. (Rul.) 177=A.I.R. 1946 Pat. 298.

———S. 100—*Finding of fact—Interference.*

Where the lower Appellate Court fails to consider in a proper judicial manner a material piece of evidence, and applies to the case a standard of proof different from, and higher than, that applicable under the Evidence Act, the High Court in second appeal will not accept its findings of fact as final and will interfere. (*Davis, C.J. and Thadani, J.*) Mt. Razki *v.* Muhib Dur Mahomed. I.L.R. (1946) Kar. 246=A.I.R. 1947 Sind 102=231 I.C. 413.

———S. 100—*Finding of fact—Interference—All available evidence not considered.*

It is firmly established that a finding of fact to be binding on a Court of second appeal must be a judicial decision reached on the consideration of the whole of the evidence. Where it appears that all the evidence available is not considered, the High Court will and should interfere in second appeal. (*Bhandari and Harnam Singh, JJ.*) Kishan Singh *v.* Taru. 51 P.L.R. 70=A.I.R. 1949 E.P. 342=4 D.L.R. (Simla) 245.

———S. 100—*Finding of fact—Interference—Failure of lower Court to appreciate real issues involved.*

If there was any failure of the Court below to appreciate the real issues involved, the finding of fact is not conclusive in second appeal. 70 I.A. 225, rel. on. (*Kidwai, J.*) Bhagwan Datt *v.* Bhawani Shankar. A.I.R. 1949 Oudh 87.

———S. 100—*Finding of fact—Interference—Finding on question whether contract was caused to be made under undue influence.*

Ordinarily, a finding of the lower appellate Court on the question whether a contract was caused to be made under undue influence is a finding of fact which is binding in second appeal. But where such finding is based on misconception of the evidence on a vital matter and has been reached by adopting a procedure which has resulted in an erroneous finding, it is vitiated and is not binding in second appeal. (*Sen, J.*) Mohanlal Jagannath *v.* Kashiram Gokul. I.L.R. (1950) Nag. 105=A.I.R. 1950 Nag. 71=1950 N.L.J. 297.

———S. 100—*Finding of fact—Interference—Finding that transaction by guardian is an act of good management.*

A finding as to whether a particular transaction by a guardian is or is not an act of good management is a finding of fact which cannot be contested in second appeal. (*Bhandari, J.*) Nathu *v.* Shankar. 5 D.L.R. (Simla) 209.

———S. 100—Finding of fact—Interference—High Courts' power. [*See* Q.D. 1941-1945, Vol. I, Col. 940.] Sunderbati Kuer *v.* Sukhdeo Singh. 226 I.C. 186=12 B.R. 696=A.I.R. 1946 Pat. 120.

———S. 100—*Finding of fact—Interference—Lower Court not dealing with the entire evidence.*

It is not always possible or necessary to refer in the judgment to every document on the record or to the evidence of every witness examined at the trial. Hence, if from a perusal of the judgment of the lower appellate Court, the Chief Court is satisfied that all the relevant material was considered, though specific reference in detail is not made to every piece of evidence on the record it will not be right to interfere with the finding of the lower appellate Court on a question of fact. (*Kaul, J.*) Sheo Kumar Singh *v.* Mahraj Singh. 21 Luck. 279=223 I.C. 524=1946 Oudh (Rul.) 169=1945 O.A. (C.C.) 263=1945 A.L.W. (C.C.) 366=1945 O.W.N. 401=1945 A.W.R. (C.C.) 263=A.I.R. 1946 Oudh 72.

———S. 100—*Finding of fact—Interference—Mistake as to meaning of document.*

A second appeal does not lie because some portion of the evidence is contained in a document and the first appellate Court has made a mistake as to its meaning. 11 Lah. 199, ref. to. (*Harnam Singh and Falshaw, JJ.*) Daulat Singh *v.* Hazara Singh. 51 P.L.R. 401=A.I.R. 1950 E.P. 90.

———Ss. 100 and 107—*Finding of fact—Interference—Powers of appellate Court.*

In cases where evidence produced by the parties is fairly balanced, an appellate Court would be reluctant to disturb a finding of fact arrived at by the trial Court. It is open to an appellate Court to come to its own finding on fact if it finds the evidence produced by one side is stronger than that produced by the other and when that finding is not vitiated by any error of law, the second appellate Court will not interfere with it. (*Oak, J.C.*) Teja *v.* Choga. A.I.R. 1950 Ajmer 50.

———S. 100—*Findings of fact—Interference—Power of High Court.*

It is settled law that in view of S. 100, C. P. Code, a High Court has no power in second appeal to question findings of fact reached by the first appellate Court which there was evidence to support. The High Court will be exceeding its powers under this section if it differs from the view taken by the lower appellate Court upon appreciation of oral evidence. (*Sir John Beaumont.*) MISRI LAL NAYAK *v.* MT. SURJI. 1950 A.L.J. 113=63 L.W. 184=1950 A.W.R. 211 =54 C.W.N. 508=52 Bom.L.R. 477=31 P.L.T. 1=A.I.R. 1950 P.C. 28=(1950) 1 M.L.J. 294 (P.C.).

———S. 100—*Finding of fact—Question of benami—Interference in second appeal.*

It is no doubt open to the High Court in second appeal to see how far the Courts below have considered the question whether the ingredients required to be established in a case of *benami* have been established. But if on the findings of the Court of fact the necessary elements are found to have been established for supporting the *benami* character of a transaction, the High Court in second appeal will not interfere with the conclusion. 23 C.W.N. 321; 3 P.L.W. 339; 19 P.L.T. 570; 23 P.L.T. 364, ref. (*Narayan, J.*) SIRIKISHUN SINGH *v.* JAIMANGAL. A.I.R. 1950 Pat. 541.

———S. 100—*Finding of fact—"Misconduct"—Railways Act, S. 72—Risk note Forms A and B—Finding of no misconduct—Interference in second appeal—Finding neither unreasonable, illegal nor unsupplied by evidence.*

A finding that there was no misconduct on the part of a railway company within the meaning of the term used in Risk Notes A and B, under S. 72, Railways Act, cannot be interfered with in second appeal, when it is neither unreasonable nor unsupported by evidence, and when there is nothing illegal about the same.

Obiter: In the circumstances no misconduct made out. (*Meredith, J.*) ISHWARI PRASAD MAHTON *v.* DOMINION OF INDIA. 4 D.L.R. (Pat.) 221.

———S. 100—*Finding of fact—Nature of tenancy—Question as to.*

The question whether a tenancy is permanent or precarious is not in itself a question of fact, but is a mixed question of law and fact. (*Das and Ayyar, JJ.*) RAJA BRAJASUNDER DEB *v.* GIRIDHARI BEHARA. 13 Cut.L.T. 66=29 P.L.T. 81.

———S. 100—*Finding of fact—Negligence—Suit for compensation for loss and non-delivery of goods consigned—Finding as to negligence—Interference.*

The question of negligence on the part of a Railway Company in a suit for compensation for loss and non-delivery of goods consigned is not purely one of fact; and the High Court in second appeal can examine the matter to find out whether the conclusion of the lower Court is correct. (*Manohar Lall and Mukharji, JJ.*) PHULCHAND *v.* GOVERNOR-GENERAL OF INDIA IN COUNCIL. 29 P.L.T. 76=A.I.R. 1949 Pat. 110=3 D.L.R. (Pat.) 53.

———S. 100—*Finding of fact—Question as to abandonment by tenant—Finding on—If conclusive.*

The question whether a ryot or a tenant has abandoned his holding or not is not a pure question of fact, but a mixed question of fact and law; and a finding of the lower Court on such a question is not therefore final in second appeal. (1936) A.L.J. 569; A.I.R. 1939 All. 392; A.I.R. 1943 All. 241, rel. (*Mustaq Ahmad, J.*) MT. KIRPA DEVI *v.* SHRI RAM. 4 D.L.R. (All.) 245=1950 A.W.R. 216.

———S. 100—*Finding of fact—Question as to inquiry by transferee into title of transferor—Application of S. 41, Transfer of Property Act—Power of High Court in second appeal to go into question.*

The question whether a particular section of an Act applies to the facts as found or not is a question of law. The question whether a transferee did or did not do any act to ascertain the power of the transferor, so as to avail himself of the benefit of S. 41, Transfer of Property Act, is one of fact, but whether from that finding it can be said that reasonable and sufficient inquiry was made by the transferee so as to attract the application of S. 41 is a question of law. It is therefore open to the High Court in second appeal to accept the finding of the lower appellate Court as to what the transferee did to inquire into the title of the transferor and then proceed to see whether that inquiry was sufficient to attract the application of S. 41. (*Lokur, J.*) KHUSHAL CHAND BHAG CHAND *v.* TRIMBAK. I.L.R. (1946) Bom. 984=229 I.C. 227=1947 Bom. (Rul.) 162=A.I.R. 1947 Bom. 49=48 Bom.L.R. 586.

———S. 100—*Finding of fact—Question whether a tenant represents the whole body of tenants in rent reduction proceedings.*

The question whether in rent reduction proceedings a tenant represented the whole body of tenants is rather a mixed question of fact and law and it cannot be said to be one which is purely of fact. (*Sinha and Mukharji, JJ.*) BASDEO NARAIN *v.* KARU MAHTON. 26 Pat. 592 =A.I.R. 1948 Pat. 153.

———S. 100—*Finding of fact—Point of limitation—Finding that cause of action arose at particular time and that suit is within time—Interference.*

A finding in a suit for ejectment on the ground of misuse of the land, that the land had been transformed from agricultural land into a *bhika* at a particular time and that the suit having been brought within two years of that date, is within time, is one of fact which cannot be interfered with in second appeal. (*Hindley, J.*) ASRABUDDIN *v.* ABUL FAZAL. 225 I.C. 337=A.I.R. 1947 Cal. 139.

———S. 100—*Finding of fact—Reasonable and probable cause.*

In an action for malicious prosecution, the existence or otherwise of a reasonable and probable cause or of malice is a question of fact. The High Court in second appeal is bound by the concurrent findings of fact arrived at by the Courts below, unless they are vitiated by an error of law or procedure. (*Sen, J.*) SHEIKH MEHTAB *v.* BALAJI. I.L.R. (1946) Nag. 358=1946 Nag.

(Rul.) 44=221 I.C. 666=1946 N.L.J. 113=A.I.R. 1946 Nag. 46.

———S. 100—Finding of fact—Reasonable and probable cause for prosecution based on a misconception of law—Finding of—If binding in second appeal. *See* Torts—Malicious Prosecution. I.L.R. (1945) All. 685.

———S. 100—*Finding of fact—Reasonable and probable cause—Existence of Finding on—If conclusive—Interference by High Court—Grounds for.*

It cannot be laid as an absolute rule that the question whether there was or was not reasonable action in a case of malicions abuse of process (or malicious prosecution) is a pure question of fact which is concluded by the finding of the lower appellate Court. It may be said that if the final Court of fact has come to a conclusion in the matter on following correct principles and on proper evidence, the High Court will not reopen the question and impose its own standard of the valuation of the evidence. But if the lower appellate Court does not follow the correct principles but relies upon evidence which is not proper and yet arrives at a finding of fact, such a finding, involving as it does, not merely a conclusion of fact but also an error of law, is not immune from examination in second appeal. Further, while it is a question of fact what the cause of a certain course of action was, whether the cause was reasonable is hardly a question of fact. (*Phani Bhusan Chakravarti, J.*) Jagadananda Das *v.* Narendra Nath. 3 D.L.R. (Cal.) 37.

———S. 100—*Finding of fact—Reasoning for—If can be considered.*

It is neither necessary nor proper for the High Court in second appeal to consider whether the reasoning for a finding of fact is acceptable. It is necessary only to see whether the proper legal principles have been applied. (*Das Gupta, J.*) Kalipada Mondal *v.* Kali Charan Mondal. A.I.R. 1949 Cal. 204.

———S. 100—*Finding of fact—Record of Rights—Construction—Inference of status of tenant from entry in Record—If one of fact or aw—Finality in second appeal.*

An inference as to the status of a tenant drawn from the entries in the Record of Rights is an inference of fact, and, even if there be an error in the interpretation of a portion of the record, there is no error of law which vitiates the finding so as to make it assailable in second appeal. 45 C.W.N. 654, ref. (*Agarwala, C.J.*) Parsadi Dusadh *v.* Md. Ataq. A.I.R. 1950 Pat. 252.

———S. 100—Finding of fact—Record of rights—Presumption of correctness of entry wrongly raised—Finding based on—Finality—Interference. *See* Bihar Tenancy Act, Ss. 103-B (3) and 107 (2). A.I.R. 1950 Pat. 293.

———S. 100—*Finding of fact—Time if essence of contract—Interference.*

Although ordinarily a finding as to whether time was of the essence of the contract is a finding of fact, such a finding can be set aside in second appeal if it is contrary to the general principles of law. (*Bhandari, J.*) Kamun *v.* Gunda Ram. 49 P.L.R. 74=A.I.R. 1947 Lah. 352.

———S. 100—*Finding of fact—Whether clause in contract is an arbitration agreement or only agreement to refer to valuer or assessor.*

The question whether a clause in a contract is an agreement to refer to arbitration falling within S. 2 of the Arbitration Act or is merely an agreement to refer the matter to a valuer or assessor for his opinion, is a question of fact, to be determined on the true construction of the terms of the clause and the words used by the parties therein. (*Abdul Rashid, Ag. C. J. and Abdur Rahman, J.*) Governor-General in Council *v.* Simla Banking and Industrial Co., Ltd. 236 I.C. 444=1946 Lah. (Rul.) 460=A.I.R. 1947 Lah. 215.

———S. 100—*Finding of fact—Whether person is interested in tenure—Finding on—Finality.*

The question whether a person has an interest or is interested in a tenure is essentially a question of fact, and the finding thereon cannot be impeached in second appeal, unless there is an utter absence of evidence on the point. (*Ramaswamy and Narayan, JJ.*) Surendra Nath *v.* Digambar Pathak. A.I.R. 1950 Pat. 391.

———S. 100—*Interference—Grounds—Discretion exercised by lower Court in the matter of relief against forfeiture of tenancy—Principles.*

Relief against forfeiture incurred by a tenant is an equitable relief in the discretion of the Court; where both the lower Courts have exercised the discretion against the tenant, the High Court will not in second appeal ordinarily interfere with the exercise of such discretion unless it is satisfied that the discretion was not judicially exercised or was exercised without proper materials. (*Chagla, C.J. and Gajendragadkar, J.*) Namdeo Lokman *v.* Narmadabai. I.L.R. (1949) Bom. 883=4 D.L.R. (Bom.) 204=A.I.R. 1950 Bom. 123=51 Bom.L.R. 987.

———S. 100—*Interference on point taken* suo motu *by the judge for first time in second appeal.*

A judge sitting in second appeal is not justified in deciding the second appeal on a point which has not been raised at any stage by the parties and which is taken by him *suo motu*. (*Leach, C. J. and Lakshmana Rao, J.*) Rudrappa Chetti *v.* Doraisami Naidu. 60 L.W. 217=1947 M.W.N. 186=A.I.R. 1947 Mad. 360 (1)=(1947) 1 M.L.J. 248.

———S. 100—*Mixed question of fact and law—Existence of custom—Jurisdiction of second appellate Court.*

Mixed questions of law and fact are open to reconsideration in second appeal by a third Court, and the soundness of the conclusion in law from proved facts can also be examined. Whenever the existence of a custom is in dispute the resulting decision is partly one of fact and partly one of law. Whether a particular piece of evidence is reliable or not is a matter essentially for the Court determining facts. A law-point arises when, taking all the facts together, a legal custom has to be inferred. Whether the custom satisfies the test of reasonableness and the question whether it is exercised as of right are questions of law. Also the general question whether from the proved facts in the case a valid legal custom can be inferred is a question of law. 19 C. 253 (P.C.); 46 C. 189 (P.C.); 20 C. 93; 40 M. 709 (P.C.); 51 C.W.N. 179; 54 A. 6; A.I.R. 1947 M. 71 and A.I.R. 1948 Pat. 425, referred to. (*Hidayatullah, J.*) Punabai *v.* Ramrao Balasaheb. I.L.R. (1950) Nag. 128=A.I.R. 1950 Nag. 54=1950 **N.L.J. 636.**

———S. 100—*Mixed question of law and fact—Proof of Custom—Question as to—High Court's powers in second appeal to go into evidence—Extent of.*

A question involving the proof of custom is a mixed question of law and fact, and therefore the High Court in appeal will go into the evidence regarding the custom, though keeping in mind that the question of credibility of the evidence is one for the Courts below. (*Das and Narasimham, JJ.*) Maheswar Naik *v.* Sailendra Narayan Bhanj Deo. I.L.R. (1949) Cut. 312.

———S. 100—*Mixed question of law and fact—Question if disputed area is cremation ground—Inference of dedication or lost grant from facts.*

The question whether the disputed land is a *Sarbasadharan* cremation ground, is essentially a mixed question of law and fact. The conclusion of the Court that there had been a dedication or lost grant of the disputed area for the purposes claimed, must more properly be regarded as a proposition of law derived from facts found than as a finding of fact itself. 19 I.A. 228 and 45 I.A. 183, referred to. (*Lord Radcliffe.*) Lakshmidhar Mirsa *v.* Ramgalal. 76 I.A. 271=63 L.W. 1=29 (Pat.) 1=A.I.R. 1950 P.C. 56=16 Cut.L.T. 1=1950 A.L.J. 318=1950 A.W.R. 308=52 Bom.L.R. 458=54 C.W.N. 143=(1950) 1 M.L.J. 100 (P.C.).

———S. 100—*Mixed question of fact and law—Question if Hindu family is joint.*

Where in considering the question whether a Hindu family is joint or separate the appellate court has fallen into an error in the proper appreciation of some of the material documentary evidence in the case as well as in regard to the legal effect of certain important pieces of evidence and proved facts, its finding is open to reconsideration by the High Court in second appeal, as there are mixed questions of fact and law. (*Fazl Ali, C.J. and Pande. J.*) Ramjhari Kuer *v.* Devanand Singh. 222 I.C. 604=12 B.R. 298=1946 Pat. (Rul.) 119=A.I.R. 1946 Pat. 278.

———S. 100—*New plea—Admissibility of document—Objection on ground of non-registration.*

An appellant in second appeal is not debarred from raising an objection to the admissibility of a document on the ground of its non-registration although no such objection was taken at any earlier stage of the proceedings. (*Sharpe, J.*) Sugan Mal Chorari *v.* Prokash Gobinda Majumdar. 82 C.L.J. 183.

———S. 100—*New plea—Mixed question of law and fact—Question if acts of defendant constitute trespass or dispossession of plaintiff.*

The question whether the acts complained of by the plaintiff constituted isolated acts of trespass by the defendant or dispossession of the plaintiff, is a mixed question of law and fact and it cannot be decided without fresh evidence. The appellant cannot, therefore, be allowed to raise this mixed question of law and fact for the first time in second appeal. (*Mookerjee and Lahiri, JJ.*) Shaikh Mongal *v.* Pure Dishargarh Colliery Co. A.I.R. 1950 Cal. 328.

———S. 100—*New plea—New question of fact—Permissibility.*

An argument which raises a new question of fact never pleaded before on considered by the lower Courts cannot be allowed to be raised in second appeal for the first time. (*Madeley, J.*) Mumtaz Husain *v.* Manzoor Ali. 21 Luck. 248=223 I.C. 607=1946 Oudh (Rul.) 174=1945 O.A. (C.C.) 272=1945 A.W.R. (C.C.) 272=1945 A.L.W. (C.C.) 364=1945 O.W.N. (C.C.) 399.

———S. 100—New plea—Plea based on S. 53-A, T. P. Act—If open in second appeal for first time. *See* T. P. Act, S. 53-A. 30 P.L.T. 388.

———S. 100—*New plea—Plea not raised in Courts below—Facts on record making out plea—Duty of Court to allow plea to be raised.*

If the facts on record are sufficient to make out a plea, raised for the 1st time in second appeal, it cannot be ignored simply because that plea was not raised in the Courts below or that it did not strike counsel in the Courts below. (*Mehr Chand Mahajan and Teja Singh, JJ.*) Parshotam Das *v.* Municipal Committee, Batala. 4 D.L.R. (Simla) 174=A.I.R. 1949 E. P. 301=51 P.L.R. 44.

———S. 100—*New plea—Plea of limitation not pressed in first appellate Court—If can be raised in second appeal.*

A point of limitation taken but not pressed, before the lower appellate Court, cannot be raised in second appeal when no materials were placed before the lower Court in support of the plea of limitation. (*Meredith and Ray, JJ.*) Darsan Singh *v.* Baldeo Das. 25 Pat. 145=1946 Pat. (Rul.) 171=223 I.C. 251=12 B.R. 361=A.I.R. 1946 Pat. 365.

———S. 100—*New plea—Plea of* res judicata *not taken in grounds of appeal—If open.*

A plea of *res judicata* which has not been put forward in the memorandum of appeal should not be allowed to be taken in the course of the hearing. (*Beevor, J.*) Banchhanidhi Kar *v.* Udekar Sahu. 14 Cut.L.T. 51=A.I.R. 1949 Pat. 214.

———S. 100—New plea—Plea that suit is bad for non-registration of firm under S. 69, Partnership Act—If open at hearing of second appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 939.] Mahomed Ali *v.* Karji Kondho Rayaguru. 18 R.P. 170.

———S. 100—*New plea—Point of law going to root of case—Permissibility at argument stage in second appeal.*

A pure point of law which goes to the root of the whole case may be permitted to be raised even at the stage of arguments in second appeal.

(*Jahagirdar, J.*) Sumati V. Kirtikar *v.* Anant Balkrishna. 5 D.L.R. (Bom.) 25.

———S. 100—*New point—Question of inadmissibility of document—Question of law.*

The question of the inadmissibility of documents being a question of law can be allowed to be raised in second for the first time. (*Manohar Lal, J.*) Pradip Singh *v.* Ambika Singh. A.I.R. 1948 Pat. 185.

———S. 100—New plea—Question of law—Bar under Art. 35 (11), Provincial Small Cause Courts Act—If question of pure law—Plea in second appeal for first time—Competency. *See* Appeal—New plea. A.I.R. 1950 Pat. 284.

———S. 100—*New plea—Question of law—Legal effect of proved facts.*

The legal effect of proved facts is a question of law and may be raised and considered even in second appeal. (*Reuben and Narayan, JJ.*) Sailajananda Pandey *v.* Lakhichand Sao. 30 P.L.T. 388.

———S. 100—New plea—Question of law not raised in pleading —If can be raised in second appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 940.] Ramachandra Prabhu *v.* Mahadevi. 222 I.C. 646=1946 Mad. (Rul.) 99=A.I.R. 1946 Mad. 57.

———S. 100—*Question of fact—Question whether sale in favour of plaintiff was real or nominal—Concurrent findings in lower Courts—Interference.*

The question whether the sale by the original owner in favour of the plaintiff's father was real and operative or nominal and fraudulent is in root analysis a question of fact and a concurrent finding of the Courts below will not be interfered with in second appeal unless the conclusion is so far vitiated by material error as to merit reversal or reconsideration. (*Raghava Rao, J.*) Satyam *v.* Venkataswami. 62 L.W. 256=A.I.R. 1949 Mad. 689=(1949) 1 M.L.J. 434.

———S. 100—*Question of law—Construction of documents and inference drawn from contents thereof—Interference in second appeal.*

Where the lower appellate Court has come to a conclusion on a construction and perusal of the document and the proper inference to be drawn from the contents thereof, it is a question of law, and the High Court, in second appeal, can consider whether the conclusion arrived at by the lower appellate Court is correct. (*Kania, Ag C. J. and Gajendragadkar, J.*) Prabhatsang Vaghela *v.* Bhagwatsang Jhala. 226 I.C. 199=1946 Bom. (Rul.) 286=48 Bom.L.R. 185=A.I.R. 1946 Bom. 454.

———S. 100—*Questions of law—Decision that there is no evidence to support finding.*

The decision that there is no evidence to support a finding or that a legal inference drawn from proved facts is wrong is one of law and not of fact. 46 C. 189 (P.C.), 47 C. 107 (P.C.), 17 C. 875 (P.C.) and 41 C. 972, rel. on. (*Hidayatullah, J.*) Mohammad Dawoodkhan *v.* Banbi. I.L.R. (1949) Nag. 862=A.I.R. 1950 Nag. 127=1950 N.L.J. 163.

———S. 100—*Question of law—Erroneous inference from proved facts.*

When an erroneous inference has been drawn from proved facts, the matter can be reconsidered in second appeal. (*Grille, C.J. and Hidayatullah, J.*) Rishab Kumar *v.* Singhai Motilal. I.L.R. (1948) Nag. 299=A.I.R. 1949 Nag. 21=1948 N.L.J. 316.

———S. 100—Question of law—Existence of reasonableness of Custom. *See* C.P. Code, S. 100—Custom. 51 C.W.N. 179.

———S. 100—Question of law—Finding that grant was not of whole village—Not one of fact—Inference drawn from entries in registers is a question of law. *See* Mad. Est. Land Act, S. 3 (2) (*d*), Expl. I. (1947) 2 M.L.J. 289.

———S. 100—*Question of law—Inference from facts.*

An erroneous inference drawn from a proved fact justifies interference in second appeal. (*Ram Labhaya, J.*) Thirai Doloi *v.* Singheswar. I.L.R. (1950) 2 Assam 137=A.I.R. 1950 Assam 216.

———S. 100—*Question of law—Interference from findings.*

The proper inference to be drawn from the findings arrived at by the lower appellate Court in respect of the disruption of the joint status of a family, is a question of law and can be considered in a second appeal. (*Waliullah, J.*) Raghbiri *v.* Lakhpat Singh. 221 I.C. 607=1946 A. (Rul.) 93=1946 A.W.R. (H.C.) 158 (2)=A.I.R. 1946 All. 118.

———S. 100—*Question of law—Inference from proved facts—Partition among members of family—Documentary evidence consistent with partition—Finding of lower Court—Interference in second appeal.*

Two brothers who were at one time joint settled down in different villages and they were each of them enjoying in his village the potter service inam lands and rendering service pertaining to that office. It was shown that taxes were paid separately by each branch in respect of the properties in the respective village and one did not pay taxes for the lands in the other's village. There was, further, separate cultivation of the property and separate enjoyment. Water applications were made by the defendant in his own name and orders were issued to him. Similarly, land encroachment notices were served upon the defendant in his own name. The defendant also dealt with the properties as belonging to him individually by mortgaging it on several occasions.

Held, that the cumulative effect of the documents and the evidence was that the parties had become divided and that the property in the hands of the defendant was his separate property and not joint family property in which the plaintiff who belonged to the other branch could claim a share.

When the question of drawing a legal inference from an appraisement of the facts arises, the case involves a question of law on which the High Court in second appeal can finally decide. (*Yahya Ali, J.*) Papayya *v.* Suryanarayan. 60 L.W. 88=1947 M.W.N. 95=A.I.R. 1947 Mad. 426=(1947) 1 M.L.J. 79.

———S. 100—Question of law—Interference—Duty of High Court. [*See* Q.D. 1941-1945, Vol. I, Col. 943.] HARI SINGH *v.* NARAIN DAS. 222 I.C. 301=1946 Lah. (Rul.) 179.

———S. 100—*Question of law or fact—Interpretation of Record of Rights.*

Where the Record of Rights is relied on by both the Courts below as the only evidence of the status of the defendants and the parties also relied on them as an instrument of title, the interpretation of the Record of Rights is a question of law and it can be gone into in second appeal. 40 C.W.N. 449 (P.C.), foll. (*Amiruddin Ahmad, J.*) **MANINDRA NATH *v.* MD. JANEALAM SADAGAR** 1 D.R. 32.

———S. 100—*Question of law—Interpretation of* khasra.

In cases in which the only document of title is the *khasra,* recording the incidents of a tenure, it is the *khasra* which would serve the purpose of a deed of title the interpretation of which would necessarily be a question of law. 1936 P.C. 83, rel. on. (*Mushtaq Ahmad, J.*) CHANGA *v.* BHAGWAN DEI. A.I.R. 1949 All. 493=1949 A.W.R. 496=1950 A.L.J. 21.

———S. 100—*Question of law—Lower Court wrongly entertaining appeal which does not lie—Second appeal.*

Obiter: Where a subordinate Court wrongly entertains an appeal when it has no jurisdiction to do so, a second appeal lies against that Court's order. 9 Pat. 685; 5 P.L.J. 97; 7 P.L.T. 264; 17 P.L.T. 815, ref. (*Reuben, J.*) BAIDYA NATH BANERJI *v.* HIMANGSU BALA BOSE. A.I.R. 1950 Pat. 90.

———S. 100—*Question of law—Negative finding on mistaken assumption of absence of evidence.*

If a negative conclusion is reached by the lower appellate Court on the mistaken assumption that there is no evidence and the conclusion is based solely on that fact, it is as much an error of law as when a finding is reached with no evidence to support it. (*Bose, J.*) MODEL INDUSTRIES, DAYALBAG *v.* RAMBHAN NARAYAN. I.L.R. (1946) Nag. 73=1946 N.L.J. 227=A.I.R. 1946 Nag. 152.

———S. 100—*Question of law—Question whether family or tribe of non-Hindu origin is governed by Hindu Law—Mixed question of law and fact.*

The question whether a family or tribe of non-Hindu origin has been so far hinduised as to attract the provisions of Hindu Law in matters of inheritance and succession is a mixed question of law and fact. (*Fazl Ali, C.J. and Ray, J.*) CHUNKA *v.* BHABANI. 24 Pat. 727=A.I.R. 1946 Pat. 218.

———S. 100—*Question of law—Presumption of Crown grant of ferry right from proved facts—Concurrent findings of fact—Power of High Court in second appeal.*

The question whether on the facts proved a (Crown) grant (of a right of ferry) may be presumed in favour of a person to the exclusion of another and preventing the latter from setting up a rival ferry, is a question of law which can be gone into in second appeal, though there are concurrent findings of fact by both the lower Courts. (*Das and Narasimham, JJ.*) BRAJARAJ RAMANUJ DAS *v.* AJIMAN NISA BIBI. I.L.R. (1949) Cut. 465=A.I.R. 1950 Orissa 19.

———S. 100—*Question of law—Sufficient cause—Limitation Act, S. 5.*

The inference drawn by a Court as to whether certain facts found by it to have been established amount to "sufficient cause" or not under S. 5 of the Limitation Act, is one of law and not one of fact, and can, therefore, be assailed in second appeal. (*Abdur Rahman, J.*) ARURA *v.* KARAM DIN. 225 I.C. 291=48 P.L.R. 325=A.I.R. 1947 Lah. 76.

———S. 100—*Question of law—Suit for pre-emption—Acquiescence of plaintiff in sale—Inference from facts and circumstances.*

In a suit for pre-emption, the question of acquiescence of the plaintiff in the sale giving rise to the right of pre-emption is not purely one of fact, if such acquiescence has to be inferred from a combination of the facts and circumstances. It would be so if it could be decided solely on the allegation that the plaintiff positively and in set terms gave consent, but it is a question of law when the point is whether conduct of the party not amounting to direct consent, should be taken as waiver. 1916 Lah. 370, referred to. (*Ram Labhaya, J.C.*) GOPI NATH *v.* NAND KISHORE. A.I.R. 1949 Ajmer 2=4 D.L.R. (A. & M.) 73.

———S. 100—*Second appeal—Order of remand.*

A second appeal is competent from an order remanding a case for rehearing. (*Harries, C.J.*) RAJ NARAYAN KUNDU *v.* SHEIK MURAD ALI. 52 C.W.N. 671.

———S. 100—*Second appeal—Right of—Execution proceedings.*

A second appeal does not lie in execution proceedings if no second appeal would lie in the suit itself. 43 A. 403, foll. (*Kapur, J.*) HARI KISHEN *v.* AMAR NATH. 52 P.L.R. 13=5 D.L.R. (Simla) 161.

———S. 100—Second appeal—Suit for damages for malicious prosecution—Question as to existence of malice or absence of reasonable and probable cause—Questions of fact. *See* MALICIOUS PROSECUTION. 1946 O.W.N. 330.

———S. 102—Applicability—Suit to recover money payable under award on arbitration—Second appeal—Competency. *See* PROV. SMALL CAUSE COURTS ACT, ARTS. 15 AND 24. 4 D.L.R. (Pat.) 199.

———S. 102 — *Second appeal—Competency—Order passed in execution in a suit of a small cause nature.*

A second appeal against an order passed in execution proceedings arising out of a suit of the nature of small causes is not entertainable, though one appeal against such an order is permissible. I.L.R. 31 All. 1; A.I.R. 1938 Bom. 534, rel. on. (*Ghulam Hasan, Kidwai and Chandiramani, JJ.*) JANKI SAHU TRUST *v.* RAM PALAT. 1950 A.L.J. 833=A.I.R. 1950 A. 580=5 D.L.R. (All.) 275 (F.B.).

———S. 102—Second appeal—Suit for money below Rs. 500—Small Cause nature—Second appeal—Competency. [*See* Q.D. 1941-1945, Vol. I, Col. 945.] RAMESHWAR MISTRI *v.* BABULAL. 225 I.C. 629=12 B.R. 640=A.I.R. 1949 Pat. 97.

———S. 102—"*Suit*"—*If includes execution proceedings.*

The word 'suit' in S. 102, C.P. Code, covers proceeding in execution as well. No second appeal, therefore, lies against an order passed in a proceeding in execution of a decree of a Small Cause Court which is transferred to the regular side for execution, if the subject matter of the suit is under Rs. 500 in value. (*Bose, J.*) RAMBHAROSE *v.* PYARELAL. I.L.R. (1946) Nag. 26=223 I.C. 491=1946 Nag. (Rul.) 130=1946 N.L.J. 14=A.I.R. 1946 Nag. 165.

———S. 102—"*Suit*"—*Meaning of—Order in execution arising out of suit of Small Cause nature—Second appeal.*

The expression "suit" in S. 102, C. P. Code, includes execution proceedings. Therefore if the suit is of the nature described in S. 102, no second appeal would lie from an order made in execution of the decree passed in such suit unless the value of the suit exceeded Rs. 500. The test in such cases is not the nature of the proceedings in execution, but the nature of the suit in which the decree sought to be executed was passed. (*Gajendragadkar, J.*) NARMADABAI NARAYANSHET *v.* HIDAYATALLI. 50 Bom.L.R. 696 =A.I.R. 1949 Bom. 115.

———S. 103—*Issue of fact—Determination of—Power of High Court in second appeal.*

The reliance by the lower appellate Court on the deposition of a witness which is inadmissible in evidence and its failure to apply its mind to any part of the plaintiff's oral evidence containing vital admission of the truth of the defendant's case is an "omission" affecting the correctness of its determination of the issue in question. These defects in its judgment raise questions of law, and they flow from his wrong and irregular approach to a question of fact arising between the parties. The High Court in such circumstances has power even in second appeal to determine under S. 103, C. P. Code, the issue of fact on a consideration of the entire materials on the record. (*Mushtaq Ahmad, J.*) CHANGA *v.* BHAGWAN DEI. A.I.R. 1949 All. 493=1949 A.W.R. 496=1950 A.L.J. 21.

———S. 103—*Powers of High Court—Failure of lower Court to determine material issues—Power to consider evidence and decide question of fact in second appeal.*

The High Court under S. 103, C. P. Code, has the power to dispose of a second appeal on an issue of fact, if the evidence on the record is sufficient for the disposal of the appeal, and the issue of fact has not been determined by the first appellate Court or it has been wrongly determined by such Court by reason of any irregularity, omission, error or defect, such as is contemplated by S. 103 (1). Where material issues which are mixed questions of law and fact have not been determined by the first appellate Court, the High Court in second appeal can, under S. 103, proceed to consider the evidence on the record and determine the issues itself. (*Davis, C. J. and Thadani, J.*)

HYDERABAD MUNICIPALITY *v.* PANALAL. I.L.R. (1945) Kar. 301=222 I.C. 513=1946 Sind (Rul.) 120=A.I.R. 1946 Sind 10.

———S. 104—*Appeal against order removing receiver—If lies—Order removing receiver coupled with order appointing fresh receivers—Effect on the right of appeal.*

The wording of S. 104, C. P. Code, makes it clear that unless an appeal is specially provided for in the Code, no appeal will lie against an order. Hence in the absence of any special provision in the Code for an appeal against an order re- 72; (1946) I.L.R. 25 Pat. 779; (1923) 46 M. moving a receiver, no appeal would lie. 1931 All. L.J. 196 and C.M.A. No. 278 of 1944, followed. (1925) I.L.R. 53 Cal. 319 and (1932) I.L.R. 60 Cal. 162, not followed.

An order removing a receiver would not become appealable merely because it is coupled with an order appointing fresh receivers. The order should be considered as two distinct orders. It would be anomalous if the removed receiver who has no right of appeal against the order of removal would be entitled to appeal merely because at the same time the Court thought it necessary to appoint other receivers to administer the estate. The appointment of a successor cannot give a right to a dismissed receiver to canvass the grounds for his dismissal. (*Horwill and Balakrishna Ayyar, JJ.*) RAYARAPPAN NAYANAR *v.* MADHAVI AMMA. 62 L.W. 799=1949 M.W.N. 684 =A.I.R. 1950 Mad. 212=(1949) 2 M.L.J. 599.

———S. 104 and O. 40, R. 1 and O. 43, R. 1 (s)—*Order removing a receiver—If appealable—General Clauses Act (X of 1897), S. 16—Practice—Appellate Court—Disability of giving opinion on merits of the case when holding appeal incompetent.*

An appeal against an order removing a receiver is maintainable.

Section 16 of the General Clauses Act furnishes a rule of interpretation and enacts that a power of appointment includes and implies within itself the power of removal and whenever a Court is empowered to make a certain appointment automatically it gets authority to exercise the power of removal in respect of the person appointed.

If Order 40, rule I, Civil Procedure Code, is read along with section 16 of the General Clauses Act, then it follows by necessary implication that an order removing a receiver falls within the ambit of the above rule and it thereby becomes expressly appealable under the provisions of Order 43, rule I (s), Civil Procedure Code. 53 Cal. 319, appr.

When an appellate Court holds that an appeal is incompetent, it is desirable that it expresses its opinion on the merits of the case also. (*Kania, C.J., Fazl Ali, Patanjali Sastri, and Merhchand Mahajan, JJ.*) RAYARAPPAN NAYANAR *v.* VALIA MADHAVI AMMA. 1949 F.C.R. 667=A.I.R. 1950 F.C. 140=(1950) S.C.J. 567 (F.C.).

———Ss. 104 (1) and 2 (2)—*Appeal—Competency—Order rejecting memorandum of appeal on the ground that copies of the judgment were not filed.*

An appeal to the High Court against the order of a District Judge rejecting the memorandum of appeals for failure on the part of the appellants to put in separate copies of the judgment in the different appeals is incompetent. (*Gopendranath Das, J.*) JOHRUN BIBI *v.* HOWRAH JUTE MILLS Co. I.L.R. (1948) 2 Cal. 1=A.I.R. 1948 Cal. 134.

———S. 104 (2)—Order under O. 22, R. 10—Second appeal. *See* C. P. CODE, O. 22, R. 10. 1946 N.L.J. 499.

———S. 105—*Scope—Affecting the decision of the case—Meaning of—Order setting aside dismissal for default—If can be challenged in appeal from final decree or order.*

Where the effect of an order is to prevent an inquiry into merits, such an order would come within the scope of S. 105, C. P. Code, as affecting the case on merits, but where the order does not affect the decision of the case on merits, it would not come within the scope of S. 105. An order setting aside a dismissal for default only reopens an inquiry and does not affect the decision of the case, and cannot therefore be questioned in an appeal from the final decree in the suit or final order in the proceeding. (*Horwill and Koman, JJ.*) VENKATANARASIMHAM *v.* NAGOJI RAO. 59 L.W. 139=1946 M.W.N. 121 =A.I.R. 1946 Mad. 344=(1946) 1 M.L.J. 216.

———S. 105 (1)—*Remand after setting aside* ex parte *decree—Appeal against decree after restoration—Order of remand, if can be challenged.*

An order setting aside an *ex parte* decree and remanding, a case cannot subsequently be questioned under S. 105 (1), C. P. Code, in an appeal from the decree passed after restoration, as that order does not affect the decision of the case with reference to its merits. (*Prasad, J.M. JJ.*) RAM CHANDRA *v.* MANKOLA. 1950 R.D. 4.

———S. 107—*Disposal of appeal—Procedure—Vague order—Intention of the order to be implemented.*

Disposal of appeals is governed by the forms in S. 107, C. P. Code. Where an appellate order is vague but the intention is clear to remand the case, that intention has to be implemented. (*Sultan Ahmad, S. J. M. and Singhal, M.*) DHANDEI KUARI *v.* SHYAM SUNDER. 1948 A.W.R. (Rev.) 38.

———S. 107—Finding of fact—Interference—Powers of appellate Courts. *See* C. P. CODE (V OF 1908), Ss. 100 AND 107. A.I.R. 1950 Ajmer 50.

———S. 107—*Points to be put before itself by the appellate Court.*

On appeal a Court has to put before itself the material pleading, the real matter at controversy, the issues arising for decision, the issues arising again for decision on appeal and the evidence on them. (*Trivedi, J.C.*) RAMJI MAVJI *v.* VALJI HARJI. A.I.R. 1950 Kut. 67.

———Ss. 109 and 115—*Appeal to Privy Council—Order in revision by the High Court.*

As under S. 109, C. P. Code, an appeal to the Privy Council lies only from a decree or final order passed on appeal by a High Court or by any Court of appellate jurisdiction, such an appeal

cannot lie against an order passed in revision by the High Court. Such an order cannot be said to be one "passed on appeal." (*Misra and Walford, JJ.*) RUKMANGAL PRASAD *v.* MST. DURGA. 21 Luck. 43=222 I.C. 308=1946 Oudh (Rul.) 59=1946 A.W.R. (C.C.) 4=1946 O.W.N. 106=1946 A.L.W. (C.C.) 100=1946 O.A. (C. C.) 4=A.I.R. 1946 Oudh. 101.

———Ss. 109 and 110—Applicability—Declaration of decision under Bengal Money Lenders Act —Appeal to Federal Court—Competency. *See* BENGAL MONEY LENDERS ACT, S. 38. 1949 F.L. J. 73 (F.C.).

———S. 109—*Applicability to orders made in revision by the High Court—Decision of subordinate Court that loan is a "commercial loan" within the meaning of the Bengal Money-Lenders Act—Interference by High Court under S. 115, C. P. Code—Bengal Money-Lenders Act (X of 1940), S. 2 (4) and (22)—Commercial loan—Onus—Suit or proceeding "pending"—Meaning of.*

Orders passed in revision do not fall within S. 109 (*a*), C. P. Code.

Sub-section (*c*) of S. 109 is clearly wide enough to cover an appeal from an order made in revision.

Although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (*c*), nevertheless if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (*a*) or sub-section (*b*) and sub-section (*c*) can be ignored.

Where an application under sections 30 and 36 (6) (*a*) (*ii*) of the Bengal Money-Lenders Act, is dismissed by a Subordinate Court as it was of opinion that the loan in question was a "Commercial loan" within the meaning of the Act, it is open to the High Court to interfere in revision under sub-section (*b*) of S. 115, C. P. Code, with such an order where the High Court takes the view that the loan was not a "Commercial loan".

The question whether a loan is a "Commercial loan" has to be regarded from the point of view of the lender, and it has to be determined for what purpose the loan was advanced, the burden of proving that the loan was a commercial one being on the lender.

Where though a mortgage suit was filed long before 1st January, 1939, and possession in execution also had been given before that date, the suit would be pending within the meaning of S. 2 (22) of the Bengal Money-Lenders Act, if the right to obtain a personal decree exists on 1st January, 1939. (*Sir John Beaumont.*) JOY CHAND LAL *v.* KAMALAKSHA CHAUDHURY. 76 I. A. 131=1949 A.L.J. 278=1949 M.W.N. 385= 53 C.W.N. 562=A.I.R. 1949 (P.C.) 239=1949 A.W.R. 308=51 Bom.L.R. 964=63 L.W. 6= (1949) 2 M.L.J. 6 (P.C.).

———S. 109—*"Decree or final order"—Test—Interlocutory order in execution proceedings.*

An order can be a "decree" only if it conclusively determines the rights of the parties and not when it merely determines an incidental question. An interlocutory order in the course of execution proceedings which decides, for instance, a point of law arising, interlocutory or otherwise, is not a decree. Judged in the light of this test, interlocutory orders which decide merely that pleas of want of jurisdiction and limitation cannot be allowed to be taken up at a late stage and that the proclamation of sale was properly prepared, cannot be regarded as a "decree" within the meaning of the expression as used in S. 109 (*a*), C. P. Code. Nor can such orders be regarded as a "final order" within the meaning of that section. The test to find out whether an order is a final one is not whether the point decided thereby is a cardinal one, bbut whether the rights of the parties are finally disposed of. The orders in question do not finally dispose of the execution application which is a live application and still awaits decision. 1943 L. 140 (F.B.), appl. (*Ram Lall, C.J. and Bhandari, J.*) Barkat Ram *v.* Bhagwan Singh. A.I.R. 1949 E. P. 222.

———Ss. 109 and 110—*Order under the Lunacy Act—Leave to appeal to Federal Court—If can be granted.*

An order under the Lunacy Act cannot affect directly or indirectly any claim to property and so the case of an order passed on an application under S. 63 of the Lunacy Act would not fall under the second part of S. 110 of the C. P. Code to justify leave to appeal to the Federal Court being granted. (*Malik, C.J. and Wali Ullah, J.*) Rukmani Bai *v.* Joshi Ram Kishan. 1950 A.W.R. 75=A.I.R. 1950 A. 242=1949 A.L.J. 563.

———S. 109 (a)—*Decree or final order "passed on appeal"—Order rejecting application for admission of appeal or if necessary for extending time under S. 5, Limitation Act.*

An order of High Court rejecting an application for admission of an appeal, or, if found necessary, for extending the time for preferring the appeal under S. 5 of the Limitation Act, is neither a decree nor a final order "passed on appeal", and the High Court has therefore no jurisdiction to grant leave to appeal under S. 109 (*a*), C. P. Code. 32 B. 108, foll.; 30 C. 679 rel. on; A.I.R. 1926 Pat. 102, A.I.R. 1917 Lah. 448, and 4 R. 265, Not Foll. (*Mitter and Sharpe, JJ.*) Purnendu Nath Tagore *v.* Kanailal Ghoshal. I.L.R. (1948) 2 Cal 202.

———S. 109 (a) and (c)—*"Final order"—Meaning of—Leave to appeal against order dismissing as not maintainable on appeal against order removing a receiver—If can be granted.*

A final order as contemplated by S. 109 (*a*) of the C.P. Code must be one which affects finally the rights of parties. An order removing or appointing a receiver does not affect at all the rights of the parties; it is merely an order making provision for the due preservation of the estate during the pendency of the suit. As a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Federal Court. The question whether one person or the other should be appointed as receiver cannot ordinarily be of any great practical importance. Accordingly an order dismissing as not maintainable an appeal against an order removing a receiver is not a fit one for the granting of a certificate for appeal to the Federal Court. (*Harwill and Balakrishna Ayyar, JJ.*) Rayarappa Nayanar *v.* Madhavi Amma. 1949 M.W.N. 699=62 L.W. 792=A.I.R. 1950 Mad. 212=(1949) 2 M.L.J. 601.

———S. 109 (a)—*Final order—Order dismissing appeal for default.*

An order dismissing an appeal for default is a final order within the meaning of S. 109 (*a*) C. P. Code. It has the effect of terminating the appeal. (*Wali Ullah and Bind Basni Prasad, JJ.*) Ganesh Prasad *v.* Mt. Makhna. A.I.R. 1948 All. 375.

———S. 109 (a)—"Final order"—Order in summary restitution proceedings—Appeal to Privy Council—Competency. [*See* Q.D. 1941-1945, Vol. I, Col.] Indo Swiss Trading Co. *v.* Hemendralalroy. 24 Pat. 614=228 I.C. 205=1947 Pat. (Rul.) 89=13 B.R. 156=1947 Comp. C. 69=A.I.R. 1946 Pat. 141.

———Ss. 109 (a) and (c) and 110—'Final order'—Order of remand directing restoration of application for amendment of decree under S. 8 of the U. P. Debt Redemption Act. [*See* Q. D. 1941-1945, Vol. I, Col. 953.] Narain Das *v.* Ala uddin Khan. 1945 A.W.R. (H.C.) 347=1945 A.L.J. 448=A.I.R. 1945 All. 401.

———S. 109 (a)—Order rejecting application for review—Appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 954.] Dwarkadas Kedar Bux *v.* Gajanan. 222 I.C. 475=1946 Cal. (Rul.) 107=A.I.R. 1946 Cal. 10.

———S. 109 (a) and (b)—*"Final order"—Test—Order refusing to appoint provisional liquidator.*

A "final order" within the meaning of S. 109 (*a*) and (*b*), C. P. Code, is one deciding finally any question at issue in the cause of the rights of any of the parties. An order appointing or refusing to appoint a provisional liquidator does not decide the rights of the parties, although the decision of that question will have an effect upon the liquidation proceedings. Such an order is not final but only an interlocutory order. 22 C. 928, applied. 12 P. 723 and 55 C. 720 (P.C.), rel. on. I.L.R. 1942 Lah. 592, Dist. (*Teja Singh and Khosla, JJ.*) Jhabar Mal Chokhani *v.* Punjab Pictures, Ltd. A.I.R. 1949 E. P. 261.

———S. 109 (c)—Appeal to F.C. in case under Land Acquisition Act which may fall under S. 109 (c)—Competency. *See* Land Acquisition Act (I of 1894), S. 54. (1949) 2 M.L.J. 556.

———S. 109 (c)—*Applicability—Money value of subject-matter ascertainable.*

S. 109 (*c*), C. P. Code, is not limited to cases where the money value of the subject-matter in dispute cannot be ascertained. It also applies to cases where such money-value has been definitely ascertained, but the case involves a question of great general importance. (*Abdul Rashid, C.J., Ram Lall, Abdur Rahman, Mahajan and Cornelius, JJ.*) MT. SHANKAR *v.* MILKHA SINGH. I.L.R. (1947) Lah. 696=A.I.R. 1947 Lah. 304 (F.B.).

———S. 109 (c)—*Applicability—Orders in revision.*

Cl. (*c*) of S. 109, C. P. Code applies to orders passed in revision as well as to orders passed in appeals. (*Lal, J.M. I.*) HAR PRASAD *v.* MANI RAM. 1948 A.W.R. (Rev.) 280=1948 R.D. 406.

———S. 109 (c)—*Applicability—Right of persons to recover interim bonus from Insurance Company—Certificate of leave to appeal—If justified.*

The question whether certain persons were entitled to recover *interim* bonus from an Insurance Company is no doubt a matter of some public importance, but it is not of such great public importance as to justify the grant of certificate of leave to appeal to the Privy Council under S. 109 (*c*), C. P. Code. (*Nagarkar, J.C.*) GULAB RAY *v.* GENERAL ASSURANCE SOCIETY, LTD., AJMER. 3 D.L.R. (A.M.) 45.

———S. 109 (c)—*Certificate of fitness—When to be granted—Substantial question of law—Sufficiency of.*

A case cannot be certified as a fit one for appeal under S. 109 (*c*), C. P. Code, on the mere ground that it raises a substantial question of law. It must involve a question of wide public importance or great general importance, which cannot be reduced into actual terms of money. A question as to the right of an endorsee of a railway receipt to maintain a suit against a railway for damages for loss is not one in respect of which leave to appeal can be granted under S. 109 (*c*). 48 I.A. 31; 52 I.A. 207, foll. 1940 All. 38, rel. (*Bhandari and Harnam Singh, JJ.*) GOVERNOR-GENERAL IN COUNCIL *v.* JALLAN & SONS, LTD. 4 D.L.R. (Simla) 248=A.I.R. 1949 E. P. 370.

———S. 109 (c)—*Certificate of fitness under—When could be granted.*

As a case falling under S. 109 (*c*) of the Code is not restricted by the general conditions regarding valuation, etc., a most exceptional case has to be made out before a case is certified to be a fit one for appeal to the King in Council under that provision of law. For a case to be so certified, the matter involved must be of great general or of great private importance and must not be measurable in terms of money. 1948 R.D. 406 and 1941 All. 211, ref. to. (*Lal, J. M. I.*) HANUMANT *v.* SURAJ PRASAD. 1949 R.D. 143.

———S. 109 (c)—*Fit case for appeal to P. C.—Question as to the nature of a holding—Finding of fact.*

Where the only questionn for decision in a declaratory suit is whether the holding in question was ancestral or not, the finding arrived at is just a question of fact. It cannot be said that there is any law point of special importance in such a case to justify leave being granted under S. 109 (*c*) of the C. P. Code to appeal to the Privy Council. (*Sultan Ahmad, S.J.M.*) JAGANNATH *v.* KAJICHARAN. 1948 A.W.R. (Rev.) 10.

———S. 109 (c)—*Fit case for granting leave to appeal—Case not considered even fit for admission on revisional side.*

Where a case was not considered even fit for admission on the revisional side, and is dismissed there is certainly no case fit for leave to appeal to the Privy Council or, in the alternative, to the Federal Court under S. 109 (*c*), C. P. Code. (*Atma Charan, J.C.*) BENI GOPAL *v.* SOBHAG MAL. 5 D.L.R. (A.M.) 40=A.I.R. 1950 Ajmer 31 (2).

———S. 109 (c)—*Leave to appeal—Procedural defect acquiesced in.*

Where a party has not raised any objection to any procedural defect (if any), there is no reason to certify that case as a fit one to appeal under S. 109 (*c*) on the ground of that alleged defect. (*Atmacharan, J.C.*) BENI GOPAL *v.* DAMODAR Das. 5 D.L.R. (A.M.) 41=A.I.R. 1950 Ajmer 33.

———S. 109 (c) and 100—*Leave to appeal to Federal Court—Substantial question of law—Meaning—Question of admissibility of a document by Courts below—Not a substantial question of law.*

Every question of law is not substantial. "Substantial" in the context in which it is used in S. 110 of the C. P. Code means substantial as between the parties and not necessarily of general importance to the public; but it does not make it any the less essential, that the question should be substantial, that is to say, it must have some substance in it.

It cannot be said that whenever a question as to the admissibility of any document is raised in an appeal and that question is decided in one way, it follows *ipso facto* that there is a substantial question of law, which would justify the grant of a certificate under S. 100 of the Code.

Where the only question which arose for decision in an appeal was whether a lady, the mother of the plaintiff was one of the daughters of one *T* and the lower Courts answered it in favour of the plaintiff which later on was confirmed by the High Court, in an application for leave to appeal to the Federal Court under Ss. 109 and 110 of the C. P. Code on the ground of an improper admission of a paprticular document.

Held, that the decision as to the admissibility of a document peprtaining to the said relationship raised no substantial question of law within the meaning of S. 110 of the C. P. Code. The fact that there was an objection to the admissibility of a particular document, however important it might be, would not make it any other than a question of fact. (*Rajamannar, O.C.J. and Yahya Ali, J.*) RAMACHANDRA RAO *v.* NARAYANA RAO. 61 L.W. 508=1948 M.W.N. 512=A.I.R. 1949 Mad. 156=4 D.L.R. (Mad.) 26=(1948) 2 M.L.J. 109.

———Ss. 109 (c) and 110—*Order on preliminary issue as to jurisdiction—Appealability—Inadequacy of certificate—Power of Court to grant special leave.*

Fazal Ali, J.—An order deciding a preliminary issue as to jurisdiction and remanding a

Majesty in Council under S. 109 (*c*), C. P. Code, suit for disposal is certainly not a decree and it is also not a final order because it has not finally disposed of the rights of the parties, since the suit has been remanded to the trial Court to be decided on merits and is not appealable under S. 110, C. P. Code.

No doubt when the High Court grants a proper certificate under S. 109 (*c*), C. P. Code, an appeal will be entertained by the Federal Court even against an order which is not final.

When a certificate purports to have been granted by the High Court under S. 110, C. P. Code, it is open to the Federal Court to see whether the case fulfils all the requirements of that section. If it is found that the case does not fulfil any of the requirements the Federal Court may refuse to entertain the appeal in spite of the certificate. When a certificate is intended to be given by the High Court under S. 109 (*c*) of the Code, there must be some indication in the certificate or the order granting leave to appeal, of the nature of the question involved in the appeal and it must show that the judicial mind of the Court has been applied to determine that though the case does not fulfil the requirements of S. 110 it is still a fit case for exercising the discretion conferred on the High Court by S. 109 (*c*).

The objection based on the inadequacy of the certificate is more than a technical objection and constitutes a serious obstacle to the entertainment of an appeal.

Though in a proper case when the interests of justice so demand, the Federal Court can entertain an appeal after granting special leave, even though the certificate granted by the High Court is defective, where parties are fighting on a very unreal issue, it is hardly a fit case either for granting special leave or for invoking the discretionary jurisdiction of the High Court to grant a certificate under S. 109 (*c*) of the Code.

Mahajan, J.—It is not possible to dismiss this appeal on the ground that a proper certificate under S. 109 (*c*) of the Code has not been granted by the High Court. Even if the certificate is defective, the Federal Court has ample power to grant special leave and in this case such leave can be granted because of the admitted diversity of judicial opinion on the meaning of the expression "suit for land" in clause 12 of the Letters Patent. (*Kania, C.J., Fazl Ali, Patanjali Sastri, Mehrchand Mahajan and Mukherjea, JJ.*) Moolji Jaitha & Co. *v.* Khandesh Spinning and Weaving Mills Company, Limited. A.I.R. 1950 F.C. 83=1950 S.C.J. 51 (F.C.).

———S. 109 (c) and O. 45, R. 3—*Otherwise fit—Matter of* private *importance—If covered.*

The cases in order to fall within the orbit of "otherwise fit" need not be only those of "public" importance but can also be a case of *private* importance. (*Iqbal Ahmad, C. J. and Sinha, J.*) Aisha Begam *v.* Kundan Jan. I.L.R. (1946) All. 221=224 I.C. 250=1946 A. (Rul.) 318=1945 A.L.J. 545=1945 A.W R. (H.C.) 383=A.I.R. 1946 All. 184.

———S. 109 (c)—*Petty litigation—Grant of certificate by High Court—If justified.*

The High Court will not be justified in granting a certificate for leave to appeal to His in a petty litigation where the subject-matter in dispute is only 13 marlas of land, although it raises an important question of general importance, as it would be wrong to put the respondent to the expense of the appeal. (*Abdul Rashid, C.J., Ram Lall, Abdur Rahman, Mahajan and Cornelius, JJ.*) Mt. Shankri *v.* Milkha Singh. I.L.R. (1947) Lah. 696=A.I.R. 1947 Lah. 304 (F.B.).

———S. 109 (c)—Substantial question of law—If sufficient for granting of leave. *See* C. P. Code (V of 1908), Ss. 110 and 109 (*c*). (1949) I M.L.J. 518.

———S. 110—*Affirming decree—Appeal dismissed—Variation in final decree due to success of cross-objection without contest on one point.*

A variation in the final decree of the High Court due to the success of the cross-objection without contest on one particular point when the appeal itself has been dismissed, does not take the decree out of the category of an affirming decree. Where the proposed appeal is only against decisions on which the High Court is in complete agreement with the Court below, and on the point on which the High Court is at variance with the Court below there is in fact no appeal at all, leave to appeal to Privy Council should not be given. (*Grille, C. J. and Pollock, J.*) Abdul Majid Khan *v.* Dattoo Raoji. I.L.R. (1946) Nag. 609=1946 N.L.J. 278=A.I.R. 1946 Nag. 307.

———S. 110—*Affirming decree—Decree of High Court partly maintaining decision of court below and partly reversing it—Appeal to Privy Council confined to part affirmed.*

For the purposes of S. 100, C. P. Code, a decree of the High Court which partly mantains the decision of the court below and partly reverses it cannot be deemed to be one of affirmance although the subject-matter of the appeal to the Privy Council is confined only to that part of the decree which affirms the decision of the Court below. (*Iqbal Ahmad, C.J. and Sinha, J.*) Jamnakunwar *v.* Lal Bahadur. I.L.R. (1946) All. 328=222 I.C. 240=1946 A. (Rul.) 155=1946 A.L.W. (H.C.) 152=1946 O.W.N. (H.C.) 144=1946 A.W.R. (H.C.) 243=A.I.R. 1946 All. 262.

———S. 110—*Affirming decree—Decree of High Court varying decree of trial Court but affirming it so far as proposed appellant is concerned.*

Where a decree of the High Court varies the decree of the trial Court but affirms it so far as it concerns the proposed appellant, the decree is not a decree of affirmance and the proposed appellant can appeal to the Federal Court as of right. (*Harries, C.J. and Sarkar, J.*) Purnendu Nath *v.* Sree Radhakanta Jew. 54 C.W.N. 538.

———S. 110—*Affirming decision—Order dismissing appeal for default.*

An order dismissing an appeal for default affirms the decision of the trial Court within the meaning of S. 110, C. P. Code. (*Wali Ullah and Bind Basni Prasad, JJ.*) Ganesh Prasad *v.* Mt. Makhna. A.I.R. 1948 All. 375.

———S. 110—*Affirming decree—Suit for partition and separate possession of two sets of proper-*

ties—Decree as sued for—Appeal—Confirmation as to one and modification as to other—First property worth more but second worth less than Rs. 10,000—Leave to appeal—Right to.

A suit for partition and separate possession comprised two sets of properties *A* and *B*, which were both claimed under one and the same title, though the High Court appeal held that they devolved under different titles. *A* was over, but *B* was under Rs. 10,000 in value. The trial Court decreed the entire claim, but in appeal the High Court upheld the decree only in respect of property *A*, making a small modification in respepct of *B*, the modification being in the defendant's favour to some extent. The defendant applied for leave to appeal to His Majesty-in-Council. It was found that the dispute regarding *A* involved no substantial question of law, while that relating to *B* did.

Held: (1) that since both *A* and *B* properties were in suit, both formed the subject-matter of the suit, though held under different titles; and the value of both being over Rs. 10,000, the condition as to value of the subject-matter was satisfied;

(2) that the second condition as to the value in appeal was also satisfied, because the subject-matter in appeal comprised both properties *A* and *B*, the combined value of which was above Rs. 10,000;

(3) that the decree of the High Court was not one of affirmance, because it modified the decree of the trial Court in respect of *B* property to some extent, and since the appeal was against the whole decree, the decree in appeal looked at as a whole did not affirm that of the Court below, but reversed it, and therefore the requirement as to a substantial question of law was not attracted. (*Bose and Niyogi, JJ.*) Mir Riayat Ali *v.* Mir Mahomed Ali. **I.L.R.** (1946) Nag. 693=1946 Nag. (Rul.) 244=226 I.C. 457=1946 N.L.J. 593=A.I.R. 1947 Nag. 93.

———S. 110—*Affirming decree—Test—Decree partly reversed and partly affirmed—Scope of appeal.*

In order to determine whether a decree is one of affirmance or not within the meaning of S. 110, C. P. Code, the true test is whether the decision of the Court below as a whole has been affirmed by the High Court and not whether the decision on the point or points left in dispute have been affirmed by the High Court. Where the decision has been partly reversed and partly affirmed by the High Court, an appeal to the Privy Council may be preferred against the whole decree and need not be confined to the points on which it has been reversed. (*Morten and Teja Singh, JJ.*) Attar Kaur *v.* Gopal Das. 49 P.L.R. 51=A.I.R. 1948 Lah. 1.

———S. 110—*"Affirming decree"—Variation by High Court in favour of party applying for leave to appeal—Effect of—Suit for partition by adopted son—Adoption held invalid and suit dismissed but properties held to be joint family properties—High Court in appeal upholding adoption but holding only small part of property as joint family property—Decree—If one of affirmance.*

Even though the decree of the High Court varies the decision of the lower Court, it does not necessarily follow that it cannot be regarded as a decree of affirmance for purposes of S. 110, C. P. Code.

In a suit for partition of joint family properties claiming a share therein as an adopted son and for possession of that share, the trial Court, while holding that all the properties in suit were joint family properties dismissed the suit on the ground that the adoption, though true, was invalid. On appeal to the High Court that Court set aside the decree of the trial Court and held that the adoption was true and valid; it further held that out of properties mentioned in the suit only a house and two items of *kulkaran watan* lands were joint family properties and the plaintiff's claim was allowed in respect of these items, the claim in respect of the other items being rejected. The plaintiff applied for leave to appeal to the Privy Council.

Held, that the variation in the decision of the Court below was in favour of the applicant, and the decree was to be regarded as one of affirmance, and hence it was necessary for the applicant to show that the appeal involved a substantial question of law. 31 Bom.L.R. 619; 1944 Mad. 890; 26 Lah. 242, foll. 30 I.A. 35; 51 I.A. 319; 1947 P.C. 189; 43 All. 220; 20 (*Dixil and Jahagirdar, JJ.*) Govind Dhondo *v.* Pat. 459; 1937 Bom. 708; 1938 Mad. 696, ref. Vishnu Keshav. I.L.R. (1948) Bom. 821=A.I.R. 1949 Bom. 164=51 Bom.L.R. 168.

———S. 110—*Affirming decree—Variation of decree in respect of costs only.*

Where the only variation that is made by the appellate Court is in respect of the costs as awarded by the lower Court but otherwise absolutely affirms the decree of the lower Court, leave to appeal to Supreme Court cannot be granted unless some substantial question of law is involved. I.L.R. 2 Luck. 98 (P.C.), followed. (*Atma Charan, J.C.*) Daulat Ram *v.* Prem Das. 5 D.L.R. (A.M.) 37=A.I.R. 1950 Ajmer 28 (2).

———S. 110—*Affirming judgment—Rejection of application for admission of appeal as time-barred.*

An order rejecting an application for admission of an appeal on the ground that it is barred by limitation, is not an order affirming the decision of the Court below within the meaning of S. 110, C. P. Code. 36 A. 350 (P.C.), appl. (*Mitter and Sharpe, JJ.*) Purnendu Nath Tagore *v.* Kanailal Ghoshal. I.L.R. (1948) 2 Cal. 202.

———S. 110—Affirming judgment—Variation of decree by consent of parties—Effect—Leave to appeal. [*See* Q.D. 1941-1945, Vol. I, Col. 958.] Prandhandas *v.* Promode Chandradeb. 222 I.C. 455=12 B.R. 279=27 P.L.T. 102=1946 Pat. (Rul.) 111=A.I.R. 1946 Pat. 19.

———S. 110—*Appealability—Test—Suit for ejectment and damages—Decree for ejectment and damages at a particular rate—High Court confirming decree for ejectment and modifying the quantum of damages in favour of the defendants—Subject-matter of suit and appeal more than Rs. 10,000 in value—Leave to appeal to*

Federal Court by the defendants, if can be granted.

A suit for ejectment of the defendants from a picture house was decreed and a decree for damages was also passed in favour of the plaintiffs at the rate of Rs. 200 a day from a particular date to the date when defendants might hand over possession. The High Court agreed with the trial Court as regards ejectment but as regards the quantum of damages the decree of the lower Court was modified in favour of the defendants in certain ways. Both the subject-matter of the suit and appeal exceeded Rs. 10,000. On the question whether the defendants were entitled to appeal to the Federal Court as the decree was not one of affirmance in its entirety of the decree of the trial Court,

Held, leave to appeal to the Federal Court should be granted.

Per *Horwill, J.*—It would be in accord with the principles accepted and followed in (1946) 2 M.L.J. 465: I.L.R. (1947) Mad. 744, to grant leave to appeal on the ground that decree of the High Court is not one of affirmance on the question of damages.

Per *Raghava Rao, J.*—If *quo ad* the party seeking leave to appeal, the decree sought to be appealed against is not one of wholesale affirmance, it does not matter in what particular or to what extent the variation has taken place or whether the variation wholly or to the extent to which it has gone is in favour of the party seeking to appeal or against him. In such a case, so long as the statutory requirements of value of the subject-matter of the suit as well as of the proposed appeal, inclusive of course even of portions on which there have been concurrent findings against the party seeking leave, to appeal, stands satisfied, the party is entitled, without showing that a substantial question of law is involved in the proposed appeal, to a certificate which cannot be limited by the exclusion of such portions of the subject-matter from its ambit. (1946) 2 M.L.J. 465: I.L.R. (1947) Mad. 744, commented upon.

Even on the narrower view adopted by this Court in (1940) 2 M.L.J. 465: I.L.R. (1947) Mad. 744, the applicant is entitled to the certificate asked for. (*Horwill and Raghava Rao, JJ.*) VIRARAGHAVA RAO *v.* NARASIMHA RAO. I.L.R. (1950) Mad. 381=63 L.W. 1089=A.I.R. 1950 Mad. 124=(1949) 2 M.L.J. 343.

———S. 110—*Applicability—Claim to or question relating to property of value over Rs.* 10,000 *—Suit for share in dower of Rs.* 40,000*—Other sharers impleaded as defendant—Dismissal—Reversal by High Court in appeal—Decree for less than Rs.* 10,000 *representing share of plaintiff—Application by defendant for leave to appeal to Privy Council—Competency.*

A suit by one of the heirs of a Mahomedan lady for his share of the dower of Rs. 40,000 payable to her impleading the other heirs as *pro forma* defendants was dismissed by the trial Court; but on appeal, the High Court reversed the decree of the trial Court and passed a decree for the plaintiff's share, amounting to Rs. 6,668-8-8, finding that the total dower was fixed at Rs. 40,000. The defendant applied for leave to appeal to the Privy Council. The plaintiff contended that as the decree in his favour was only for a sum below Rs. 10,000, the value of the claim or question could not, by any stretch of reasoning, be held to be above Rs. 10,000.

Held, that the decree of the High Court was one of reversal of the trial Court's decree, and involved directly or indirectly a claim or question to or respecting property of value above Rs. 10,000, and the applicant was therefore entitled as of right to a certificate of leave to appeal to the P.C., under S. 110, C.P. Code. (*Manohar Lall and Mukharji, JJ.*) BASHIR MD. KHAN *v.* MD. K. A. KHAN. 26 Pat. 371=A.I.R. 1948 Pat. 372.

———S. 110—*Applicability—High Court decreeing suit setting aside fourteen sales and a power of attorney—Leave to appeal to the Privy Council granted to three vendees only as regards the sales in their favour—Value of the subject of the suit and that of properties in dispute in appeal in the aggregate exceeding Rs.* 10,000*—Granting of leave, if proper.*

The High Court decreed a suit setting aside fourteen sales and a power of attorney and granted leave to appeal to the Privy Council to three of the vendees only as regards the sales in their favour. The value of the subject of the suit in the Court of the first instance was upwards of Rs. 10,000 and the value of all the properties in dispute on appeal to the Board exceeded, in the aggregate this sum.

On a preliminary objection that the High Court had no power to grant leave having regard to the terms of S. 110, C. P. Code, for the purposes of which the case of each appellant must be regarded *separately,*

Held, negativing the objection, the case was not one of an appeal involving several appellants each of whom sued or was sued in respect of some distinct or unrelated cause of action and it was unnecessary to consider the applicability of S. 110, C. P. Code, and on the facts of the appeal there was but one "matter in dispute," and the mere circumstance of a plurality of appellants cannot make it otherwise. (*Lord Mac Dermott.*) PETHU REDDIAR *v.* RAJAMBU AMMAL. 75 I.A. 153=I.L.R. (1949) Mad. 211=62 L.W. 881=1948 A.L.J. 228=1948 M.W.N. 441=3 D.L.R. (P.C.) 1=A.I.R. 1948 P.C. 97=50 Bom.L.R. 503=52 C.W.N. 892=(1948) 2 M.L.J. 25 (P.C.).

———S. 110—*Decree in respect of* 6 *out of* 11 *items claimed valued at more than Rs.* 10,000*—Appeal by defendant against the decree and cross-objections by plaintiff in regard to* 4 *out of* 5 *items disallowed—Dismissal of appeal and allowing of cross-objections—Value of items allowed less than Rs.* 10,000*—No question of law involved—Leave to appeal to Privy Council by defendants as against the decree in regard to all the* 10 *items—Competency—Decree of High Court one of variation and not of affirmance—Certificate to issue as of right.*

Plaintiff the reversioner to the estate of S.

claiming to be entitled to all the 11 items of property of *S* valued at Rs. 31,304 sued for a declaration that they belonged to *S* and that a settlement deed executed by *S's* mother in respect of them was void. The trial Court gave the plaintiff a declaration in respect of 6 out of the 11 items of property claimed valued at Rs. 21,214. The defendants appealed to the High Court and the plaintiff filed a memorandum of cross-objection in which he said that the subordinate Judge should have declared him to be entitled to 4 more of the disallowed 5 items. The value of these 4 items was Rs. 9,190. The appeal was dismissed while the cross-objections were allowed. The defendants wanted to appeal to the Privy Council in respect of all the 10 items. On an objection by the plaintiff that as there were concurrent findings so far as 6 items of the property are concerned, the defendants could only appeal with regard to the items awarded by the High Court in appeal and they in themselves did not fulfil the requirements of the C. P. Code with regard to value, there being no question of law involved.

Held, that the petitioners wished to challenge in the appeal to the Privy Council the validity of the plaintiff's claim with regard to 10 out of 11 items of property and the High Court's decree varied the decree in respect of four of the items. This being a decree of variation and not of affirmance, the petitioners are entitled as of right to a certificate under the provisions of S. 110, C. P. Code. 51 M.L.J. 295, overruled. (*Leach, C. J., Lakshmana Rao and Rajamannar, JJ.*) GANGADARA AYYAR *v.* SUBRAMANIA SASTRIGAL. I.L.R. (1947) Mad. 6=228 I.C. 420=1947 Mad. (Rul.) 74=59 L.W. 387=1946 M.W.N. 483=A.I.R. 1946 Mad. 539=(1946) 2 M.L.J. 69 (F.B.).

———S. 110—*"Involve directly", etc.—Mortgage of property worth more than Rs. 10,000—Suit for amount less than Rs. 10,000—Decree for amount exceeding Rs. 10,000, including a post litem interest—Leave to appeal.*

In a suit to enforce a mortgage, claiming an amount of less than Rs. 10,000, there was a decree for an amount more than Rs. 10,000, including *post litem* interest. The value of the mortgaged property was more than Rs. 10,000. The mortgagor applied for leave to appeal to the Privy Council.

Held, that a mortgage suit was concerned exclusively with the amount due on the mortgage to the mortgagee and unless the amount exceeded Rs. 10,000 it would not satisfy the requirements of the first paragraph of S. 110, C. P. Code, that the subject-matter of the suit must be that sum. 1937 All. 169, Diss. 39 Mad. 843, rel. on. (*Agarwala, C.J. and Narayan, J.*) SATIBALADASI *v.* CHOTA NAGPUR B. A. LTD. 27 Pat. 237=A.I.R. 1949 Pat. 448.

———S. 110—*Leave to appeal to Federal Court—Grant of—Guiding principles to be borne in mind.*

Where an application is made to the High Court under S. 110, C. P. Code, for the grant of leave to appeal to the Federal Court, the Court must bear in mind some very fundamental principles. The first is that the High Court is the final Court in the Province normally and ordinarily; another is that law favours a finality in litigation and that it is only in the special circumstances laid down in the code that a litigant is entitled to travel outside the Province and go to the Federal Court. Where the trial Court as well as the Court of appeal have concurred in their judgments, it is for the petitioner seeking leave to appeal to satisfy the High Court that a substantial question of law arises which requires further deliberation and adjudication by the highest Court. At the same time, in spite of the fact that both the Courts have arrived at the conclusion, if they have done by different processes of reasoning, if those processes of reasoning are inconsistent or self-destructive there would be justification for allowing the matter to be further considered by the Federal Court. But when those processes of reasoning supplement each other and the result is that the ultimate conclusion reached by both Courts is reinforced by the reasoning which each of them has advanced, there is no ground for further consideration. (*Chagla, C. J. and Gajendragadkar, J.*) KAIKHUSHROO PEROJSHA GHIARA *v.* C. P. SYNDICATE LTD. 50 Bom.L.R. 744=A.I.R. 1949 Bom. 134=4 D.L.R. (Bom.) 20.

———S. 110—*Requirements of section—Valuation of subject-matter—Leave to appeal to Federal Court.*

Under para. 1 of S. 110, C. P. Code, where the subject-matter of the suit in the Court of first instance was less than Rs. 10,000, it must be the same as far as the petitioner is concerned for leave to appeal to the Federal Court. Under para. 2 of the section, the Court has to consider what is the detriment to the petitioner, and if that is less than Rs. 10,000, then, whatever may be the value of the property in suit, the case does not fulfil the requirements of the section. The phrase "directly or indirectly" refers to suits in existence and cannot be stretched to refer to suits *in germio futuri*. 9 R. 53 and 24 A. 236, referred to. (*Khosla and Kapur, JJ.*) TEJ KRISHEN *v.* DELHI CLOTH AND GENERAL MILLS CO., LTD. 5 D.L.R. (Simla) 119=A.I.R. 1950 E.P. 195.

———S. 110—*Right of appeal to Privy Council—Though appeal failed decision modified partly on cross-objections—No substantial question of law.*

Where the main appeal against the decision of the trial Court fails, but the decision is partly modified on cross-objection and there is no substantial question of law, the appellate decree does vary the decision of the trial Court as contemplated by S. 110, C. P. Code, so as to entitle the appellant to go up to the Privy Council. (*Misra, Kaul and Kidwai, JJ.*) ABDUR SAMAD ANSARI *v.* AISHA BIBI. 22 Luck. 461=1947 O.A. (C.C.). 119=1947 O.W.N. 369=A.I.R. 1948 Oudh 76=1947 A.W.R. (C.C.) 119 (F.B.).

———S. 110—*Substantial question of law.*

A question which has been well considered in previous decisions of the Privy Council is not a substantial question of law within the meaning of

S. 110 of the C. P. Code, for the purpose of granting leave to appeal to the Privy Council (*Nehru, A.M.*) Bahadur v. Banshi. 1947 A. W.R. (Rev.) 113.

———**S. 110 and O. 32, R. 3 (4)**—*Substantial question of law—Failure to serve notice on minors under O. 32, R. 3 (4).*

After the decision of their Lordships of the Privy Council in I.L.R. 30 Cal. 1021, that failure to serve notice on the minors under O. 32, R. 3 (4), C. P. Code, is a mere irregularity and is not fatal to the suit, it cannot be contended that such an irregularity involves a substantial question of law. (*Oak, J.C.*) Panmal v. Narain Singh. A.I.R. 1950 Ajmer 62.

———S. 110—*Substantial question of law—Inference as to nature of property* (e.g.) *whether* debutter *or secular.*

If a Court is asked to infer from evidence the legal nature of a certain property, (*e.g.*) whether it is to be regarded as *debutter* or secular, the inference would be an inference of law and not of fact. Where the oral evidence as to the user of the property is in conflict and there is not much evidence to establish the *debutter* nature of the property, the question whether the High Court is right in inferring from such evidence that the property is *debutter,* is a substantial question of law giving rise to a right of appeal to the Federal Court. (*Harries, C.J. and Sarkar, J.*) Purnendu Nath v. Sree Radhakanta Jew. 54 C.W.N. 538.

———S. 110—*"Substantial question of law"—Meaning of.*

A question of law is substantial if it is substantial as between the parties to the suit. A question of law is substantial as between the parties if the decision turns one way or another on the particular view taken of the law. If it does not affect the decision then it cannot be substantial as between the parties. But if it substantially affects the decision then it is substantial as between the parties though it may be wholly unimportant to others. The construction of a compromise which forms the root of title and whether it is possible, as a matter of law, to infer that there was a compromise, and as to what the terms were, from the material on record, are not only questions of law but are substantial questions of law as between the parties when the decision of the case turns upon those questions. 2 Luck. 93 (P.C.), foll. 1940 Nag. 29 and 1948 Mad. 111, Comm. on. (*Bose, A.C.J. and Padhye, J.*) Dinkar Rao v. Rattansey Asariya. I.L.R. (1949) Nag. 224=A. I.R. 1949 Nag. 300=1949 N.L.J. 125=4 D.L. R. (Nag.) 56.

———S. 110—*"Substantial question of law"—Meaning and essentials of—Construction of document or decree.*

A substantial question of law within the meaning of S. 110, C. P. Code, is not necessarily a question of public importance; it must be a substantial question of law as between the parties to the case involved. What is contemplated is not a question of law alone; it must be a substantial question of law. Where the question of law is not well settled or when there is some doubt as to the principle of law involved, it would certainly be "a substantial question of law."

The question of construction of a document or a decree is certainly a question of law; but every construction of a document or decree does not necessarily involve a substantial question of law. (*Chagla, C.J. and Gajendragadkar, J.*) Kaikushroo Pirojsha Ghiara v. C. P. Syndicate, Ltd. 50 Bom.L.R. 744=A.I.R. 1949 Bom. 134=4 D.L.R. (Bom.) 20.

———S. 110—*Substantial question of law of general interest—Question of jurisdiction of the Civil Court in view of S. 211 of the U. P. Municipalities Act.*

Where a question as to the bar of jurisdiction of the Civil Court by virtue of the provisions of S. 211 of the U. P. Municipalities Act is involved, as cases of such character come before the Court frequently, it cannot be denied that the question is a substantial question of law of general interest so as to satisfy the condition in the third part of S. 110, C. P. Code. (*Verma C.J. and Sinha, J.*) Chail Behari Lal v. Municipal Board, Agra. I.L.R. (1948) All. 99=1947 A.L.J. 616=1947 A.W.R. (H.C.) 412=2 D.L.R. 685=A.I.R. 1948 All. 189.

———S. 110—*Substantial question of law—Income from forest produce—Liability to tax—Question of—If justifies grant of leave.*

The question whether income from self-grown forest produce is agricultural income within the meaning of the Income-tax Act is a substantial question of law within the meaning of S. 110, C. P. Code, and would justify the grant of a certificate for an appeal to the Privy Council. (*Madeley and Misra, JJ.*) Mustafa Ali Khan v. Commissioner of Invome-tax, U. P. & C. P. (1946) I.T.R. 265.

———S. 110—*Substantial question of law—"Malikhana"—Income from—Liability to income-tax—Question of—Leave to appeal.*

The question whether income from "malikhana" is liable to income-tax is a substantial question of law within the meaning of S. 110, C. P. Code. (*Madeley and Misra, JJ.*) Mustata Ali Khan v. Commissioner of Income-tax, U. P. & C. P. (1946) I.T. R. 265.

———S. 110—*Substantial question of law—Order dismissing appeal for default.*

Per *Wali Ullah, J.*—An order dismissing an appeal for default does not involve a substantial question of law within the meaning of S. 110, C. P. Code, as the only question before the Privy Council if an appeal is preferred will be whether or not the Court was justified, under the circumstances of the case, in dismissing the appeal. (*Wali Ullah and Bind Basni Prasad, JJ.*) Ganesh Prasad v. Mt. Makhna. A.I.R. 1948 All. 375.

———S. 110—*Substantial question of law—Payment of annuity with interest—Liability to income-tax—Quesion as to—Leave to appeal.*

The question whether certain payments of annuity with interest are liable to income-tax is a substantial quesion of law for purposes of appeal to the Privy Council under S. 110, C. P. Code. (*Madeley and Misra, JJ.*) Mustafa Ali Khan *v.* COMMISSIONER OF INCOME-TAX, U. P. &. C.P. (1946) I.T.R. 265.

———S. 110—*Substantial question of law—Principle of law well established—Application of those principles to a particular set of facts—Hindu Law—Joint family—Blending of separate property—Test.*

Where the principles of law on a point are well settled and the only question is the application of those legal principles to a particular set of facts, it cannot be said that a substantial question of law arises.

The test for determining whether there had been a blending of separate with joint family property by a Hindu is the intention of the person dealing with the properties and the various matters which may legitinately be considered by the Courts in order to determine what the intention of the persons concerned was have been already indicated by the Privy Council and as there could be no enunciation of any fresh legal principle leave to appeal cannot be granted on the question whether the circumstances in any particular case would justify an inference of "blending." (*Shalabuddin, J.*) CHINNASWAMI *v.* NALLAPPA REDDIAR. 60 L.W. 511=1947 M.W.N. 497=A.I.R. 1948 Mad. 111=(1947) 2 M.L.J. 194.

———S. 110—*Substantial question of law—Question of law definitely settled by High Courts in India.*

A question of law which has been definitely settled by the High Courts in India and on which there is no difference of opinion, is not a substantial question of law within the meaning of S. 110, C. P. Code. (*Bhandari and Harnam Singh, JJ.*) NIKA SINGH *v.* RAM CHAND. 51 P.L.R. 95=A.I.R. 1949 E. P. 330=4 D.L.R. (Simla) 208.

———S. 110—*Substantial question of law—What is—Case involving important rights of parties—Sufficiency.*

The fact that the case is one which is undoubtedly important and in which important rights are in question does not necessarily mean that substantial questions of law arise out of the judgment of the Court so as to entitle an applicant to leave to appeal to the Federal Court. (*Imam and Narayan, JJ.*) JANKI PRASAD *v.* RAMKRIPAL PANDEY. A.I.R. 1950 Pat. 305.

———S. 110—*Substantial question of law—What is—Question of Court-fee, if one.*

A substantial question of law within the meaning of S. 110, C. P. Code, does not mean a question of general importance but only a substantial question of law as between the parties in the case. The question of the payment of the proper Court-fee is no question between the parties and is just a question between the state on the one hand and the plaintiff in the suit on the other and so would not be substantial question of law. (*Atma Charam, J.C.*) DAULAT RAM *v.* PREM DAS. 5 D.L.R. (A.M.) 37=A.I.R. 1950 Ajmer 28 (2).

———S. 110—*"Subject-matter"—Valuation of—Suit to declare several alienations by Hindu alienor invalid—Alienees different—Suit founded on common cause of action—Value of all alienated properties—If to be taken—Mesne profits—Not ascertained—If to be included.*

In a suit to have it declared that various alienations effected by a Hindu alienor were invalid, founded on a common cause of action, the value of the subject-matter of the suit, for purposes of S. 110, C. P. Code, is the value of all the properties, though the alienees are different; and if such value exceeds Rs. 10,000 a certificate under S. 110, C. P. Code, will issue.

Obiter: The mere fact that mesne profits have not yet been ascertained is no ground for not including the value of the mesne profits for the purpose of ascertaining the value of the subject-matter of the appeal to His Majesty in Council under S. 110, C. P. Code. (*Somayya and Chandrasekhara Ayyar, JJ.*) PETHU REDDIAR *v.* RAJAMBA AMMAL. 226 I.C. 398=1946 M.W.N. 401=1946 Mad. (Rul.) 261=A.I.R. 1946 Mad. 458=(1946) 1 M.L.J. 245.

———S. 110—*Valuation—Approbate and reprobate—Plaint giving low valuation—Defendant disputing and alleging higher value but not pressing plea—Suit proceeding on plaintiff's valuation—Application for leave to appeal to Federal Court on allegation of higher value—Plea by defendant of lower value—If barred.*

Where in a suit the defendants disputed a low valuation given by the plaintiffs and alleged a higher valuation, but did not press their point and accepted the valuation of the plaintiff and the suit proceeded on the basis of the valuation given by the plaintiffs, the defendants are not estopped from taking objection to a higher valuation given by the plaintiffs in an application for leave to appeal to the Federal Court, so as to make out that the property was worth more than Rs. 10,000. The principle of approbate and reprobate does not arise in such a case so as to preclude the defendants from contending that the value of the properties is not such as to entitle the plaintiffs to the grant of leave. (*Imam and Narayan, JJ.*) JANKI PRASAD *v.* RAMKRIPAL PANDEY. A.I.R. 1950 Pat. 305.

———Ss. 110 and 109 (c)—*Valuation—Court of first instance—Meaning—Arbitrators, if can be described as such—Claim before arbitrators exceeding Rs. 10,000—Award for a lesser sum—Amount due with interest as per award less than Rs. 10,000 on the date of filing in the High Court of the petition to pass a decree in terms of the award—Decision of the High Court on the petition on the Original Side reversed on appeal—Leave to appeal to the Federal Court against the decision on appeal—If can be granted—S. 109 (c)—Substantial question of law—If sufficient for granting of leave.*

Arbitrators cannot be described as the "Court of first instance" within the meaning of S. 110, C. P. Code. The word "Court" in that section must be understood with reference to the scheme of the Code in general and refers to one of the Couts in the hierarchy of Civil Courts in the country as envisaged by the Code.

A claim before the arbitrators was above Rs. 10,000. But the award was for a lesser amount. An application was made to the Original Side of the High Court to pass a decree in terms of the award. Even on that date the amount awarded together with interest as provided in the award was less than Rs. 10,000. The petition was dismissed but upon appeal this decision was reversed. On an application for leave to appeal to the Federal Court, it was contended that for purposes of S. 110 in regard to valuation "the Court of first instance" must be deemed to be the arbitrators.

Held: As the word "Court" in S. 110 refers to Courts as contemplated by the C. P. Code, in this case "the Court of first instance" must be held to be the High Court on the Original Side and as the value of the subject-matter in that Court was less than Rs. 10,000 leave to appeal could not be granted.

Though a case may involve a substantial question of law, it would not be a ground entitling a party to obtain leave to appeal because it is not every substantial question of law that can be treated as a question of public importance to justify the grant of a certificate under S. 109 (*c*), C. P. Code. (*Rajamannar, C.J. and Balakrishna Ayyar, J.*) BALASUBRAMANIA & Co. *v.* RADHAKRISHNAMURTHY. I.L.R. (1950) Mad. 245=62 L.W. 288=1949 M.W.N. 235=A.I.R. 1949 Mad. 741=4 D.L.R. (Mad.) 233=(1949) 1 M.L.J. 518.

———S. 110—*Valuation—Test.*

A suit for a declaration that the plaintiff was the sole owner of certain property of the value of over Rs. 10,000 and that the defendants *A* and *B* who had obtained decrees against the husband of the plaintiff had no right to proceed against it in execution and valued at Rs. 17,500 was decreed. But *B* who held a decree for a sum less than Rs. 10,000 appealed against the decree and his appeal was allowed. On a question whether the plaintiff could appeal to the Privy Council,

Held, that as the plaintiff was directly interested in the property which was worth more than Rs. 10,000 and the relief claimed was the sole ownership of that, the case satisfied the requirements of S. 110 (*b*) of the C. P. Code and leave to appeal could be granted. (*Verma and Sinha, JJ.*) RAM DEVI *v.* BADLU RAM. I.L.R. (1947) All. 806=1947 A.L.J. 315=A.I.R. 1948 All. 51.

———S. 110—*Value of subject-matter—Appeal to Federal Court—Application for leave—Report of valuation called for from lower Court—Finding of lower Court as to value—When to be challenged—Principles to be considered.*

Where in proceedings for leave to appeal to the Federal Court under S. 110, C. P. Code, the High Court calls for a report from the Court below as to the true value of the subject-matter of the suit at the time of the institution of the suit and at the time of the application for leave to appeal to the Federal Court, and the lower Court gives a valuation, in considering whether the valuation given by the Court is acceptable or whether there are good grounds for the finding of that Court as to the value of the subject-matter, what has to be looked is the principle

adopted in arriving at the valuation and not the precise particulars in the statements of the various witnesses examined by the lower Court or the documents admitted in evidence and considered by that Court unless it is shown that a wrong principle has been adopted, the valuation arrived at by the lower Court has to be accepted. (*Imam and Narayan, JJ.*) JANKI PRASAD *v.* RAMKRIPAL PANDEY. A.I.R. 1950 Pat. 305.

———S. 110—*Value of subject-matter in appeal to Privy Council—Computation—Decree of affirmance with a slight variation as to certain debts in a partition decree—Leave to appeal to Privy Council—When granted.*

The value of the subject-matter in dispute in an appeal to the Privy Council in a partition suit must be taken to be the value of the share in the joint family property in respect of which the appellant is claiming. When there is a slight variation of the decree which is wholly in favour of the proposed appellant and about which he has no grievance and in regard to other matters the appellate decree has affirmed the decree of the trial Court, the appellate decree is in the main one of affirmance within the meaning of S. 110 of the C. P. Code and the appellant cannot have because of the modification, a right of appeal on other points on which the Courts have concurred without showing that there is a substantial question of law involved. If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages, a variation to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmance. But where the question in dispute is on a totally different point such as the question of debts due by the family in a partition suit in regard to which the applicant has succeeded and succeeded altogether so that he has no further grievance in the matter, he cannot without showing a substantial question of law have a right to litigate upon other points upon which the Courts have been in agreement. (*Wadsworth, O.C.J. and Yahya Ali, J.*) LAKSHMANAN CHETTIAR *v.* THANGAM. I.L.R. (1947) Mad. 744=1947 M.W.N. 26=60 L.W. 151=A.I.R. 1947 Mad. 227=(1946) 2 M.L.J. 465.

———S. 110—*Value of suit and appeal exceeding Rs. 10,000—Appeal allowed in part—Leave to appeal—If to be granted.*

Where the value of the suit and the value of the appeal exceeds Rs. 10,000 and the appeal is allowed in part and a portion of the decree of the trial Court is vacated, the decree is not a decree of affirmance but is a decree varying the decree of the Court below, and the appellant is entitled as of right to a certificate granting leave to appeal under S. 110, C. P. Code. (*Harries, C.J. and Banerjee, J.*) KEDAR NATH MUKHERJEE *v.* SREE SREE ISWAR KALIMATA. 5 D.L.R. (Cal.) 55=A.I.R. 1950 Cal. 341.

———S. 110 (3)—*Applicability—Question of law—Whether there was consideration for compromise—If can be raised for first time in appeal.*

The question whether there was or was not consideration for a compromise is a question of fact and not a question of law or a substantial question of law for purposes of granting leave to appeal to the Supreme Court under S. 110 (3), C. P. Code. Nor can such a question of fact be raised for the first time in appeal; it ought to be raised in the first Court itself and made the subject of an issue in that Court. (*Shearer and Das, JJ.*) GANGAMONI DEVI *v.* KUMUD CHANDRA MAZUMDAR. A.I.R. 1950 Pat. 478.

———S. 110, Para. 2—*Value of subject-matter of suit less than Rs.* 10,000—*Decree of High Court directly involving right valued over Rs.* 10,000.

A common Manager was appointed under S. 95 of the B. T. Act, in respect of several items of immovable property. Thereafter one *G* purchased an undivided four annas share in two of these items, and brought a suit for a declaration that the appointment of the common manager was illegal and for restoration to him of the said four annas share. To that suit he made all the proprietors parties-defendants. The High Court reversing the decree of the lower appellate Court held that the appointment of the common manager was illegal. The common manager filed an application for leave to appeal to His Majesty in Council. It was admitted that the value of the right of management of the four annas share was only Rs. 2,900.

Held, that as the value of the subject-matter of the suit in the Court of first instance and in appeal was below Rs. 10,000 the case did not fulfil the requirements of the first paragraph of S. 110, C. P. Code, but that the case came under the second paragraph of that section as the decree of the High Court directly involved the question of the management of the entire property, and the value of that right was over Rs. 10,000. (*Mitter and Akram, JJ.*) NURAL ABSAR *v.* HARIPADA BISWAS. 50 C.W.N. 255.

———S. 110 (3)—*Substantial question of law—Question never raised in Courts below or even in application for leave to appeal to Supreme Court—Grant of leave—Permissibility.*

An entirely new point, never taken at any previous stage of the litigation, nor even in the application for leave to appeal to the Supreme Court, cannot be urged or made the ground for granting leave to appeal. The question of law must definitely and clearly arise and must not be one newly raised; and leave to appeal cannot be granted for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, i.e., either in the trial Court or the appellate Court. A.I.R. 1940 Mad. 810, foll. (*Shearer and Das, JJ.*) GANGAMONI DEVI *v.* KUMUD CHANDRA MAZUMDAR. A.I.R. 1950 Pat. 478.

———S. 111—*Leave to appeal to Privy Council from decision of single Judge of High Court in second appeal—If can be granted—Leave to appeal under Letters Patent refused.*

S. 111, C. P. Code, is a bar to leave to appeal to His Majesty in Council being granted from a decision of a single Judge of a High Court sitting in second appeal, even where leave to appeal from it to Division Bench under the Letters Patent has been rejected. The section does not however affect the power of the Privy Council to grant special leave to appeal. 1936 Pat. 106, foll. (*Agarwala and Narayan, JJ.*) MOTILAL PARMANIK *v.* MT. JAGAT RANI DEVI. A.I.R. 1949 Pat. 77.

———S. 111—*Scope—If governs Cl. 31, Letters Patent (Pat.)—Order of single Judge in civil revision—Appeal to Supreme Court—Maintainability.*

There is no conflict between S. 111, C. P. Code, and Cl. 31 of the Letters Patent (Pat.); the latter is governed by the former and no appeal therefore lies to the Supreme Court under S. 111, C. P. Code, from an order of a single Judge of the High Court passed in the exercise of revisional jurisdiction. 6 Pat.L.J. 116, dist.; 23 Lah. 592 (F.B.); 17 P.L.T. 173; A.I.R. 1949 Nag. 96, ref.; 56 Cal. 512; 46 Mad. 958; A.I.R. 1931 Bom. 503, rel. (*Reuben and Jamuar, JJ.*) MAHADEO CHAUDHARY *v.* PARBATI DEVI. 5 D.L.R. (Pat.) 137.

———S. 114 and O. 47, R. 1—*Review application—Appeal also filed subsequently—Review application, if can be heard.*

The filing of an appeal subsequent to the filing of an application for review does not make the hearing of the review application incompetent. (*Dayal, Chandra and Sapru, JJ.*) BEHARI LAL *v.* GOBARDHAN LAL. I.L.R. (1948) All. 532=1948 A.L.J. 312=1948 O.W.N. 261=A.I.R. 1948 A. 353=3 D.L.R. (All.) 77=1948 A.L.W. 256.

———S. 115—REVISION.

Applicability.
Applicability of O. 22 to Revision applications.
Case decided.
"Case"—Meaning.
Court-fee—Decision as to—Revision.
Court subordinate.
Cross objections in revision.
Decisions extra cursum curiae.
Decree not in excess of award.
Delay in applying.
Discretion.
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Interference.
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Jurisdiction.
Material Irregularity.
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Revenue Court. (*See* C. P. CODE, S. 115 —COURT SUBORDINATE.)
—COURT SUBORDINATE.
Revision Competency.
Revisional Jurisdiction—Scope.
Scope and applicability.

——S. 115—*Applicability—Appellate order by District Judge under S. 476-B, Cr. P. Code—Procedure—Cr. P. Code, Ss.* 435 *and* 439—*Application of.*

An application in revision against an appellate order of a District Judge under S. 476-B, Cr. P. Code, is governed not by Ss. 435 and 439 Cr. P. Code, but by S. 115, C. P. Code. (*Fazl Ali, C.J., Manohar Lall and Ramaswami, JJ.*) DEONANDAN SINGH *v.* RAMLAKHAN SINGH. 27 Pat. 52=2 D.L.R. 492=A.I.R. 1948 Pat. 225=49 Cr.L.J. 246 (F.B.).

——S. 115—Applicability—Application under S. 47 dismissed as incompetent—Appeal also dismissed—Revision —Competency— Remedy— Second appeal. *See* C. P. CODE, Ss. 47 AND 145. 4 D.L.R. (Nag.) 47.

——S. 115—Applicability—Order by Magistrate under S. 110, Bombay Municipal Boroughs Act—Revision to High Court—Civil or criminal. *See* BOM. MUNICIPAL BOROUGHS ACT, S. 100. 52 Bom.L.R. 537 (F.B.).

——S. 115—Applicability—Order from which no appeal lies—Order under O. 32, R. 2—Revision —Competency. *See* C. P. CODE, O. 43, R. 1 (*a*). 4 D.L.R. (Cal.) 78.

——S. 115—*Applicability—Process for recovery of fine against property of deceased under S. 70, I. P. Code—Objection by person in possession—Order rejecting—Remedy—Revision—Competency.*

If a process for recovery of a fine or a penalty is issued against the property of a deceased person in the possession of another, the latter, if he does not pay the fine and thereby save the property, but wishes to oppose the recovery, he may sue the Government for a declaration that the deceased had no subsisting right or interest in the property and in that suit he may pray for an injunction against the execution of the process. He can of course still press his claim on the property direct in the Court which issues the process for recovery of the fine. But if he fails in that Court, his remedy is not by way of a revision application against the order, but only by suit. (*Trivedi, J.C.*) GAJASINGHJI *v.* KUTCH GOVERNMENT. A.I.R. 1950 Kutch 20=51 Cr.L.J. 643.

——S. 115 and O. 22—*Applicability of O.* 22 *to revision applications—Principles to be applied in regard to revisions generally* .

There is no provision of law laying down the procedure or law applicable for substitution of legal representative in revision applications. But as the remedy by way of revision is only discretionary, if the party does not apply for substitution in time, the proceedings will cease unless there are good grounds for the failure to apply in time. (*Kaul and Misra, JJ.*) KHUDA BUX KHAN *v.* MAHANAND TEWARI. 22 Luck. 373=A.I.R. 1948 Oudh 84=1947 O.W.N. 221=1947 O.A. (C.C.) 150=1947 A.W.R. (C.C.) 150.

——S. 115—*Case decided—Decision on preliminary issue of jurisdiction.*

No revision lies against a decision on a preliminary issue of jurisdiction because it does not amount to a "case decided" within the meaning of S. 115, C. P. Code. I.L.R. 43 All. 564, Rel. on. (*Chandiramani, J.*) MANNA LAL *v.* RAM GOPAL. A.I.R. 1950 All. 205.

——S. 115 and O. 32, R. 15—'Case decided'—Dismissal of application under R. 15 of O. 32, C. P. Code, for appointment of guardian *ad litem*—Revision. [*See* Q.D. 1941-1945, Vol. I, Col. 970.] DRIGRAJ KUNWAR *v.* AMAR KRISHAN NARAIN SINGH. 20 Luck. 454.

——S. 115—*"Case decided"—Interlocutory orders— Revision—Competency—Order refusing amendment of written statement.*

It cannot be laid down as an invariable rule that no application in revision will lie against any interlocutory order. Each order has to be looked at from the point of view as to whether it is a "case decided" within the meaning of S. 115, C. P. Code. "Case" is not an exact equivalent of a "suit". It is something wider, but not wide enough to include every order passed by a Court during the pendency of a suit. An order refusing to amend a written statement cannot be a "case decided" within the meaning of S. 115, C. P. Code. (*Davis C. J. and Thadani J.*) DASSOMAL *v.* KUNDANMAL. I.L.R. (1945) Kar. 347=221 I.C. 641=1946 Sind (Rul.) 67=A.I.R. 1946 Sind 36.

——S. 115—*"Case decided"—Interlocutory order—Revision—Interference — Rule—Ends of justice.*

The High Court is no doubt ordinarily unwilling to interfere in revision with interlocutory orders, but where the exercise of, or failure to exercise, jurisdiction results or is likely to result in gross injustice or irreparable injury, interference becomes necessary for the ends of justice. (*Rege, J.*) KORJI *v.* SATAN. 4 D.L.R. (M.B.) 37=A.I.R. 1950 M.B. 24.

——S. 115—*"Case decided"—Interlocutory orders— Revision—Order improperly holding document forming basis of suit inadmissible in evidence and excluding same from evidence on record—Revision—Interference.*

The word "case" in S. 115 does not mean the whole case always. Any state of facts juridically considered would be a "case"; it would include a decision on any substantial question in controversy between the parties affecting their rights, even though such order be passed in the course of the trial of the suit. An interlocutory order deciding a question of that kind as distinguished from a purely formal and incidental order is a "case decided," and would be subject to revision if the other conditions of S. 115 are satisfied and the order has resulted or is likely to result in such gross injustice or irreparable injury as cannot be remedied otherwise than by the exercise of the extraordinary jurisdiction of the High Court at that stage.

Where the lower Court improperly holds a document or an instrument, which is the very basis of the suit, to be inadmissible in evidence and thus prevents it from coming in evidence on record, such an order is revisible under S. 115, C. P. Code; if the order is not interfered with, it is likely to result in gross injustice to the plainntiff. 1943 Lah. 65, foll. (*Atma Charan, J. C.*) JHUMAR MAL BOHRA *v.* MOHAN LAL PALOL. 5 D.L.R. (A.M.) 1.

———S. 115—*Case decided—Meaning.*

The word 'case' in case decided in S. 115, C. P. Code, should be construed to be wide enough to include the decision on any substantial question in controversy between the parties affecting their rights even though such order is passed in the course of the trial of the suit. (*Nawal Kishore and Bapna, JJ.*) DR. NIRANJAN NATH *v.* SARDAR MAL. A.I.R. 1950 Raj. 31.

———S. 115—*Case decided—Meaning.*

It is not possible to evolve a clear, hard and fast line between orders which do not amount to the decision of a "case" and orders which do amount to the decision of a "case". The word "case" would seem to be wide enough to cover decisions on any matter in controversy affecting the rights of the parties to a suit. In this view interlocuory orders would be covered by the words "case decided". (*Ram Labhaya.*) MUNICIPAL COMMITTEE *v.* MOOLCHAND. 4 D.L.R. (A. & M.) 69=1949 A.M.L.J. 9.

———S. 115—*Case decided—Order by District Judge on objection by Chief Inspector of Stamps as to insufficiency of Court-fee paid.*

The amendments introduced into the Court-Fees Act by S. 6-A and 6-B has fundamentally altered the rights of parties in regard to an order as to court-fees. In view of this, an order of District Judge passed on an objection taken by the Chief Inspector of Stamps as to the insufficiency of court-fee paid in the trial Court has to be held to amount to a 'case decided' within the meaning of S. 115, C. P. Code and liable to be revised by the High Court. (*Wali Ullah, J.*) MAHOMED ISHAQ *v.* THE CHIEF INSPECTORY OF STAMPS. I.L.R. (1947) All. 433=1947 A.W.R. (H.C.) 94=1947 A.L.J. 99 =A.I.R. 1947 A. 340.

———S. 115—*'Case decided'—Order granting application for leave to sue in forma pauperis.*

An order granting an application for leave to sue *in forma pauperis* is a *"case decided"* within the meaning of S. 115, C. P. Code and hence can be revised. (*Malik, Wali-ullah and Mootham, JJ.*) RAMZAN ALI *v.* SATUL BIBI. I.L.R. (1947) All. 812=1948 A.L.J. 43=A.I.R. 1948 A. 244=1948 A.L.W. 86=2 D.L.R. 673 (F. B.).

———S. 115—*"Case decided"—Order in suit for damages for breach of contract for sale of millets asking plaintiff to withdraw claim as beyond jurisdiction—Revision.*

In a suit for damages for breach of contract of sale of certain goods the Munsif split up the claim into two parts, *vix.*, one claiming refund on account of an alleged overpayment and the other claiming damages on account of an alleged failure to supply a certain portion of the goods agreed to be sold. He held that he had jurisdiction to entertain the claim for recovery of overpayment but that he had no jurisdiction to entertain the claim with regard to damages. He passed an order:—I therefore order that the plaintiffs, if they so choose, may withdraw their claim for damages within 10 days of today failing which that claim shall stand dismissed for want of jurisdiction while I shall proceed with the trial for the claim for refund of overpayments.

Held, so far as this part of the order as to the claim for damages is concerned a "case has been decided." Further if that decision is wrong, the lower Court has failed to exercise a jurisdiction vested in it by law. Accordingly a revision petition against the order is entertainable. (*Verma and Sankar Saran, JJ.*) HAZARI RAM *v.* UMRAO SINGH SEWAT LAL. I.L.R. (1947) All. 3=225 I.C. 96=1946 A.L.W. 378=1946 A. (Rul.) 417=1946 A.W.R. (H.C.) 551=A.I.R. 1946 All. 512.

———S. 115—*"Case decided"—Order of District Judge fixing remuneration for an auditor under the Guardians and Wards Act proceeding.*

During the course of Guardians and Wards Act proceedings an auditor was appointed and the District Judge fixed certain remuneration for him according to his interpretation of High Court Rules. On a question whether his order was open to revision under S. 115, C. P. Code,

Held, Mathur, J., in the peculiar circumstances of the case, it could not be said that the order was not a case decided and that it did not come within the mischief of S. 115.

Sinha, J.: It cannot be said that the order in question is not a judicial order. Unless there is something in the Act "expressly or impliedly ousting its jurisdiction", the High Court has a right to review the order of the District Judge. To hold that the High Court has no jurisdicion to interfere with such an order is to deprive the High Court of the power which the legislature has allowed it, to redress an obvious wrong in certain cases. (*Sinha and Mathur, JJ.*) VISHNU SAHAI *v.* BHAGBHARI. 1947 A.L.J. 675=1948 O.W.N. 57=2 D.L.R. 369=A.I.R. 1949 All. 117=1948 A.L.W. 54.

———S. 115—*"Case decided"—Order on application for examination of witness on commission.*

An order that a commission shall or shall not issue or that *viva voce* cross-examination of a witness on commission cannot be permitted is not a "case decided" within the meaning of S. 115, C. P. Code. The aggrieved party has however a remedy by invoking the inherent powers of the Court under S. 151, C. P. Code. (*Davis, C.J. and Thadani, J.*) SHANTIBAI *v.* MOTIRAM. I.L.R. (1945) Kar. 351=223 I.C. 281=1946 Sind (Rul.) 144=A.I.R. 1946 Sind 30.

———S. 115—*Case decided—Order on review application.*

The proceeding relating to the application for review is a separate proceeding and as such when the Court decides that application one way or the other it amounts to a case decided and a revision would be competent. I.L.R. 53 All. 612; 1948 A.L.J. 43, appl. (*Wanchoo and Bhargava, JJ.*) RAM SAHAI *v.* BHAGWAN DEGI. I.L.R. (1950) All. 18.

——**S. 115**—Case decided—Order overruling objection that debt was wiped out under S. 13 (3) of Punjab Relief of Indebtedness Act—Revision. [*See* Q.D 1941-1945, Vol. I, Col. 972.] BHERI RAM *v.* JIWAYA MAL. I.L.R. (1945) Lah. 513.

——**S. 115**—'Case' decided—Order refusing to allow amendment of pleading—Revision. [*See* Q.D. 1941-1945, Vol. I, Col. 971.] LILADHAR *v.* FIRM RADHAKISHAN RAMSHAHAYA. A.I.R. 1946 Nag. 5.

——**S. 115**—*"Case decided"—Order under S. 16, Arbitration Act, remitting order for reconsideration—Revision—Competency.*

An order under S. 16, Arbitration Act of 1940, remitting an award for reconsideration by the arbitrators does not "decide a case" within the meaning of S. 115, C. P. Code, and hence such an order, is not open to revision. Since an objection as to improper remission of the award can be taken in appeal against the order setting aside or refusing to set aside the award, a revision application under S. 115 is incompetent and would nont properly lie. (*Davis, C.J. and Thadani, J.*) MT. ZARALBIBI *v.* SHAMSUDDIN KHAN. I.L.R. (1946) Kar. 21=227 I.C. 129=A.I.R. 1946 Sind 141.

——**S. 115 and O. 22, R. 5**—"Case decided"—Question as to proper legal representative left to be determined during trial of suit—Revision—Competency. [*See* Q.D. 1941-1945, Vol. I, Col. 974.] AMBIKA PRASAD SINGH *v.* JAGDAMBA PRASAD SINGH. 20 Luck 488.

——**S. 115**—*"Case decided"—Suit for account—Preliminary decree—Application for final decree—Dismissal for default—Order refusing to restore on application by plaintiff—Revision.*

An order rejecting an application for restoration of an application for a final decree in a suit for account dismissed for default is a *case decided* and is open to revision under S. 115, C. P. Code, when there has been an irregularity in the exercise of jurisdiction. (*Misra and Kaul, JJ.*) JAMALUDDIN ABDUL WAHAB *v.* ABDUL ALI. I.L.R. (1950) All. 65=4 D.L.R. (All.) 277.

——**S. 115**—*"Case decided"—When would amount to—Proceeding for the substitution of legal representatives—If "a case decided."*

In order that a proceeding may be regarded as a 'case decided' within the meaning of S. 115, C. P. Code, it must be shown that it is a proceeding independent of the suit and entirely dissociated from it. Hence a proceeding relating to substitution of a legal representative of a deceased plaintiff which is a proceeding in the suit, it is not a 'case decided'. (*Ghulam Hasan, C.J. and Kadwai, J.*) ANAND BEHARI LAL *v.* SHAH MAHD. HAFIZ ATA. 226 I.C. 439=1946 A.W.R. (C.C.) 206=1946 Oudh Rul. 252=A.I.R. 1947 Oudh 44=1946 O.W.N. 301=1946 O.A. (C.C.) 206.

——**S. 115 and O. 1, R. 10**—*Case decided—Refusal to add party.*

An order refusing to implead a person as a party under O. 1, R. 10, C. P. Code is a case decided and may be challenged in revision. The trial of a case without impleading the proper parties may amount to an irregular exercise of jurisdiction. (*Kidwai, J.*) SHRI NATH *v.* NAND LAL. 1947 O.W.N. 236=A.I.R. 1948 Oudh 44=1947 O.A. (C.C.) 167=1947 A.W.R. (C.C.) 167.

——**S. 115**—*"Case"—Meaning of—Decision on question if plaint should be rejected for want of jurisdiction—Revision.*

In S. 115, C. P. Code, "case" is not synonymous with a suit when an order is passed in that suit. A case can be a part of proceedings in a suit. A decision on the question whether a plaint should be rejected for want of jurisdiction of Court, should be taken as decision of a case. A revision application against such order can be prporperly entertained under S. 115, C. P. Code. (*Trivedi, J.C.*) MURARJI SURJI *v.* JAYANT TRADING CORPORATION, LTD., BOMBAY. A.I.R. 1949 Kut. 5.

——**S. 115**—*Conversion of second appeal into revision—Practice.*

A second appeal which is not competent will not be treated as an *application* in revision where the respondent has not appeared and the subject-matter of the proceeding is a small sum. (*Thadani, C.J. and Ram Labhaya, J.*) MUSAFIR ALI *v.* MD. ROYSUL HAQ. A.I.R. 1950 Assam 114.

——**S. 115**—"Court"—*See* C. P. Code, S. 115. "Court subordinate".

——**S. 115**—*Court-fee—Decision as to—Revision.*

A question of court-fees, not involving also a question of jurisdiction, can well be left over to be determined in an appeal from the decree. But if it also involves a question of jurisdiction, it is expedient to entertain a revision petition under S. 115, C. P. Code. (*Niyogi, J.*) HAJRABI *v.* MAHOMED IBRAHIM. I.L.R. (1947) Nag. 902=A.I.R. 1948 Nag. 219.

——**S. 115**—*Court-fees—Decision as to—Revision.*

It is well-settled that a decision upon court-fee which is adverse to the plaintiff amounts to a decision of the Court, refusing to exercise its jurisdiction to try the issues as between the plaintiff and the defendant, and in such a case the decision of the Subordinate Court is subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. 18 P.L.T. 977 (F.B.), foll.; 76 I.A. 131, rel. on. (*Ramaswami and Sarjoo Prasad, JJ.*) BASUKI PRASAD SINGH *v.* SATYA KINKAR. A.I.R. 1950 Pat. 470.

——**S. 115**—*Court-fee—Decision as to—Revision.*

Where the question of Court-fees has been decided by the lower Court in favour of the plaintiff, the High Court in revision would ordinarily decline to interfere. (*Thadani, Ag. C.J.*) PRAHLAD CHANDRA ROY *v.* RASH BEHARI ROY. A.I.R. 1949 Assam 64.

——**S. 115**—*Court-fees—Decision as to—Revision.*

When the matter involves a question of jurisdiction of the lower Court also and is not one affecting court-fee alone, a revision lies to the High Court. (*Panchapakesa Aiyar, J.*) SUBRAHMANYAM *v.* LAKSHMI NARAYANAMMA.

L.W. 789=1948 M.W.N. 832=A.I.R. 1949 Mad. 415=4 D.L.R. (Mad.) 100=(1948) 2 M.L.J. 523.

———S. 115—*Court-fees—Decision as to—Revision.*

An order demanding additional court-fee is revisable. (*Sen, J.*) Pandurang Mangal *v.* Bhojalu Usanna. I.L.R. (1948) Nag. 210=A.I.R. 1949 Nag. 37=1948 N.L.J. 121.

———S. 115—*Court-fees—Decision as to valuation and ordering payment of proper court-fee—Revision.*

Where on a dispute as to the valuation and the court-fee payable, the Court determines the valuation and directs the party concerned to pay the additional court-fee, the order of the Court is not open to revision under S. 115, C. P. Code. (*Dayal and Agarwalla, JJ.*) Ahmadi Begum *v.* Kulsumun Nisa. 1949 A.L.J. 250=4 D.L.R. (A.) 185=1949 A.W.R. 338.

———S. 115—*Court-fees—Decision regarding valuation—Revision—Court-Fees Act, S. 12.*

If in coming to a decision as to the value for purposes of jurisdiction and court-fee the lower Court commits an irregularity which comes within S. 115, C. P. Code, the High Court will be justified in interfering at that stage. If the lower Court has no material before it on which to come to the finding at which it has arrived, a case is made out for revision of its order. (*Kapur, J.*) Vakharia *v.* Behari Lal Batra. 4 D.L.R. (Simla) 257=A.I.R. 1949 E.P. 372.

———S. 115—*Court-fee—Order as to—Revision—Court-Fees Act, S. 12.*

An order demanding additional court-fees is revisable. I.L.R. (1938) Nag. 106, foll. 29 N.L.R. 125 and 1946 N.L.J. 110, not followed. (*Sarwate, J.*) Manohar Singh *v.* Parmeshari. I.L.R. (1949) Nag. 66=A.I.R. 1949 Nag. 211=4 D.L.R. (Nag.) 78=1949 N.L.J. 33.

———S. 115—Court-fees—Order as to—Revision [*See* Q.D. 1941-1945, Vol. I, Col. 976.] Mahadeo Gopal *v.* Hari Waman. I.L.R. (1945) Bom. 729=222 I.C. 14=1946 Bom. (Rul.) 65.

———S. 115—*Court-Fees—Order requiring additional court-fee—Revision.*

An order demanding additional court-fee is revisable under S. 115, C. P. Code, as in such cases there is a refusal to exercise jurisdiction in the matter and trying the case on the merits unless the additional court-fee demanded is paid. A.I.R. 1942 Mad. 585, foll. (*Harnam Singh, J.*) Anguri Devi *v.* Gurnam Singh. 52 P.L. 336.

———S. 115—Court-fee—Wrong decision as to Jurisdiction of High Court to interfere. *See* Court-Fees Act, S. 12 (1). 49 Bom.L.R. 72.

———Ss. 115 and 3—*"Court subordinate"—Court with exclusive jurisdiction—If included.*

S. 115, C. P. Code, can have application in respect of the Courts mentioned in S. 3 but not in respect of those Courts which have been given exclusive jurisdiction by express provision of law or by necessary implication. Where the legislature by clear words creates a new tribunal, self-contained and exclusive, then the matter which needs to be considered is not whether the jurisdiction of the High Court is taken away but whether it was at all there. 31 B. 604, rel. on. (*Hidayatullah and Kaushalendra Rao, JJ.*) Sawatram Ramprasad Mills Co., Ltd. *v.* Vishnu. I.L.R. (1949) Nag. 905=A.I.R. 1950 Nag. 14.

———S. 115—*Court subordinate—Election Commissioner acting under District Board Electoral Rules—Order on election petition—Revision—Erroneous construction of rule—If ground for revision as affecting jurisdiction to decide.*

It is open to the High Court to interfere in revision with an order of an Election Commissioner acting under the Bihar District Board Electoral Rules. He is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code, and hence his orders can be revised by the High Court if sufficient grounds exist. But an error of law, *e.g.*, a wrong interpretation of the Electoral Rules, is not a ground for revision, as it does not affect his jurisdiction to decide the matter, as it is open to the Election Commissioner to continue the rule rightly or wrongly and it is solely within his jurisdiction to decide about it, and his decision, is therefore not open to revision. 14 Pat. 488; 20 Pat. 373; 22 Pat. 577, rel. (*Das and Sarjoo Prasad, JJ.*) Jamuna Prasad *v.* Jogendra Prasad. 29 Pat. 581=5 D.L.R. (Pat.) 211.

———S. 115—*"Court subordinate"—Rent controller and appellate authority appointed under Punjab Urban Rent Restriction Act.*

A Court of law may be defined as a tribunal dealing with and adjudicating upon civil disputes by operation of law in a judicial manner untroubled by ulterior considerations or matters of executive policy and observing certain definite rules of procedure which are either defined by statute or recognised by practice. Applying this test to the controller and the "Appellate Authority" appointed under the Punjab Urban Rent Restriction Act, they are not Courts of law subordinate to the High Court within the meaning of S. 115, C. P. Code, and their orders are therefore not subject to revision by the High Court. A.I.R. 1949 Lah. 94, diss. from. (*Das, C.J., Khosla and Kapur, JJ.*) Pitman's Shorthand Academy *v.* Lila Ram & Sons. 52 P.L.R. 1=A.I.R. 1950 E.P. 181=5 D.L.R. (Simla) 162 (F.B.).

———S. 115—Court subordinate—Appellate authority under S. 12 (1) of the Madras Buildings (Lease and Rent Control) Act—Orders of—Revision—If competent. *See* Madras Buildings (Lease and Rent Control) Act, S. 12 (1). (1948) 1 M.L.J. 314; (1949) 1 M.L.J. 419.

———S. 115—*Court subordinate—Authority appointed under S. 15 of the Payment of Wages Act.* *See* Payment of Wages Act, S. 15 and C. P. Code, S. 115. 1946 A.L.W. 49.

———S. 115—Court subordinate—Authority appointed *under S. 15 of Payment of Wages Act.*

The "authority" appointed under S. 15, Payment of Wages Act, is a Civil Court and further it is a Court subordinate to the High Court within the purview of S. 115, C. P. Code, and S. 44, Punjab Courts Act. (*Abdul Rashid, Ag. C. J.,* *Ram Lall and Mahajan, JJ.*) WORKS MANAGER, CARRIAGE AND WAGONSHOPS *v.* HASHMAT. I.L.R. (1947) Lah. 1=226 I.C. 44=1946 Lah. (Rul.) 425=48 P.L.R. 477=A.I.R. 1946 Lah. 316 (F.B.).

——S. 115—"Court subordinate"—Authority appointed under S. 15, Payment of Wages Act—Revisional jurisdiction of High Court. *See* PAYMENT OF WAGES ACT, S. 15 (1). I.L.R. (1949) Nag. 905.

——S. 115—*"Court subordinate"—Authority appointed under—Payment of Wages Act, S. 15 (1)—Order of—Jurisdiction of High Court to revise.*

The Authority under S. 15 (1) of the Payment of Wages Act is not a "Court" subordinate to the High Court within the meaning of S. 115, C. P. Code, and therefore the High Court has no revisional jurisdiction over the orders of that authority. The mere use of the word "Court" in connection with that authority and the mere fact that the Act and the rules thereunder enjoin the authority to follow the procedure of a Court of civil jurisdiction would not make that authority a Court. 47 Bom.L.R. 852, appl. and foll. 1944 Nag. 531; 1937 Sind 6 foll.; 28 Lah. 1; 20 Pat. 373 (F.B.), not foll. (*Rajadhyaksha and Jahagirdar, JJ.*) SPRING MILLS, LTD. *v.* AMBEKAR. I.L.R. (1949) Bom. 863=4 D.L.R. (Bom.) 46 =A.I.R. 1949 Bom. 188=51 Bom.L.R. 148.

——S. 115—*"Court subordinate" Authority invested with jurisdiction under the Payment of Wages Act—If a Court whose orders are revisable by the High Court—Payment of Wages Act (IV of 1936), S. 15.*

The word "Court" is not a term of art having a fixed meaning: it indicates a large number of entirely divergent things. So far as a Court of law, in the wider sense of the word, is concerned, it might be held that any person or body of persons, called upon to decide any question of right in accordance with judicial principles and which is a 'tribunal which exercises jurisdiction by reason of the sanction of the law' is a Court. It does not, however, follow from this that every such tribunal is a Court of civil jurisdiction to which alone S. 115, C. P. Code, applies. It cannot be predicated of a large variety of tribunals, like the revenue and rent Courts, Commissioners for the trial of election petitions and special Courts as those of Special Judges under the U. P. E. E. Act, that they are subject to the powers vested in the High Court by reason of S. 115, C. P. Code.

The authority invested with jurisdiction under the Payment of Wages Act is not a Court subordinate to the High Court within the meaning of S. 115, C. P. Code and as such an application to revise its orders would not be maintainable. (***Misra, Kaul and Kidwai, JJ.***) H. C. D. MATHUR *v.* E. I. RY. 1949 A.L.J. 471=1949 A.W.R. 581=A.I.R. 1950 All. 80=5 D.L.R. (All.) 81 (F.B.).

——S. 115—*"Court Subordinate"—Bombay Tenancy Act, S. 24—Collector's order under—Revision—Jurisdiction of High Court.*

An order made by the Collector in appeal under S. 24 of the Bombay Tenancy Act, 1939, is not subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. The Collector in such a case, is not a Court subordinate to the High Court. (*Sen and Rajadhyaksha, JJ.*) PARVATIBAI UTAMLAL *v.* RUPAKESHAY. I.L.R. (1947) Bom. 351=49 Bom.L.R. 658=A.I.R. 1948 Bom. 118.

——S. 115—"Court subordinate"—Debt Adjustment Board under Bombay Agricultural Debtors Relief Act—Order of—Revision. [*See* Q.D. 1941-1945, Vol. I, Col. 977.] PEOPLE'S OWN PROVIDENT AND GENERAL INSURANCE CO. *v.* GURACHARYA. I.L.R. (1945) Bom. 912=224 I.C. 289=1946 Bom. (Rul.) 207=A.I.R. 1946 Bom. 200.

——S. 115—*Court subordinate—District Court exercising powers of Qazi under Mahomedan Law.*

The Court of the District Judge exercising as the principal Court of original civil jurisdiction the powers of a Qazi under the Mahomedan Law, is subordinate to the High Court, and its orders can, therefore, be revised under S. 115, C. P. Code. (*Misra and Madeley, JJ.*) MAHOMED SAFDAR ALI *v.* ADVOCATE-GENERAL. 21 Luck 516 =225 I.C. 21=1946 O.W.N. 240=1946 O.A. (C.C.) 179=1946 A.W.R. (C.C.) 179=1946 Oudh (Rul.) 205=A.I.R. 1946 Oudh 244.

——S. 115—*Court subodinate—Distict Judge acting as Revenue Court—Revision—Competency.*

No revision lies to the Chief Court when a District Judge decides cases under the Oudh Rent Act because he is not a Civil Court but a Revenue Court and is consequently not subordinate to the Chief Court for the purposes of S. 115, C. P. Code. (*Misra and Kidwai, JJ.*) SANKATA PRASAD *v.* RAM KUSHI DEVI. 22 Luck 207=230 I.C. 25=1947 Oudh (Rul.) 117=1947 A.W.R. (C.C.) 44=1947 R.D. 94=1947 O.W.N. 88=1947 O.A. (C.C.) 44=A.I.R. 1947 Oudh 232.

——S. 115—"Court subordinate"—District Judge acting under proviso to S. 10, Bengal Alienation of Land Act—If Court or *persona designata*—Order on application to revise order of Collector—Jurisdiction of High Court to revise. *See* BENGAL ALIENATION OF LAND (TEMPORARY PROVISIONS) ACT (1944), S. 10. 227 I.C. 194.

——S. 115—*Court subordinate—District Judge exercising powers under S. 78 of Bihar and Orissa Village Administration Act.*

An application for revision does not lie against an order of a District Judge setting aside a decree passed by a *panchayat* in exercise of the powers conferred on him by S. 78, Bihar and Orissa Village Administration Act. The High Court has no power to revise an order made by a *panchayat* as it is not a civil Court and is not subject to the superintendence of the High Court. The District Judge, when exercising his jurisdiction under S. 78 of the Act, is not sitting as the president of the District Court and is not a Court subordinate to the High Court within the meaning of S. 115, C. P. Code. 22 P.

577, comm. on. (*Shearer and Reuben, JJ.*) SUDAGAR CHAUDHARY *v.* RADHARAMAN PRASAD. 28 Pat. 63=A.I.R. 1949 Pat. 333.

——S. 115—"Court subordinate"—District Judge holding election inquiry under S. 15, Bombay Municipal Moroughs Act—If Court or *persona designata*. [*See* Q.D. 1941-1945, Vol. I, Col. 978.] KESHAV RAMCHANDRA *v.* MUNICIPAL BOROUCH, JALGAON. I.L.R. (1946) Bom. 143=A.I.R. 1946 Bom. 64.

——S. 115—*Court subordinate—District Judge refusing to appoint* mutwalli *of mosque on application—Revision—Competency.*

A District judge in appointing or refusing to appoint a *mutwalli* of a mosque in a summary proceeding under S. 10, Religious Endowments Act (1863), acts as a Court and exercises judicial functions and not administrative or executive functions. His order on such application is therefore subject to revision by the High Court under S. 115, C. P. Code. (*Sen, J.*) MAHOMED BHAI *v.* WAZIRBI. I.L.R. (1946) Nag. 646=1946 N.L.J. 325=A.I.R. 1947 Nag. 31=1946 Nag. (Rul.) 143=224 I.C. 338.

——S. 115—"*Court subordinate*"—*Election Commissioner under rules framed under Madras District Municipalities Act (V of 1920)—Is* persona designata *not subject to revisional jurisdiction of High Court.*

The rules under the Madras District Municipalities Act (V of 1920) framed under G. O. No. 1609 I.A., dated 4th May, 1940, provide that an Election Commissioner exercising jurisdiction under the rules shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a Judge of the Court over which he presides. It is also provided that his orders shall be final. Accordingly a petition under S. 115 of the Code of Civil Procedure to revise his order does not iie. (*Krishnaswami Nayudu, J.*) BAMMIDI NAGULA *v.* BHANOJI ROW. A.I.R. 1950 Mad. 123=(1949) 2 M.L.J. 532.

——S. 115—"*Court Subordinate*"—*Election Petitions Commissioners—Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order*, 1936.

Per *Majoriy of Full Bench.*—The Election Petitions Commissioners appointed under the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, are not a Court subordinate to the High Court within the meaning of S. 115, C. P. Code, and S. 44, Punjab Courts Act, and are an independent and special Tribunal exercising exclusive jurisdiction in a defined class of cases.

It cannot be laid down as a broad and unqualified proposition that once it is held that an officer, authority or functionary is exercising the functions of a Court in relation to rights that may be called "civil" that officer, authority or functionary must be held to be subordinate to the High Court. One clear indication of subordination has always been held to be that the Court whose subordination is in question is subject to the appellate jurisdiction of the High Court. A Court may also be subordinate to the High Court even *qua* matters which are not subject to the High Court's appellate power if these matters have been entrusted for adjudication to an admittedly subordinate Court as a Court and not to the Presiding Officer of such Court as a *persona designata*. The Election Petitions Commissioners do not satisfy either of these tests.

Per *Cornelius, J., contra.*—The Election Petitions Commission is a Court Subordinate to the High Court for the purposes of S. 115, C. P. Code. By merely declaring or characterising a cerain funcionary as *persona designata* the effect cannot be produced of rendering such functionary not a Court, if his functions involve the determination by reason of the sanction of the law, and not merely by reason of voluntary submission to such jurisdiction, of justiciable issues relating to civil rights arising between persons subject to the jurisdiction and if the manner in which he is required or expected to resolve such issues is essentially the manner adopted by a Court. It is undeniable that an election pertition challenging the election of a member of a Provincial Legislature raises an issue relating to civil rights between persons within the jurisdiction, and the commission determines this issue not by reason of voluntary submission of the parties to its jurisdiction but under the sanction of law.

S. 115, C. P. Code, embodies a very important part of the High Court's functions in relation to all Courts and tribunals which are required by law to observe the procedure laid down in the C. P. Code. The Election Petitions Commission is required by statutory rule to follow that procedure, and it is a necessary consequence of that statutory provision that in procedural matters the commission should be subject to the revisionary jurisdiction of the High Court. The mere fact that election petitions are exclusively triable by the commission does not affect this conclusion, for, it can never be any part of the High Court's intention to interfere with the making of any order by a Court of special jurisdiction, if the grounds on which the order proceeds have been exclusively assigned by law to such tribunal or to interfere by peremptory order with the ordinary course of adjudication by such tribunal within its limited jurisdiction except where a grave wrong or defect of justice is manifest such as cannot be remedied by the regular procedure, or where there is reason to assume absence of good faith. For instance, whether the High Court's jurisdiction is attracted during the pendency, or after the conclusion of the proceedings before a special tribunal, in a case of which such tribunal is properly seized, and which falls within its exclusive jurisdiction, the High Court can never undertake the decision, directly or indirectly, of any question which lies within the aforesaid exclusive jurisdiction, but nevertheless it may make effective orders to safeguard the interest of justice, (*e.g.*) where there has been failure to conduct the proceedings "according to the requirements of substantial justice" and equally even in relation to interlocutory or procedural orders, there is nothing to prevent the High Court from making an effective order, where the conditions which will justify interference are present.

For the purposes of S. 115, C. P. Code, direct subjection to the authority of the High Court in any or all respects is not necessary in relation to the Court whose orders are to be revised, but it is sufficient that it is a Court of a civil nature, and inferior in rank. (*Munir, Ag. C.J., Cornelius and Khurshid Zaman, JJ.*) Sultan Ali *v.* Nur Hussain. Pak.L.R. (1949) Lah. 215=50 Cr.L.J. 598=A.I.R. 1949 Lah. 131 (F.B.).

———S. 115—*Court subordinate—Judge as persona designata exceeding powers conferred and acting outside powers—Revision—High Court's power to interfere.*

If a Judge acting as a *persona designata* exceeds the powers conferred upon him by law or acts outside it he ceases to act as a *persona designata*, and becomes a Court subordinate to the High Court under S. 115, C. P. Code. The High Court has therefore power to revise an order passed by a *persona designata* who acts without jurisdiction. (*Davis, C.J. and Thadani, J.*) Vensimal *v.* Karachi Dt. Local Board. I.L.R. (1947) Kar. 117=A.I.R. 1948 Sind 116.

———S. 115—*Court subordinate—Land acquisition collector dealing with application for reference—Land Acquisition Act, S.* 18.

In dealing with an application under S. 18 of the Land Acquisition Act asking for a reference, the collector does not act as a Court and even if he does, he does not do so as a Court subordinate to the High Court, and his order is therefore, not revisable under S, 115, C. P. Code. (*Biswas, Blank and Chakravartti, JJ.*) Khetsidas Gangaram *v.* First Land Acquisition Collector. I.L.R. (1946) 2 Cal. 573=226 I.C. 330=1946 Cal. (Rul.) 357=50 C.W.N. 758=A.I.R. 1946 Cal. 508 (F.B.).

———S. 115—*"Court subordinate"—Order of fine by Revenue Officer for breach of Forest Rules under C. P. Land Revenue Act—Revision—Jurisdiction of High Court—Cr. P. Code, Ss.* 435 *and* 439*—Powers of revision—"Offence."*

The High Court has no jurisdiction under S. 115, C. P. Code, to entertain applications in revision from orders passed by a Revenue Officer (Deputy Commissioner) imposing penalties under the C. P. Land Revenue Act for breach of Forest Rules framed under S. 162 of that Act nor would the breach of the rules in question be an "offence" as defined by the Cr. P. Code. Hence an order by the Revenue Commissioner or Deputy Commissioner imposing a fine for breach of Forest Rules cannot be considered to be a conviction by a Criminal Court under the Cr. P. Code, and is therefore not revisable by the High Court in the exercise of its powers of revision under the Cr. P. Code. (*Meredith and Ray, JJ.*) Udit Pratap Singh *v.* Sukru Kishan. 25 Pat. 806=13 Cut.L.T. 14=A.I.R. 1947 Pat. 381.

———S. 115—*Cross-objections in revision—Competency.*

Cross-objections cannot be filed in civil revision petitions under S. 115, C. P. Code. A.I.R. 1941 Mad. 55; 14 I.C. 562, Rel. on. (*Chandiramoni, J.*) Sundar Lal *v.* Sabira Begam. 1950 A.L.J. 672.

———S. 115—*Decision* extra cursum curiae*—Revision.*

Where the parties to a pending suit ask the presiding Judge to decide the matter before him in his own way with or without evidence, with or without issues, with or without details, and deal with the dispute as *extra cursum curiae*, and agree to abide by his decision against which they agree not to appeal, the High Court will not interfere in revision with the order of the Judge. (*Davis, C.J. and Thadani, J.*) **Pirdinoshah *v.*** Bachalshah. A.I.R. 1947 Sind 185.

———S. 115—Decree not in excess of award—Revision—Validity of award—If can be challenged. *See* Arbitration Act, S. 17. I.L.R. (1949) Nag. 272.

———S. 115—*Decree of affirmance—Variation of decree in respect of costs only.*

Where the only variation that is made by the appellate Court is in respect of the costs as awarded by the lower Court but otherwise absolutely affirms the decree of the lower Court, leave to appeal to Supreme Court cannot be granted unless some substantial question of law is involved. I.L.R. 2 Luck. 98 (P.C.), fol. (*Atma Charan, J.C.*) Daulat Ram *v.* Prem Das. A.I.R. 1950 Ajmer 28 (2)=5 D.L.R. (A.M.) 37.

———S. 115—*Delay in applying—If ground for refusal to interfere—Interference on payment of costs to opposite party.*

The fact that an applicant for revision of an order under S. 115, C. P. Code, has applied after a great delay would not be a ground for the High Court refusing to exercise its revisional powers in a fit case. when for such delay, the opposite party can be sufficiently compensated for in costs. A.I.R. 1938 Mad. 921, ref. (*Ramaswami and Sarjoo Prasad, JJ.*) Basuki Prasad Singh *v.* Satya Kinkar. A.I.R. 1950 Pat. 470.

———S. 115—*Delay in applying—Practice.*

When applications in revision are very belated ones and are not intended to be pressed, the High Court would not interfere with the order of the lower Court sought to be revised even though the order itself might be an improper one. (*Seth, J.*) Raghunath Das *v.* Sri Kishan. 1950 A.W.R. 137=A.I.R. 1950 A. 248=1950 A.L.J. 80.

———S. 115—Discretionary order—Revision—Order refusing stay, under S. 151. of civil suit for rent, pending commutation proceedings under Tenancy Act before Revenue Officer—Interference—Grounds for. *See* C. P. Code, S. 151. 5 D.L.R. (Pat.) 192.

———S. 115—*Discretion—Illegal order setting aside prior illegal order—Interference in revision.*

The exercise by the High Court of its powers of revision under S. 115, C. P. Code, is discretionary, and the section imposes no obligation on the High Court to interfere in each case of illegal exercise of jurisdiction by a subordinate Court. Where the effect of an illegal order passed by the lower Court has been to set aside another illegal order, and thus to restore the parties to their original position, the High Court will not be disposed to interfere and set aside the second only of the two illegal orders which would have the result of restoring the first illegal order. (*Mootham, J.*) CHANDER BHAN SINGH *v.* LALLU SINGH. I.L.R. (1947) All. 389=229 I.C. 26=1947 All. (Rul.) 112=A.I.R. 1947 A. 343.

———S. 115—*Discretion of lower Court as to specific performance—Interference.*

The relief of specific performance is no doubt discretionary and the revisional Court will not ordinarily interfere with the exercise of the lower Court's discretion. Where a particular aspect of the case has not been considered at all by the lower Courts, there is no exercise of discretion at all and it is open to the Court in revision to exercise its discretion on the facts found. (*Baxi, J.C.*) RANIBAI *v.* KHIMJI HIRJI. A.I.R. 1950 Kut. 86.

———S. 115—*Erroneous decision—Order to supply particulars under O. 6, R. 5—Revision.*

S. 115, C. P. Code, is not concerned with erroneous conclusions of law or fact in which the question of jurisdiction is not involved. An erroneous order under O. 6, R. 5, C. P. Code, directing the defendant to supply certain particulars of the written statement filed by him, has nothing whatsoever to do with jurisdiction and cannot be revised under S. 115, C. P. Code. (*Harries, C. J. and Sarkar, J.*) RALYARAM MELARAM *v.* KALURAM. A.I.R. 1950 Cal. 149.

———S. 115—*Erroneous decision—Question of fact—Decision going to root of jurisdiction—Interference.*

The question whether a particular enactment is applicable to a particular territory is, no doubt, a question of fact, and not one of law. But if the trial of the suit depends on the question whether a particular enactment is in force in a particular territory, the decision of the question goes to the root of the jurisdiction of the trial Court, and if it is erroneous the High Court will interfere in revision. (*Thadani, C.J. and Ram Labhaya, J.*) KA OR SHABONG *v.* KA LASUBON SHABONG. I.L.R. (1950) 2 Assam 140=A.I.R. 1950 Assam 214.

———S. 115—*Erroneous decision—Question of limitation.*

Where the lower Court exercises a jurisdiction not vested in it by law under a misconception of the law of limitation, its order is liable to be set aside in revision. (*Harries, C.J. and Banerjee, J.*) BASANTILATA DHAR *v.* AMARNATH HALDAR. 54 C.W.N. 451=A.I.R. 1950 Cal. 411.

———S. 115—*Erroneous decision—Revision.*

The High Court will not interfere with an incorrect decision of the lower Court when there is no question of lack of jurisdiction or material irregularity in procedure. (*Shearer and Reuben, JJ.*) P. C. LALL CHOUDHURY *v.* S. A. MOJIB. A.I.R. 1949 Pat. 472.

———S. 115—*Erroneous decision — Revision when competent.*

The question whether the decision of the lower Court was correct or incorrect cannot be gone into in an application under S. 115, C. P. Code. If the lower Court had jurisdiction to decide the question before it and there is no irregularity or illegality in the exercise of that jurisdiction, its decision is not open to revision even if it is a wrong decision. 1944 O.W.N. 440: 1945 O.W.N. 234, Rel. on. 1948 A.L.J. 90, Distd. (*Misra and Bhargava, JJ.*) JANKI PRASAD SINGH *v.* SHEO PUJJAN. 1949 A.L.J. 511=5 D.L.R. (All.) 102.

———S. 115—*Erroneous decision—Revision, when competent.*

Although error in a decision may not by itself mean that the subordinate Court acted illegally or with material irregularity so as to justify interference in revision under S. 115 (*c*), C. P. Code, nevertheless, if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-S. (*a*) or sub-S. (*b*), and sub-S. (*c*), can be ignored. 76 I.A. 131, ref. to. (*Mahomed Khurshid Zaman and Kayani, JJ.*) FATEH MAHOMED KHAN *v.* MALKANI BHAG BHARI. A.I.R. 1950 Lah. 185.

———S. 115—*Error of law—Appellate Court failing to determine basic question of fact—Interference in revision.*

When the decisions of the appellate Court are based on facts proved by the testimony of witnesses and the decision is not contrary to law, they will be binding on the highest Court. But where the only fact that goes to the root of the case is whether any right of way could be claimed on basis of long user, it is a question of law, and the appellate Court failing to determine the basic question of fact, commits a serious error of law calling for interference in revision. 70 I.A. 225, ref. to. (*Bannerji, J.C.*) HAROO *v.* MAN DASS. A.I.R. 1949 H. P. 4.

———S. 115—*Error of law—Erroneous decision on question of notice under S. 77 of Railways Act—Interference in revision.*

Where the Court below has passed a decree in favour of the plaintiff in a suit against the Railway Administration wrongly holding that a notice under S. 77 of the Railways Act is not necessary, the High Court in revision under S. 115, C. P. Code, is not entitled to reverse that decree, as the error of the Court is not on a point touching jurisdiction but a mere error of law. S. 77 of the Railways Act does not provide that no suit shall be entertained in the absence of notice. It provides only that it cannot be decreed. The Court has always got the jurisdiction to entertain the suit, and has then to decide upon the necessity of notice. With regard to the necessity of notice, it has jurisdiction to decide rightly or wrongly. (*Manohar Lall, Meredith and Mahabir Prasad, JJ.*) DOMINION OF INDIA *v.* HAZARI LAL. 28 Pat. 552=A.I.R. 1949 Pat. 410=30 P.L.T. 280 (F.B.).

———S. 115—*Error of law—Interference.*

In a case under S. 115, C. P. Code, errors in law are not in themselves a ground for interference in revision. There must at the lowest be some material irregularity which touches the question of jurisdiction. (*Meredith J.*) Governor-General in Council v. Bishundayal. A.I.R. 1948 Pat. 48.

———S. 115—*Error of law—Interference by High Court—Principles—Decree in spite of statutory prohibition.*

Where a decree is erroneous in the sense that some technical rule of law has been overlooked which could have been remedied, the High Court would not ordinarily interfere in revision, but where there is a prohibition in a statute and a claim could not have been decreed according to law, the High Court would not be justified in importing any abstract considerations of justice and overlooked the principle that justice should be administered according to law. (*Malik, C.J. and Mushtaq Ahmad, J.*) Naubat Rai *v.* Jugal Kishore. I.L.R. (1950) A. 58=1949 A.W. R. 202=A.I.R. 1949 A. 606=1949 A.L.J. 102.

———S. 115—*Error of law—Interference in revision.*

Under S. 115 (*c*), C. P. Code, the High Court can interfere only in those cases where in the exercise of jurisdiction the lower Court acts illegally or with material irregularity. A mere error of law not involving the jurisdiction of the Court is not enough. (*Das and Guha, JJ.*) Kally Nath Dutta *v.* Shew Bux. 54 C.W.N. 355=A.I.R. 1950 Cal. 87.

———S. 115—*Error of law—When and when not a proper ground for interference.*

If the error of law complained of has resulted in giving the Court concerned a jurisdiction which it did not in fact possess, or if it has resulted in that Court refusing jurisdiction which it did in fact possess, then the question is one which is clearly within the scope of S. 115, Cl. (*a*) or (*b*), C. P. Code. If, however, the error committed does not touch the question of jurisdiction, S. 115 has no application unless the case comes wihin the purview of cl. (*c*) of the section. (*Kidwai,J.*) **Lachman *v.* Ali Bux. 22 Luck. 403** =1947 O.W.N. 362=1947 O.A. (C.C.) 140= 1947 A.W.R. (C.C.) 140=A.I.R. 1947 Oudh 228.

———S. 115—*Error of law—When a ground for interference in revision.*

If a Court assumes jurisdiction, or declines to exercise jurisdiction upon an erroneous view of the law its order can be revised. But if the decision of a question of law has no effect upon the jurisdiction of the Court, it cannot be interfered with in revision under S. 115, C. P. Code. (*Seth, J.*) Lakshmi Shanker Tewari *v.* Rama Kant. 1949 A.L.J. 439=1949 A.W. R. 521=A.I.R. 1950 A. 144.

———S. 115—*Error of law—When ground for revision—Order of Court dismissing pauper applicatoin under O.* 33, *R.* 5 (*d*) *erroneously interpreting that rule.*

Once a Court rightly assumes jurisdiction to decide a dispute between the parties, it does not exercise its jurisdiction illegally of with material irregularity simply because it decides either a question of law or a question of fact erroneously and in such a case, High Court has no power of revision against a decision of the lower Court. But if a question of jurisdiction is involved in its conclusion of law or fact, then High Court can interfere in the event of such conclusion being erroneous, because that would amount to illegal assumption or exercise of jurisdiction. Under O. 33, R. 5 (*d*), C.P. Code, the Court's jurisdiction to reject an application for leave to sue *in forma pauperis* is derived from or is based upon the decision of the question whether the applicant's allegations do not show a cause of action. If it decides that question on an erroneous interpretation of R. 5 (*d*), it will not be acting within the ambit of its jurisdiction, and its order dismissing the application is, therefore, revisable. (*Sinha and Ray, JJ.*) Kamani Devi *v.* Kameshwar Singh. 25 Pat. 58 12 B.R. 398=223 I. C. 336=1946 Pat. (Rul.) 183=A.I.R. 1946 Pat. 316.

———S. 115—*Error of law—Wrong decision on limitation—Revision—Interference.*

An erroneous decision on a question of limitation will not justify the High Court in interfering with that decision in revision under S. 115, C. P. Code. (*Das and Ayyar, JJ.*) Kantha Sahu *v.* Probasi Naik. 13 Cut.L.T. 63.

———S. 115 and O. 22—*Failure to bring legal representatives of deceased respondent on record—Revision petition, if may be dismissed.*

Cornelius, J.—The High Court may dismiss a revision petition by reason of the petitioner's failure to prosecute it. The expression "failure to prosecute" must necessarily include default in the taking of all such steps as are necessary for the further continuance of the proceedings, and failure to bring before the Court the representatives of a deceased respondent, whose interests are likely to be affected, should the petition succeed, is clearly such a default. (*Din Mahomed, Ram Lall and Cornelius, JJ.*) Ajudhia Pershad Ram Pershad *v.* Sham Sunder. I.L.R. 1947 Lah. 417=229 I.C. 307=1947 Lah. (Rul.) 168=A.I. R. 1947 Lah. 13 (F.B.).

———S. 115—Finding of fact—Interference. *See* C. P. Code. S. 115—Question of fact—Interference.

———S. 115—Illegality—Appeal from order granting review—Appellate Court considering sufficiency of evidence in proof of grounds for review and reversing finding of trial Court—If acts illegally—Revision—Interference. *See* C. P. Code, O. 47, R. 4 (2), proviso (*b*). 4 D.L.R. (Nag.) 108.

———S. 115—*Illegality—Discretion—Interference in revision—Order for refund of commission under O. 21, R. 93—Omission to award interest—Revision—Interference.*

In making an order under O. 21, R. 93, C. P. Code, for refund of the commission on the sale proceeds by the Nazir who conducted the sale, it is discretionary with the Court to allow interest, on the amount or not. Where the Court does not consider it fair or just to allow interest, the High Court will not interfere with the discretion exercised by the lower Court, in the absence of any question relating to jurisdiction. (*Ram Labhaya, J. C.*) GUMAN MAL *v.* PAHLAD DAS. 4 D.L.R. (A.M.) 24=A.I.R. 1949 Ajmer 47=1949 A.M.L.J. 1.

———S. 115—*Illegality or material irregularity—Court—Order for payment of excess court-fee on wrong application of law coming into force after suit—Grant of short and inadequate adjournments for payment—Order rejecting plaint for non-payment—Interference in revision—Order of rejection becoming final—If bar to interference.*

Where the lower Court demands excessive court-fee on a plaint, applying to the case, the provisions of Act XXV of 1948, which came into force subsequent to the institution of the suit, and rejects the plaint for failure to pay the deficient court-fee, it having granted for payment of the excess-fee only short and inadequate adjournments, it manifestly acts illegally and with material irregularity in the exercise of its jurisdiction, and the High Court will consequently interfere in revision with the decision of the lower Court. By interfering with the order demanding further court-fee, the Court must, of necessity, as a consequence, also set aside the order rejecting the plaint, and the fact that the latter order has the force of a decree and has become final is no bar to the exercise by the High Court of its powers of interference with the order of the lower Court. (*Ramaswami and Sarjoo Prasad, JJ.*) BASUKI PRASAD SINGH *v.* SATYA KINKAR. A.I.R. 1950 Pat. 470.

———S. 115—*Illegality or material irregularity—Wrong decision on fact or law—Revision—Jurisdiction under S. 34, Arbitration Act—Failure to exercise—Interference.*

It is settled law that where a Court has jurisdiction to determine a quesion and it determines that question it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law. But where the lower Court has failed to exercise the jurisdiction vested in it, *e.g.*, under S. 34, Arbitration Act, to stay proceedings in the suit the High Court is entitled to interfere in revision. I.L.R. (1945) All. 162, rel. on. (*Rajadhyaksha and Chainani, JJ.*) CENTRAL GOVERNMENT OF INDIA *v.* CHHOTALAL CHHAGANLAL. I.L.R. (1949) Bom. 449=51 Bom.L.R. 615=A.I.R. 1949 Bom. 359=4 D.L.R. (Bom.) 147.

———S. 115—Interference—Abuse of powers by the execution Court—Interference. [*See* Q.D. 1941-1945, Vol. I, Col. 984.] BAGYALAKSHMI AMMAL *v.* BAPPU AIYAR. I.L.R. (1946) Mad. 640=223 I.C. 325=1946 Mad. (Rul.) 109=A.I.R. 1946 Mad. 90.

———S. 115—*Interference—Appeal under S. 476-B, Cr.P.Code—Order awarding costs—Jurisdiction—Interference by High Court.*

S. 35, C. P. Code, does not apply to an appeal under S. 476-B, Cr. P. Code, and hence in such an appeal the Appellate Court has no jurisdiction to award costs. If the Court awards costs, it acts illegally in the exercise of its jurisdiction and such an order awarding costs will be interfered with by the High Court under S. 115, C. P. Code. (*Fazl Ali, C.J., Manohar Lall and Ramaswami, JJ.*) DEONANDAN SINGH *v.* RAMLAKHAN SINGH. 27 Pat. 52=2 D.L.R. 492=A.I.R. 1948 Pat. 225=49 Cr.L.J. 246 (F.B.).

———S. 115—*Interference—Conditions necessary for.*

S. 115, C. P. Code, applies to jurisdiction only, the irregular exercise, the non-exercise or the illegal assumption of jurisdiction. It is not directed against conclusion of law or fact which involve no question of jurisdiction. If, however, the lower Court has absolutely and whimsically declined to exercise its jurisdiction, and refuses to make any orders which it should have done, the High Court will interfere under S. 115, C. P. Code. (*Manohar Lall, Ag. C. J., Sinha and Das, JJ.*) R. NICHOLES LINES *v.* ALL INDIA SPINNERS ASSOCIATION. (1946) P.W.N. 321=13 B.R. 382=230 I.C. 88=1947 Pat. (Rul.) 274=A.I.R. 1947 Pat. 185 (S.B.).

———S. 115—*Interference in revision—Decision by lower Court of question relating to substantive part of case as preliminary question—Proper course.*

A preliminary objection almost invariably relates to the entire suit. While it may touch the merits of the case in a collateral or indirect manner, it must not involve the direct decision of a question which is an integral part of the merits of the case. If a lower Court decides a question which belongs to the substantive part of the case as preliminary question, it falls into the error of deciding the case piecemeal. The proper course for the High Court in revision is to set aside the finding recorded by the Court and to make a direction that the issue in question should be decided along with all other issues arising out of the case on the merits, at the close of the trial. (*Cornelius, J.*) TAHIR SHAH *v.* KANDA. Pak.L.R. (1949) Lah. 619=A.I.R. 1949 Lah. 279.

———S. 115—Interference—Discretion of Court as to sufficiency of cause for and excusing of delay under S. 5 of Limitation Act. *See* LIMITATION ACT (IX OF 1908), S. 5. (1949) 1 M.L.J. 144.

———S. 115 and O. 33, R. 5—*Interference—Dismissal of pauper application on extraneous and irrelevant considerations.*

Where a Court purports to dismiss an application to sue *in forma pauperis* on certain considerations extraneous to those provided for in R. 5 of O. 33, C. P. Code, and which are irrelevant, on grounds which could not be the basis of such a decision, the Court thereby invests itself with a jurisdiction which in law it did not possess and as such its order can be interfered with in revision. (*Malik, C.J. and Desai, J.*) ORDE *v.* DEACON. 1950 A.W.N. 191=1950 A.L.J. 93.

———S. 115—*Interference—Executing Court adjourning petition for acceptance of security from decree-holder owing to his absence.*

There is nothing illegal in an execution Court adjourning a petition for acceptance of security from the decree-holder owing to his absence, and if there is any illegality it is not such as to call for interference in revision. (*Atma Charan, J.C.*) TRIVENI PERSHAD *v.* SHIV CHAND. 5 D.L.R. (A.M.) 30.

———**S. 115**—Interference—Grounds for—Executing Court going behind the decree under a mistake of law. *See* HINDU LAW—JOINT FAMILY—FATHER. (1947) 1 M.L.J. 183.

———**S. 115**—*Interference — Grounds—Order without jurisdiction but rectifying an error—Interference by **High Court**.*

The revisional powers of the High Court have to be exercised only in the interests of justice. While the High Court has power to interfere with an order made without jurisdiction, it will not interfere with an order which the interests of justice required should be upheld, and which has rectified an error which should not be allowed to remain. (*Davis, C. J. and Thadani, J.*) VENSIMAL *v.* KARACHI DT. LOCAL BOARD. I.L.R. (1947) Kar. 117=A.I.R. 1948 Sind 116.

———**S. 115**—*Interference—Limits to powers of.*

If the High Court is satisfied upon these three matters, *viz.*, (*a*) that the order of the subordinate Court is within its jurisdiction, (*b*) the case is one in which the Court ought to exercise jurisdiction and (*c*) the Court has not acted illegally, it has no power to interfere because it differs, however profoundly, from the conclusions of the subordinate Court upon questions of fact or law. A.I.R. 1949 P.C. 156, foll. (*Sen, J.*) RAJUL RAOJEE *v.* PROVINCIAL GOVERNMENT, CENTRAL PROVINCES AND BERAR. I.L.R. (1950) Nag. 690=5 D.L.R. (Nag.) 174.

———**S. 115**—*Interference—Order cutting down Pleader Commissioner's Bill—Interference—Power of High Court—**Constitution of India, Art. 227**.*

An order of lower Court cutting down a Pleader Commissioner's Bill on the ground that some unnecessary work had been done by the Pleader Commissioner without hearing him in the matter, is not a judgment or a judicial order at all. The fact that the amount of fees determined is incidentally to be included in the decree amount to be paid by the parties does not make it a judicial order. The High Court has, therefore, no power to interfere with an order of that sort under S. 115, C. P. Code; on the other hand, this is a case covered by the High Court's powers of superintendence under Art. 227 of the Constitution. It is under this provision that the Court has power to fix the fees to be paid in such matters and it is clearly ancillary to that that the Court has power to control orders to be passed in respect of such fees. (*Roxburgh, J.*) SITANSUJIBAN MITRA *v.* DILIP KUMAR. 86 C.L.J. 26=54 C.W.N. 782.

———**S. 115**—*Interference—Order made by consent of parties.*

The Court would not ordinarily be disposed to exercise its discretion any powers under S. 115, C. P. Code for the purpose of setting aside an order of a lower Court which was made with the consent express or tacit of the person who seeks to have that order vacated. (*Moothani, J.*) SURAJ BALI SINGH *v.* JADU NANDAN SINGH. I.L.R. (1947) A. 223=1946 A.W.R. (H.C.) 618=1946 A.L.J. 479=1946 A.L.W. 593=A.I.R. 1947 All. 98=231 I.C. 281.

———**S. 115**—*Interference—Order that no special issue need be framed on a point.*

Where a Court orders that no special issue need be framed on a particular point and that parties can lead evidence on that point under another issue the matter is one which need not be agitated in revision at that stage and could well be agitated in the appeal. Hence a revision against such an order would have to be dismissed. DAS. A.I.R. 1950 Ajmer 28 (2)=5 D.L.R. (A.M.) 37. (*Atma Charan, J.C.*) DOULAT RAM *v.* PREM

———**Ss. 115 and 151**—*Interference—Orders under S.* 151.

Powers under S. 151, C. P. Code, after all are discretionary and orders passed under the section cannot be ordinarily interfered with on the revisional side by the Court under S. 115, C. P. Code and more so when another remedy by way a suit is available. 76 I.A. 67, Foll. (*Atma Charan, J.C.*) JUGAL KISHORE *v.* ANANT RAM CHATURBHUJ. 5 D.L.R. (A.M.) 48=A.I.R. 1950 Ajmer 27.

———**S. 115**—*Interference—Petitioner not fully candid and failing to disclose essential facts—High Court will not interfere in revision.*

The High Court will be reluctant to interfere with an order in revision in favour of a party who has not been fully candid with the High Court and has omitted to disclose essential matters upon which the decision of the case would turn. (*Swas and Chakravartti, JJ.*) JITENDRA NATH BASU *v.* TARAK CHANDRA ROY CHOUDHURY. 225 I.C. 254=A.I.R. 1947 Cal. 28.

———**S. 115**—*Interference by High Court—Principles governing.*

S. 115 of the C. P. Code is intended *inter alia* to keep Subordinate Courts within the limits of their jurisdiction. Neither the trial Court can give jurisdiction to itself, nor can the appellate Court give jurisdiction to the trial Court, by an erroneous decision and in either case the High Court is competent to interfere in revision.

Where the very basis and foundation of the jurisdiction of the Court below rests on the correctness of the conclusion of the lower Court as regards the character of the lands in question, if the High Court finds that the Court below assumed jurisdiction to try the suit for rent on an erroneous finding as to the character of the land, it can interfere under S. 115, C. P. Code. Case law discussed. (*Viswanatha Sastri, J.*) PENTAKOTA NARYUDU *v.* VENKATA RAMANAMURTHI. A.I.R. 1950 Mad. 158=(1949) 2 M.L.J. 623.

———**S. 115**—*Interference in revision—Setting aside of* ex parte *decree against pardanashin lady.*

Where a lower Court finds that there was no proper service of the notice of suit on a pardanashin lady and sets aside an *ex parte* decree on the ground, there is nothing to justify the inference that it has acted illegally or with material irregularity so as to justify interference in revision under S. 115, C. P. Code. (*Atmacharan, J.C.*) GOPI LAL *v.* MT. GAINDI. 5 D.L.R. (A.M.) 11.

———**S. 115**—Interference—Unjust order. *See* C. P. CODE, O. 23, R. 3 AND S. 115. 1946 A.L.J. 500.

———**S. 115**—*Interference—View of law not necessarily wrong—Other remedy open.*

Where it cannot be said that the view of law of the lower Court is necessarily wrong and where another remedy by way of suit is open to the aggrieved party, it is not necessary to interfere in revision with the order of the lower Court. (*Oak, J.C.*) THE OFFICIAL RECEIVER *v.* HIRA. A.I.R. 1950 Ajmer 38.

———**S. 115**—Interference in revision—Wrong decree set aside in appeal which is incompetent. [*See* Q.D. 1941-1945, Vol. I, Col. 985.] SUDHANSU KUMAR *v.* BANAMALI. 223 I.C. 537=1946 Cal. (Rul.) 193=A.I.R. 1946 Cal. 63.

———**S. 115**—*Interlocutory order—Interference—Order refusing amendment of written statement.*

S. 115, C. P. Code, is no bar to the maintainability of a petition for revision of an order refusing amendment of a written statement. The High Court's powers to interfere in revision with interlocutory orders are not restricted where, however, another remedy is available to the injured party by way of appeal or suit, an interlocutory order will not ordinarily be interfered with. A.I.R. 1947 Pat. 469, ref. to. (*Panigrahi and Narasimham, JJ.*) CHANDRA KISHORE DAS *v.* BABULAL AGARWAL. I.L.R. (1949) Cut. 105=A.I.R. 1949 Orissa 77.

———**S. 115 and O. 6, R. 17**—*Interlocutory order—Interference—Order refusing leave to amend pleadings.*

An order refusing leave to amend a pleading is certainly open to revision. 1934 A.L.J. 989; 40 I.C. 65, Rel. on. (*Atma Charan, J.C.*) RAM SWARUP *v.* MT. NASIBI. 5 D.L.R. (A.M.) 28 =A.I.R. 1950 Ajmer 32 (1).

———**S. 115**—*Interlocutory orders—Interference—Power of High Court.*

The High Court has jurisdiction to revise an interlocutory order, (*e.g.*), order refusing prayer for amendment of plaint passed by a subordinate Court from which no appeal lies to the High Court. View of Page, J., in 53 C. 767, foll.; 28 C.W.N. 991; 37 C.W.N. 1098 and 33 C.W.N. 1146, ref. to. (*Sen, J.*) NANILAL DEY *v.* KANAKLATA DASI. I.L.R. (1949) 1 Cal. 76 =54 C.W.N. 37.

———**S. 115**—*Interlocutory orders—Interfeference when justified.*

Ordinarily the High Court is loathe to interfere in interlocutory orders, but where the exercise of jurisdiction or failure to exercise it results or is likely to result in gross injustice or irreparable injury, interference *ex debito justitiae* becomes necessary. Such a matter would be a "case decided" within the meaning of S. 115, C. P. Code. (*Rege, J.*) KORJI *v.* SATAN. A.I.R. 1950 M. B. 24.

———**S. 115**—*Interlocutory orders—Revision.*

The High Court has ample jurisdiction to revise interlocutory orders and to set them aside, although such orders may be attacked in an appeal from the final decree or order in the proceeding. 53 Cal. 767; 38 C.W.N. 1146; 7 I.C. 436, ref. (*Amarendra Nath Sen, J.*) KISHORE MOHAN PAL *v.* SUDHAMAYEE. 4 D.L.R. (Cal.) 168.

———**S. 115**—*Interlocutory orders—Revision—Order improperly holding document forming basis of suit inadmissible in evidence and excluding same from evidence on record—Revision—Interference.*

The word "case" in S. 115 does not mean the whole case always. Any state of facts juridically considered would be a "case"; it would include a decision on any substantial question in controversy between the parties affecting their rights, even though such order be passed in the course of the trial of the suit. An interlocutory order deciding a question of that kind as distinguished from a purely formal and incidental order is a "case decided," and would be subject to revision if the other conditions of S. 115 are satisfied and the order has resulted or is likely to result in such gross injustice or irreparable injury as cannot be remedied otherwise than by the exercise of the extraordinary jurisdiction of the High Court at that stage.

Where the lower Court improperly holds a document or an instrument, which is the very basis of the suit, to be inadmissible in evidence and thus prevents it from coming in evidence on record, such an order is revisable under S. 115, C. P. Code; if the order is not interfered with, it is likely to result in gross injustice to the plaintiff. A.I.R. 1943 Lah. 65, foll. (*Atma Charan, J.C.*) JHUMAR MAL BOHRA *v.* MOHAN LAL PALAL. 5 D.L.R. (A.M.) 1.

———**S. 115**—*Interlocutory order—Revision—Power of High Court—Order wrongly placing onus of proof.*

The High Court has power to revise an interlocutory order of the Courts below in which conditions of Cls. (*a*), (*b*) or (*c*) of S. 115, C.P. Code, are satisfied, where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no remedy available to him.

The correct placing of the onus of proof is a vital point of procedure, and the incorrect placing of the onus may, therefore, amount to a material irregularity. Where the onus of proof is wrongly placed on the defendant and the effect of requiring him to lead evidence seriously prejudices him and deprives him of the very valuable right of adducing evidence in rebuttal of evidence adduced by the plaintiff, the prejudicial effect of this procedure is not capable of remedy and it is a proper case in which the High Court ought to interfere in revision. (*Reuben and Ray, JJ.*) BIR BABU *v.* RAGHUBAR BABU. 26 Pat. 393=A.I.R. 1947 Pat. 469.

———**S. 115**—*Irregularity justifying interference—Direction as to order in which evidence was to be let in.*

Where in a case of clash of interests between defendants *inter se*, the trial Court gives a direction in regard to the order in which the evidence is to be given, though it might be irregular, the irregularity is not such which calls for an interference on the revisional side. (*Atmacharan, J. C.*) KISHAN LAL *v.* SUJAN MAL. 5 D.L.R. (A.M.) 21 (2)=A.I.R. 1950 Ajmer 35 (2).

———S. 115—*Irregularity—Order refusing to decide question of jurisdiction as preliminary issue—Revision.*

An order by a subordinate Court refusing to go into and decide the question of jurisdiction as a preliminary issue before proceeding to hear the suit on the merits may amount to an irregularity calling for interference in revision. A.I.R. 1934 Mad. 617; 146 I.C. 792, foll. (*M. B. Rege, J.*) LACHMAN *v.* BALKRISHNA. 5 D.L.R. (M. B.) 6=A.I.R. 1950 M.B. 45.

———S. 115—Jurisdiction—Absence of—Claim petition under O. 21, R. 58, C. P. Code—Dismissal *ex parte*—Order setting aside dismissal and restoring petition to file—Revision—Competency. *See* C. P. CODE, O. 9, R. 13. I.L.R. (1947) Kar. 73.

———S. 115—Jurisdiction—Absence of—Court re-opening case after decree and ordering payment of stamp duty and penalty under S. 33, Stamp Act—Revision—Interference. *See* STAMP ACT, S. 33. 3 D.L.R. (Nag.) 103.

———S. 115—*Jurisdiction—Absence of material irregularity—Defendant offering to confess judgment if plaintiff (Zamindar) would appear in Court and state on affirmation as to debt—Order calling on plaintiff to appear in Court—Disobedience—Dismissal of suit—Revision—Interference—Oaths Act, Ss. 8, 9 and 12.*

Where a plaintiff declines to appear in Court in accordance with an order of Court requiring him to appear and make an affirmation, on the application of the defendant agreeing to confess judgments if the plaintiff were to take oath or state on solemn affirmation that the defendant had borrowed money from him, but offers to give evidence on commission (he being a zamindar and pleading status and prestige as a plea for non-appearance in Court), and the Court dismisses the suit on the ground of disobedience of the order of the the Court, the order, is without jurisdiction or in any event, vitiated by material irregularity justifying the Court to interfere with and set aside the order under S. 115, C. P. Code. What the Court, is entitled to in such a case is that it may take into consideration the refusal of the party to take the oath or make the affirmation, but it cannot compel the plaintiff to attend personally in order to state whether he is prepared to take the oath or make the affirmaion which the defendant calls on him to do; nor can it dismiss the suit for failure to appear in Court to make the affirmation on oath. The Court can only proceed with the trial of the suit. 4 P.L.J. 152, dist. (*Shearer, J.*) BHUBNESHWARI CHAND *v.* SUKAL. A.I.R. 1950 Pat. 180.

———S. 115—*Jurisdiction—Absence of—Receiver in suit for dissolution of firm—Lease by of factory of firm for premium—Non-payment of premium by lessee—Attachment of lessee's money in bank on receiver's application—If without jurisdiction—Revision.*

Where in a suit for dissolution of partnership of a firm, a receiver is appointed by the Court, and such receiver leases out a property of the firm (a factory) on premium for a period of two years, and, on default by the lessee, the Court, at the instance of the receiver, attaches the lessee's moneys in a bank, the order of attachment is not without jurisdiction, so as to entitle the High Court to revise such order under S. 115, C. P. Code, on the ground of want of jurisdiction. (*Agarwala, C.J. and Narayan, J.*) NASIR *v.* LUTF. 27 Pat. 263=A.I.R. 1949 Pat. 496.

———S. 115—Jurisdiction—Absence of—Rejection of application for leave to sue in *forma pauperis*—Revision — Interference — Grounds. *See* C. P. CODE, O. 33, RR. 5, 6 AND 7. 3 D.L.R. (Lah.) 9.

———S. 115—*Jurisdiction—Application under O. 21, R. 91—Appellate decision holding that judgment-debtor had no saleable interest and setting aside sale—Revision—Competency.*

An erroneous decision upon a direct question of limitation gives rise to an application in revision under S. 115, C. P. Code. But when the decision merely affects jurisdiction but is not itself a decision as to jurisdiction, the High Court has no power to interfere in revision, when the points giving rise to the application is a decision on a point of law which the Court had jurisdiction to decide. No revision application can therefore lie from a decision in appeal on an application made under O. 21, R. 91, C.P.Code, when the decision is that the judgment-debtor had no saleable interest in the property sold and the sale therefore has been set aside. (*Macklin and Rajadhyaksha, JJ.*) JAYARABAI *v.* BINDO GANESH. 48 Bom.L.R. 598=A.I.R. 1947 Bom. 119.

———S. 115—Jurisdiction—Failure to exercise—Order refusing to frame issues—Revision. *See* C. P. CODE, O. 14, R. 5 AND S. 115. 223 I.C. 303.

———S. 115—*Jurisdiction—Illegal exercise of—Order allowing withdrawal of suit under O. 23, R. 1—Revision.*

If a Court allows a suit to be withdrawn in a case not covered by O. 23, R. 1, C. P. Code, the jurisdiction vested by that rule is illegally exercised by it and the High Court can in such circumstances interfere in revision. (*Hidayatullah, J.*) SATYANARAYAN HIRALAL *v.* CHHOTELAL ONKAR PRASAD. I.L.R. (1948) Nag. 966=A.I.R. 1949 Nag. 10=1948 N.L.J. 325.

———S. 115—Jurisdiction—Illegal exercise of—Passing of decree on award before expiry of period allowed for filing objections thereto. *See* ARBITRATION ACT (X OF 1940), S. 17 AND C. P. CODE (V OF 1908), S. 115. (1948) 2 M.L.J. 365.

———S. 115—Jurisdiction—Irregular exercise of—O. 33, R. 1—Court not correctly addressing itself to matter—Order—Revision. *See* C. P. CODE, O. 33, R. 1, EXPL. A.I.R. 1950 Pat. 364.

———S. 115—*Jurisdiction—Question of fact.*

A decision as to the amount of profits derived by a mortgagee in possession is a pure question of fact and does not involve any question of jurisdiction and so not open to revision. (*Chandiramani, J.*) SHRI THAKURJI MAHARAJ *v.* JANGOO SINGH. A.I.R. 1950 All. 105.

———S. 115—Jurisdiction—Scheme decree—Directions for budget—Objection to items in budget framed—Order disallowing—Revision—Competency. *See* C. P. CODE, S. 47. 49 Bom.L.R. 306.

———S. 115—*Jurisdiction under—Extension of to cases not falling under section—Practice.*

The Court as a matter of principle will not extend its jurisdiction under S. 115, C. P. Code, to cases not specifically falling within the section. (*Macklin and Bavdekar, JJ.*) BALDEVDAS VALLABHDAS *v.* DEVENDRA PRASAD. 49 Bom. L. R. 306=A.I.R. 1947 Bom. 462.

———S. 115—*Limitation for application—Ajmer, J.C.'s Court Notification of 12th May, 1938—Exclusion of time requisite for obtaining copy of lower Court's judgment.*

No limitation is prescribed in the Limitation Act for purposes of admitting applications in revision. The Ajmer J. C.'s Court Notification No. 518-835, dated 12th May 1933, appears to lay down that in case an application in revision is filed beyond the period of three months it would be considered to have been filed with undue delay and thrown out on that ground alone. There is however no reason why the time required for obtaining copy of the judgment of the Court below should not be excluded. (*Atma Charan, J. C.*) BHURALAL *v.* KASIM. A.I.R. 1950 Ajmer 1.

———S. 115—*Material Irregularity—Court closing defendants' case for his failure to execute warrant of arrest against his witness.*

A Court acts illegally and with material irregularity in abruptly closing the defendant's case on the ground that he did not get the summons served on a witness who was reported to be dead or did not get a warrant of arrest issued against another witness executed. (*Atma Charan, J.C.*) LALA *v.* ANANT MAL. A.I.R. 1950 Ajmer 2.

———S. 115—Material irregularity—Court misdirecting itself and not considering crucial point—Application to sue *in forma pauperis*—Court taking subject-matter of suit into account and treating possession of property as equivalent to possession of sufficient means to pay Court-fee—Legality—Interference. *See* C. P. CODE, O. 33, R. 1, EXPL. 25 Pat. 318.

———S. 115—*Material irregularity—Court not applying its mind to the facts of the case.*

Where a Court does not apply its mind to the facts of a case, when it is its duty to do so, it acts with material irregularity in the exercise of its jurisdiction, for it then omits to perform a function which it is its duty to perform, for a proper disposal of the case. Therefore, in such a case a revision is competent against such an order. (*Seth, J.*) HIRANIA *v.* RAM PIARI. 1950 A.W.R. 164=A.I.R. 1950 A. 367.

———S. 115—*Material irregularity—Decision based on faulty reading or non-reading of record—Interference.*

The omission to look into the record in the case by the lower Court is a gross irregularity in the exercise of its jurisdiction, and its decision based upon a faulty reading or rather a non-reading of the record is liable to be set aside in revision by the High Court. (*Das and Das Gupta, JJ.*) MIHIRLAL *v.* PANCHKARI. 54 C.W.N. 637=A.I.R. 1950 Cal. 520.

———S. 115—*Material irregularity—Dismissal of appeal on question of fact not raised in the trial Court—Interference in revision.*

Where an appellate Court dismisses an appeal on a question of fact which was never agitated in the trial Court, it is an irregularity in the exercise of the Court's jurisdiction and its decision is liable to be set aside in revision. (*Madeley, J.*) DARBARI SINGH *v.* SHEO SHANKAR LAL. 1947 A.W.R. (C.C.) 93=1947 O.A. (C.C.) 93=1947 O.W.N. 298=A.I.R. 1948 Oudh 98=2 D.L.R. 71.

———S. 115—*Material irregularity—Erroneous decision on limitation based on misapprehension of pleadings.*

If a wrong decision on a question of limitation is based on misapprehension by the lower Courts of the pleadings of the parties, that would amount to material irregularity, and a revision in that case would be competent. 135 P.L.R. 1913, ref. to. (*Mahomed Shafi, J.*) MT. MALUK LADI *v.* ANWAR SULTAN. A.I.R. 1950 Pesh. 31.

———S. 115—*Material irregularity—Failure to record finding that claim was not barred by limitation.*

Where a Court fails to record a definite finding that the claim was not barred by limitation before passing a decree for redemption, it acts illegally and with material irregularity in the exercise of its jurisdiction and its orders has to be set aside in revision. (*Seth, J.*) SURAJ BALI *v.* RANG BAHADUR SINGH. 1950 A.L.J. 86=5 D.L.R. (A.) 97=1950 A.W.R. 189=A.I.R. 1950 All. 88.

———S. 115—*Material irregularity—Ignoring of express statute.*

Ignoring of express statute and depriving a party of his right under it, is material irregularity in the exercise of jurisdiction and would be ground for interference in revision. (*Trivedi, J.C.*) GANGABAI *v.* MALBAI A.I.R. 1950 Kut. 64.

———S. 115—*Material irregularity — Wrong procedure in course of trial.*

A Court acts with material irregularity in the exercise of its jurisdiction when it adopts a wrong procedure in the course of the trial which materially affects the decision of the case. Where in a suit for mesne profits in which the plaintiff makes a claim in respect of profits that might have been realised by the defendant by the exercise of reasonable care, the lower Court wrongly directs the defendant to lead evidence in the first instance, such direction materially affects the determination of the question of mesne profits, and the High Court can interfere under S. 115 (*c*), C. P. Code. 53 C.W.N. 458 (P.C.) and 53 C.W.N. 562, Disc. (*Das and Guha, JJ.*) KALLY NATH DUTTA *v.* SHEW BUX. 54 C.W.N. 355=A.I.R. 1950 Cal. 87.

———S. 115—*Material irregularity—Interference—Defendant offering to confess judgment if plaintiff (Zamindar) would appear in Court and state on affirmation as to debt—Order calling on plaintiff to appear in Court—Disobedience—Dis-*

missal of suit—Revision—Interference—Oaths Act, Ss. 8, 9 *and* 12.

Where a plaintiff declines to appear in Court in accordance with an order of Court requiring him to appear and make an affirmation, on the application of the defendant agreeing to confess judgments if the plaintiff were to take oath or state on solemn affirmation that the defendant had borrowed money from him, but offers to give evidence on commission (he being a zamindar and pleading status and prestige as a plea for non-appearance in Court), and the Court dismisses the suit on the ground of disobedience of the order of the Court, the order, is without jurisdiction or in any event, vitiated by material irregularity justifying the Court to interfere with and set aside the order under S. 115, C. P. Code. What the Court is entitled to in such a case is that it may take into consideration the refusal of the party to take the oath or make the affirmation, but it cannot compel the plaintiff to attend personally in order to state whether he is prepared to take the oath or make the affirmation which the defendant calls on him to do; nor can it dismiss the suit for failure to appear in Court to make the affirmation on oath. The Court can only proceed with the trial of the suit. 4 P.L.J. 152, dist. (*Shearer, J.*) BHUBNESHWARI CHAND *v.* SUKAL. A.I.R. 1950 Pat. 180.

———S. 115—*Material irregularity—Omission to consider important provisions of law.*

Exclusion from consideration by a Court of the most important and relevant provisions of law or a misreading of it would be a material irregularity or illegality in exercise of jurisdiction and would be a valid ground for interference under S. 115, C. P. Code. (*Yorke, Sinha and Mathur, JJ.*) KHUN KHUN CHAWBE *v.* MAHABIR CHAWBE. I.L.R. (1948) All. 155=1948 A. L.W. 113=1948 A.L.J. 90=A.I.R. 1948 A. 261=2 D.L.R. 856 (F.B.).

———S. 115—*Material irregularity—Order dismissing application under O.* 33, *R.* 5 (d)—*Real point in controversy not considered.*

If a Court rejects an application for leave to sue in *forma pauperis* under O. 33, R. 5 (*d*), C. P. Code, without applying its mind to the real point in controversy, it acts with material irregularity in the exercise of its jurisdiction, and its order is, therefore, open to revision. (*Sinha and Ray, JJ.*) KAMANI DEVI *v.* KAMESHWAR SINGH. 25 Pat. 58=12 B.R. 398=223 I.C. 336=1946 Pat. (Rul.) 183=A.I.R. 1946 Pat. 316.

———**S. 115 and O. 33, R. 1**—*Material irregularity—Order refusing leave to sue in* forma pauperis—*Revision.*

Where in disallowing an application for leave to sue in *forma pauperis* the Court has entirely misdirected itself and has taken wholly irrelevant matter into consideration and no evidence is on the record for the Court to have arrived at a decision in favour of the respondent, the Court has acted with material irregularity in giving a decision calling for interference in revision. (*Abdul Rahman, J.*) MAHOMED ASHRAF *v.* MAHOMED BIBI. 223 I.C. 353=1946 Lah. (Rul.) 268=47 P.L.R. 402=A.I.R. 1946 Lah. 81.

———S. 115—Material irregularity—Permission to withdraw suit with leave to file fresh suit—Failure to give reasons or state defects—Material irregularity justifying interference in revision. *See* C. P. CODE, O. 23, R. 1 (2). (1946) 2 M.L.J. 113.

———**S. 115 and O. 23, R. 1**—*Material irregularity—Withdrawal permitted with consent as application was not opposed—If material irregularity.*

The Court would not ordinarily be disposed to exercise its discretionary powers under S. 115, C. P. Code, for the purpose of setting aside an order of a lower Court which was made with the consent, express or tacit, of the person who seeks to have that order vacated. Where an application for withdrawal of a suit under O. 23, R. 1, C. P. Code, was not opposed and the withdrawal is ordered, it cannot be said that the Judge acted with material irregularity as to justify interference under S. 115, C. P. Code. (*Moothani, J.*) SURAJ BALI SINGH *v.* JADU NANDAN SINGH. I.L.R. (1947) A. 223=1946 A.W.R. (H.C.) 618=1946 A.L.J. 479=1946 A.L.W. 593=A.I. R. 1947 A. 98=231 I.C. 281.

———S. 115—*New plea—Limitation—Ground of exemption claimed on basis of endorsement of payment under S.* 20, *Limitation Act, not sustained—Endorsement as acknowledgment under, S.* 19—*Relief on basis of—Right to in revision.*

A party relying on an endorsement of payment on a promissory note as saving limitation under S. 20 of the Limitation Act and failing in it is not debarred from relying on the endorsement as an acknowledgment under S. 19, in revision. The question whether the endorsement did or did not extend limitation, either under S. 19 or under S. 20, having been in issue, the trial Court should decide the issue not only with reference to S. 20, which the party set up, but also with reference to S. 19, though not specifically set up by the party, in that Court. The trial Court not having applied its mind to the question whether S. 19, Limitation Act, would apply to save limitation, as it was its duty to do, there is no reason why appropriate relief should not be granted to the party in revision. The lower Court by not applying its mind must be deemed to have acted with material irregularity in the exercise of its jurisdiction, and the High Court will interfere and grant relief on the basis of S. 19. 2 Lah. 13, rel. (*Achhru Ram, J.*) THAKAR DAS *v.* SANT RAM. 4 D.L.R. (Simla) 51=A.I.R. 1949 E.P. 219.

———S. 115—New plea—Maintainability of a suit decreed under S. 9 of the Specific Relief Act—If can be raised. *See* SP. REL. ACT (I OF 1877), S. 9 AND C. P. CODE (V OF 1908), S. 115. (1948) 2 M.L.J. 453.

———S. 115—*New plea—Practice.*

An objection which is not purely a law point patent from the record and which necessitates the production of some evidence by the parties, cannot be taken for the first time in revision. (*Chopra, J.*) MT. SHANKRI *v.* NATHU RAM. A.I.R. 1950 Pepsu 1.

———S. 115—Order allowing amendment—Interference in revision—Principles. *See* C. P.

Code (V of 1908), Ss. 80 and 115. (1948) 2 M.L.J. 423.

———**S. 115 and O. 6, R. 17**—*Order allowing amendment of plaint—Revision—Competency.*

A revision under S. 115, C. P. Code, against an order allowing an amendment of the plaint under O. 6, R. 17, is not competent. (*Sapru, J.*) Sitla Bux Singh *v.* Mahabir Singh. 1948 A.L.J. 136=A.I.R. 1948 A. 221=1948 A.L.W. 229.

———**S. 115**—*Order amending decree—Revision—Competency.*

An order amending a decree so as to bring it in conformity with the judgment is not revisable under S. 115 of the Civil Procedure Code, because an alternative remedy in the form of an appeal against the amended decree is available. (*Viswanatha Sastri, J.*) Pullappa Naidu *v.* Venkatanarappa Reddi. 1950 M.W.N. 326=A.I.R. 1950 Mad. 578=(1950) 1 M.L.J. 667.

———**S. 115**—*Order amending or refusing to amend plaint—Order as to framing of issue—Interpretation of remand order—Revision—Interference.*

An order amending or refusing to amend a plaint or other pleading is open to revision by the High Court under S. 115, C. P. Code. The High Court, under S. 115, has jurisdiction to entertain revisions against orders relating to amendment of pleadings, or the framing of an issue, or relating to the proper interpretation of a remand order made by the lower Court. The High Court, however, is not bound to interfere; the discretion has to be exercised judicially and according to well-recognised principles. Each case will have to be judged on its own facts and circumstances. (*Pollock, Hemeon and Padhye, J.*) Narayan Sonaji *v.* Sheshrao Vithoba. I.L.R. (1948) Nag. 16=A.I.R. 1948 Nag. 258=3 D.L.R. (Nag.) 18=1948 N.L.J. 477 (F.B.).

———**S. 115**—*Order appealable—Revision—Competency—Procedure.*

No revision application lies from an order open to appeal. When such an application is made, the proper course for the Court is to treat the application as an appeal and proceed to dispose of it. (*Trivedi, J.C.*) Khimji Champsi *v.* Devji Vijpar. A.I.R. 1950 Kut. 18.

———**S. 115**—Order passed in revision by the High Court—Appeal to Privy Council—If lies. *See* C. P. Code, Ss. 109 and 115. 1946 O.A. (C.C.) 4.

———**S. 115 and O. 6, R. 17**—*Order rejecting amendment of plaint—Revision, when lies.*

Where a plaintiff seeks to amend his plaint by the addition of a defendant, and consequential amendment in the relief claimed and it is refused, the order refusing the amendment can be revised by the High Court. (*Sinha and Mathur, JJ.*) Shyam Lal *v.* Bhukan Saran. 1947 A.L.J. 666=2 D.L.R. 366=1947 A.W.N. (H.C.) 439.

———**S. 115**—Remedy open. [*See* Q.D. 1941-1945, Vol. I, Col. 992.] Ramcharan Das *v.* Hiro Nand. I.L.R. (1946) Lah. 427=222 I.C. 177=1946 Lah. (Rul.) 164.

———**S. 115**—*Other remedy open—Amendment of decree consequent on amendment of decretal portion of judgment.*

An order amending a decree to bring it into conformity with the judgment whose decretal portion has been amended to bring it into conformity with its earlier parts is not revisable under S. 115 of the Code as an alternative remedy in the form of an appeal against the amended decree is available. Case-law discussed. (*Horwill, J.*) Simhagiri Dora *v.* Zamindarini of Chemudu. 1949 M.W.N. 69=A.I.R. 1950 Mad. 15=(1949) 1 M.L.J. 171.

———**S. 115**—*Other remedy open—Appealable order not appealed against—Revision—Order rejecting application under O. 9, R. 9—Revision, if open.*

An order rejecting an application under O. 9, R. 9, C. P. Code, for restoration of a suit disposed of adversely to the plaintiff for default in payment of adjournment costs is open to appeal; the remedy is not by way of revision to the High Court. (*Beevor, J.*) Kishun Prasad *v.* Hardwar Singh. 225 I.C. 559=12 B.R. 641=1945 P.W.N. 392=A.I.R. 1946 Pat. 184.

———**S. 115**—*Other remedy open—Appealable order under S. 47, C. P. Code.*

Where an order under S. 47, C. P. Code, is appealable, a revision is not competent. (*Ramabhadram.*) Dhula *v.* Chandan Lal. 1949 A. M.L.J. 56=A.I.R. 1949 Ajmer 62 (1).

———**S. 115**—*Other remedy open—Compromise order relating to execution, discharge or satisfaction of decree.*

Where as a result of a compromise of execution proceedings an order is made relating to execution, discharge or satisfaction of decree, it is appealable and a revision is not competent. (*Ramabhadram.*) Nathu Lal *v.* Mahomed Sadiq. 1949 A.M.L.J. 52.

———**S. 115**—Other remedy open—Decision under S. 9, Specific Relief Act. *See* Specific Relief Act, S. 9.

———**S. 115**—*Other remedy open—Interference—Discretion of High Court.*

S. 115, C. P. Code, gives the High Court discretionary powers to interfere or not, the High Court will not usually interfere if another remedy is available to the aggrieved party. (*Manohar, Lall, Ag.C.J., Sinha and Das, JJ.*) R. Nicholes Lines *v.* All India Spinners Association. 13 B.R. 382=230 I.C. 88=1947 Pat. (Rul.) 274=A.I.R. 1947 Pat. 185=1946 P.W.N. 321 (S.B.).

———**S. 115**—*Other remedy open—Interference.*

The High Court will not interfere in revision when another remedy by way of suit is open to the aggrieved party. (*Mehta, J.*) Faizulla Bhai *v.* Chunnilal. 5 D.L.R. (M.B.) 26.

———**S. 115**—*Other remedy open—Interference when proper.*

Where non-interference in revision is likely to result in multiplicity of suits, in delay and in unnecessary expense to the parties, a revision may be entertained, although the applicant has not availed himself of his remedy by way of appeal to the lower Court. (*Ghulam Hasan and Walford, JJ.*) Ram Sundar Pande *v.* Parasram. 21 Luck. 167=1946 Oudh (Rul.) 105=223 I.C. 40=1945 O.W.N. 416=1945 O.A. (C.C.) 267 =1945 A.W.R. (C.C.) 267=A.I.R. 1946 Oudh 88.

———**S. 115**—*Other remedy open—Order refusing to set aside* ex parte *decree under O. 9, R. 13.*

The High Court may interfere in revision with an order refusing to set aside an *ex parte* decree under O. 9, R. 13, C. P. Code, where the finding of the Court below as to want of sufficient cause for non-appearance has not been reached after due inquiry, although the applicant has not availed himself of his right of appeal against the *ex parte* decree. The rule as to non-interference in revision when another remedy is open is not rigid, and each case must be considered on merits. (*Padhye, J.*) Kashi Rao *v.* Ramchandra. I.L.R. (1948) Nag. 252=A.I.R. 1948 Nag. 362=1949 N.L.J. 83.

———**S. 115**—*Other remedy open—Order under S. 3 of Charitable and Religious Trusts Act—Revision, if tenable.*

It is not an absolute rule that there should be no interference in revision if another remedy is open. This is a matter to be decided on the facts of each case. An application in revision against an order passed by an additional District Judge under S. 3 of the Charitable and Religious Trusts Act, is tenable, and the High Court may interfere in an appropriate case. (*Puranik, J.*) Ramkishorelal *v.* Kamal Narain. I.L.R. (1946) Nag. 96=A.I.R. 1947 Nag. 87=1946 N.L.J. 5.

———**S. 115**—*Other remedy open—Order under S. 9, Specific Relief Act—Interference.*

The High Court will not interfere in revision with an order under S. 9 of the Specific Relief Act, as the aggrieved party has a more effective remedy by a regular suit to get rid of the summary decision. A.I.R. 1914 Mad. 382, rel. on. (*Atma Charan, J.C.*) Mota *v.* Uda. 5 D.L.R. (A.M.) 4=A.I.R. 1950 Ajmer 6 (2).

———**S. 115**—*Other remedy open—View of law not necessarily wrong—Interference.*

Where it cannot be said that the view of law of the lower Court is necessarily wrong and where another remedy by way of suit is open to the aggrieved party, it is not necessary to interfere in revision with the order of the lower Court. (*Oak, J.C.*) The Official Receiver *v.* Hira. A.I.R. 1950 Ajmer 38.

———**S. 115**—*Other remedy open—Revision—Competency—Case open to appeal but not appealed against.*

It is only in cases in which no appeal at all, either first or second, lies to the Chief Court that a Revision Application will be entertained, if no appeal is preferred to a lower appellate Court although such an appeal lay. But this is extraordinary and should be resorted to only for special reasons. (*Kidwai, J.*) Barko *v.* Habiba Khanam. 22 Luck. 88=1946 Oudh (Rul.) 271=A.I.R. 1947 Oudh 101=227 I.C. 100=1946 R.D. 250=1946 O.W.N. 303=1946 A.W.R. (C.C.) 212=1946 O.A. (C.C.) 212.

———**S. 115**—*Other remedy open—Revision—Interference.*

The general rule is that where another remedy (by suit) is open, it is not the practice of the High Court to interfere in revision. But this rule is not inflexible. Each case must be considered on its own merits. (*Sen, J.*) Pragilal *v.* Khilawansing Dangi. I.L.R. (1946) Nag. 586=224 I.C. 526=1946 Nag. (Rul.) 155=1946 N.L.J. 349=A.I.R. 1946 Nag. 393.

———**S. 115**—Other remedy open—Revision—Maintainability. *See* C. P. Code, O. 21, Rr. 46 and 49 and S. 52. (1945) 2 M.L.J. 531.

———**S. 115**—*Question of fact—Inference of misconduct on part of railway administration—Interference in revision.*

Where on the facts proved, the lower Court infers misconduct on the part of the Railway Company in respect of a consignment, the High Court will not interfere in revision with such a finding of fact. (*Reuben, J.*) Governor-General in Council *v.* Amilal Marwari. (1946) P.W.N. 137=230 I.C. 274=1947 Pat. (Rul.) 303=13 B.R. 421=A.I.R. 1947 Pat. 81.

———**S. 115**—*Question of fact—Interference.*

Where the finding of fact is arrived at by the application of a wrong principle of law or is manifestly at variance with the evidence on record the High Court will interfere in revision. (*Balakrishna Ayyar, J.*) Devaraja Aiyar *v.* Srinivasan. 63 L.W. 1172=1950 M.W.N. 705=(1950) 2 M.L.J. 484.

———**S. 115**—*Question of fact—Interference.*

A finding that certain payments were in fact made is a finding of fact and as such it is not for the Court sitting in revision to hold otherwise. (*Atma Charan, J.C.*) Sheoji *v.* Motilal. 5 D.L.R. (A.M.) 46 (2)=A.I.R. 1950 Ajmer 11 (2).

———**S. 115**—*Question of fact—Interference.*

A question of fact which has been concurrently decided by two Courts cannot be in any way interfered with in a revision petition, when the Courts below have not acted in the exercise of their jurisdiction illegally or with material irregularity. (*Chopra, J.*) Mt. Shankri *v.* Nathu Ram. A.I.R. 1950 Pepsu 1.

———**S. 115**—*Question of fact—Interference—Decision as to amount of profits derived by mortgage in possession.*

A decision as to the amount of profits derived by a mortgagee in possession is a pure question of fact and does not involve any question of jurisdiction and so not open to revision. (*Chandiramani, J.*) Shri Thakurji Maharaj *v.* Jangoo Singh. A.I.R. 1950 All. 105.

———**S. 115**—*Question of fact—Interference—Finding that Counsel is material witness—Order directing his withdrawal from suit.*

Where a lower Court directs the withdrawal of a Counsel from a suit after taking into consideration all the circumstances and coming to a conclusion that he is a material witness and that his appearance will be embarrassing to the trial, its finding is binding on the High Court in revision, and even if the High Court takes a different view that the Counsel is not a material witness, it is not open to it to set aside that finding. (*Sen, J.*) All India Reporter, Ltd. G. D. Moghe. 5 D.L.R. (Nag.) 92=A.I.R. 1950 Nag. 110=1950 N.L.J. 187.

———S. 115—*Question of fact—Interference—Question as to existence of oral contract to pay debt of another.*

Where the question is as to whether there was an oral contract between the parties as to the payment by the defendant of a debt of another, is a pure question of fact and ordinarily on an application for revision the Court of the J. C. would not entertain such a question. But where the Courts below have not looked at the subject-matter at dispute in its proper light, the Court will interfere in revision. (*Trivedi, J.C.*) Khimji Manek *v.* Thacker Chathurbhuj Laxmidas. A.I.R. 1950 Kut. 44.

———S. 115 and O. 9, R. 13—*Question of fact—Sufficient cause for setting aside* ex parte ***decree.***

The question as to the existence of sufficient cause or otherwise for setting aside an *ex parte* decree is one of fact and cannot be interfered with in revision under S. 115, C. P. Code. (*Ghulam Hasan. C.J.*) Kewal Singh *v.* Tulshi Ram. 21 Luck. 581=A.I.R. 1947 Oudh 84=226 I.C. 543=1946 Oudh (Rul.) 257=1946 A.W.R. (C.C.) 217=1946 O.A. (C.C.) 217=1946 O.W.N. 343.

———S. 115—*Question of law—Whether service under O. 5, R. 15 is due and valid service.*

The question whether service of procees under O. 5, R. 15, C.P. Code, is due and valid service is a question of law. (*Almond, J.C. and Mahomed Ibrahim, J.*) Mt. Ghulam Fatima *v.* Bilkis Jan. 228 I.C. 121=1947 Pesh. (Rul.) 6=A.I.R. 1947 Pesh. 7.

———S. 115—*Question of fact—Interference—When proper.*

Although in revision the High Court will not usually interfere with the findings of fact, there are circumstances when it will upset findings of fact if those findings are not based on evidence or if they are based on inadmissible evidence or if they are blatantly and obviously inaccurate findings which no Court should have arrived at. (*Sen, J.*) Pannalal Shaw *v.* Nanigopal Biswas. 3 D.L.R. (Cal.) 47=52 C.W.N. 922=A.I.R. 1949 Cal. 103=50 Cr.L.J. 142.

———S. 115—Revision—Competency—Decree in suit under S. 9 of Specific Relief Act—Revision. *See* Specific Relief Act, S. 9. 1948 N.L.J. 337.

———S. 115—*Revision —Competency—Decision in proceedings under S. 9, Specific Relief Act.*

Reading S. 9 of the Specific Relief Act and S. 115 of the C. P. Code, it cannot be said that no revision lies from a decision under S. 9 of the Specific Relief Act. Moreover, there must be some remedy if in proceedings under S. 9 of the Specific Relief Act, there has been grave abuse of jurisdiction or material illegality or irregularity has occurred in the case. It is left to the discretion of the High Court to decide whether or not it is expedient to interfere in a particular case. (*Davies.*) Babu Ram *v.* Bashiruddin. 1946 A.M.L.J. 30.

———S. 115 and O. 9, R. 9—*Revision—Competency—Dismissal of restoration application without issuing notice.*

Where an application filed under O. 9, R. 9, C. P. Code, for the restoration of a suit dismissed for default is itself dismissed without notice being issued to opposite party, a revision petition against such dismissal is maintainable as the order is one passed without notice to the opposite party and is hence not one passed under O. 9, R. 9, C. P. Code. (*Koman, J.*) Kunhikrishna Reddi *v.* Ramaraju. 227 I.C. 93=59 L.W. 279=1946 M.W.N. 343=A.I.R. 1946 Mad. 482=(1946) 1 M.L.J. 274.

———S. 115 — Revision—Competency—Existence of appeal. *See* U. P. E. E. Act, S. 14 and U. P. Debt Red. Act, S. 8. 1946 A.L. J. 3.

———S. 115 — Revision—Competency—Failure to exercise jurisdiction. *See* Court-Fees Act (VII of 1870), S. 11 and C. P. Code (V of 1908), Ss. 148 and 151. (1949) 1 M. L.J. 233.

———S. 115—*Revision — Competency — Lower appellate Court holding reference to arbitration to be invalid and directing case to be tried and disposed of according to law.*

Where a Munsif overruled all objections as to the validity of a reference and passed a decree in terms of the award but the lower appellate Court held the reference to be invalid and directed the case to be tried and disposed of according to law, in revision it was contended that it could not be interfered with in revision.

Held, the order of the lower appellate Court amounted to a "case decided" within the meaning of S. 115, C. P. Code, as the appeal pending before it was a case which was entirely disposed of by it finally by its order.

The lower appellate Court by deciding that there was no valid reference to arbitration and that there the case should not have been referred to arbitration but that it should have been tried by the trial Court and in ordering the trial Court to try the case itself, had acted illegally in the exercise of its jurisdiction and its order was therefore revisable. (*Dayal and Agarwala, JJ.*) Mahomed Yakub Khan *v.* Sirajul Haq. 1949 A.L.J. 288=A.I.R. 1949 A. 771=1949 A.W.R. 342.

———S. 115—***Revision — Competency—Order allowing valuation of appeal to be amended after time for filing appeal had expired.***

Where a lower Court allows the valuation of an appeal to be amended after the time for filing the appeal had expired, it is not a matter in which the High Court would be justified in interfering in the exercise of its revisional jurisdiction. Either the lower Court committed an error of law or in applying S. 5, Limitation Act, it improperly exercised a discretion vested in it by law. In any event no revision would lie against such an order. (***Kaul and Chandiramani, JJ.***) Gajadhar Misir *v.* Ram Bux Singh. I.L.R. (1950) All. 86.

———S. 115 — Revision—Competency—Order dismissing application for amendment of execution petition. *See* C. P. Code, Ss. 47 and 115. (1947) 2 M.L.J. 235.

———**S. 115** — Revision—Competency—Order holding suit bad for misjoinder. *See* C. P. Code (V of 1908), O. 1, R. 1 and S. 115. (1949) 1 M.L.J. 207.

———**S. 115**—Revision—Competency—Order of appellate authority appointed under S. 12 (1) (*a*) of the Madras Buildings (Lease and Rent Control) Act (XV of 1946), to entertain appeals against orders of Rent Controller. *See* Madras Buildings (Lease and Rent Control.) Act, S. 12 (1) (*a*) and C. P. Code, S. 115. (1948) 1 M.L.J. 314.

———**S. 115**—Revision—Competency—Order of remand after setting aside order of lower Court returning plaint for presentation to proper Court. *See* C. P. Code (V of 1908), O. 41, R. 23 and S. 115. 1948 O.A. (C.C.) 1.

———**S. 115 and O. 6, R. 17**—*Revision—Competency—Order refusing leave to amend pleadings.*

An order refusing leave to amend a pleading is certainly open to revision. 1934 A.L.J. 989; 40 I.C. 65, Rel. on. (*Atma Charan, J.C.*) Ram Swarup *v.* Mt. Nasibi. A.I.R. 1950 Ajmer 32 (1)=5 D.L.R. (A.M.) 28.

———**S. 115**—Revision—Competency—Order refusing to bring a person on record as legal representative of deceased party. *See* C. P. Code (V of 1908), O. 22, R. 3 and S. 115. (1950) 1 M.L.J. 309.

———**S. 115 and O. 14, R. 5 (2)**—*Revision—Competency—Order striking off issues.*

It is within the powers of trial Court under R. 5 (2) of O. 14, C. P. Code, to strike off any issues which according to it is either wrongly framed or introduced and as such an order striking off certain issues, is not revisable under S. 115, C. P. Code. (*Malik and Bind Basni Prasad, JJ.*) Prakash Chand *v.* Mahendra Kumar. I. L.R. (1948) All. 337=1948 A.L.J. 105=1948 A.W.R. (H.C.) 112=A.I.R. 1948 A. 288=1948 O.A. (H.C.) 112=1948 A.L.W. 155.

———**S. 115**—Revision—Competency—Refusal to entertain objection as to attachment. *See* C. P. Code (V of 1908), Ss. 60 and 115 and Provident Funds Act (XIX of 1925), S. 3. (1950) 1 M. L.J. 186.

———**S. 115**—*Revision—Maintainability—Disallowance of claim for want of proof.*

Where the collection charges are disallowed to a mortgagee because there was no proof that they were incurred in making the collection, it cannot be said that the Court has acted unreasonably or contrary to law and a revision against such an order is not maintainable. (*Chandiramani, J.*) Shri Thakurji Maharaj *v.* Jangoo Singh. A.I.R. 1950 All. 105.

———**S. 115**—*Revision—Matter of calculation—If can be gone into.*

Where the question involved is purely one of calculation as to amount due in a suit for redemption, it is not a matter which can be gone into in revision. (*Kidwai and Chandiramani, JJ.*) Abdul Sattar Khan *v.* Brij Raj Singh. 5 D. L.R. (All.) 62.

———**S. 115**—*Revisional jurisdiction of High Court—Scope—Order for temporary injunction—Whether can be passed.*

The revisional jurisdiction of the High Court is only a variety or form of appellate jurisdiction and consequently it is competent for the High Court to issue a temporary injunction in its revisional side. (*Yahya Ali, J.*) Tirumalai Tirupati Devasthanams Committee *v.* N. Chengama Naidu. 60 L.W. 301=1947 M.W.N. 361=A.I.R. 1947 Mad. 390=(1947) 1 M.L.J. 411.

———**S. 115**—*Scope and applicability of.*

Cl. (*c*) of S. 115, C. P. Code, will apply when the Court concerned acts illegally or with material irregularity. It cannot apply to cases where the Court merely comes to a wrong decision on a question of fact or law. The use of the word "acted" indicates the true position and limits this clause to that class of cases where the Courts having jurisdiction violates any rule of law or of procedure prescribing the mode in which such jurisdiction is to be exercised. Where the decision of the lower Court may be wrong as to the interpretation of a particular provision of law, no revision would lie under S. 115 (*c*) if the Court has not "acted" illegally or with material irregularity in the manner explained above. (*Wanchoo and Bhargava, JJ.*) Abdul Majid *v.* Daleep Singh. 1949 A.L.J. 216=A.I.R. 1949 A. 744=1949 A.W.R. 313.

———**S. 115**—*Scope and applicability.*

S. 115, C. P. Code, applies only to cases in which no appeal lies, and, where the Legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself upon three matters: (*a*) That the order of the Subordinate Court is within its jurisdiction, (*b*) That the case is one in which the Court ought to exercise jurisdiction, and (*c*) That in exercising jurisdiction, the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied upon those three matters, it has no power to interfere because it differs, however profoundly, from the conclusions of the Subordinate Court upon questions of fact or law. 11 I.A. 237=11 Cal. 6 (P.C.) and 33 M.L.J. 69=44 I.A. 261=40 Mad. 793 (P.C.), referred to.

There is no justification for the view that subsection (*c*) of S. 115 is intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts so as to prevent gross injustice in non-appealable cases; it would indeed be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured. 1 C.W.N. 617, disapproved. (*Sir John Beaumont.*) Venkatagiri Ayyangar *v.* Hindu Religious Endowments Board, Madras. 76 I.A. 67=53 C.W.N. 458=A.I.R. 1949 P.C. 156=1949 A.L.J. 213=62 L.W. 374=1949 M.W.N. 402=51 P.L.R. 265=4 D.L.R. (P.C.) 225=1949 A.W.R. 335=51 Bom.L.R. 952=(1949) 1 M.L.J. 505 (P.C.).

———**S. 115**—Scope—Appeal not competent—Revision. *See* Bengal Tenancy Act, S. 26-F (10). 4 D.L.R. (Cal.) 168.

———**S. 115**—*Scope—Election dispute—Order of Presidency Small Cause Court setting aside the election of a candidate to the City Municipal Council—If open to revision—Madras City Municipal Act (IV of 1919)—Rules under Ss. 59 (1) and 347 (i) for adjudication of election disputes—R. 12 (3)—Effect.*

The fact that R. 12 (3) of the rules framed under Ss. 347 (1) and 59 (1) of the Madras City Municipal Act for adjudication of election disputes provides that "the order of the Small Causes Court under sub-Rr. (1) and (2) shall be final" does not bar a revision petition under S. 115 of the Code of Civil Procedure.

In view of the fact that a difference of opinion is possible on the rule as it stands, it is desirable that the intention—whether it be to permit or prohibit revision petitions—be made clear by an appropriate amendment of the rule.

The powers of the Court in revision are very much less than when the matter is brought up to it in appeal. If the trial judge had jurisdiction in the matter and had not acted illegally or with material irregularity, the High Court has no power to interfere even if it differs from the conclusions of the Subordinate Court upon questions of fact or law. (*Balakrishna Ayyar, J.*) Rajam Bharathi *v.* Damodaram Naidu. A.I.R. 1950 Mad. 730=(1950) 1 M.L.J. 332.

———**S. 115**—*Scope and applicability—Question as to competency of a second suit for redemption—Decision, if revisable.*

S. 115, C. P. Code, applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. 44 I.A. 261 and 1949 A.W.R. 335, Foll.

The determination of the question whether a second suit for redemption does or does not lie, is a matter which the trial Court has jurisdiction to decide, and even if it decides it erroneously, that is not a matter for interference in revision. (*Kaul, J.*) Tirloki *v.* Chaitram. 1950 A.W.R. 179.

———**S. 115**—*Suit tried as original suit after objection that it should be tried as a small cause suit—Appeal by plaintiff—No question of jurisdiction raised—Revision of appellate decree as being without jurisdiction—Not maintainable.*

If a small cause suit is tried as an original suit and then on that basis an appeal is preferred, an application to set aside the appellate decree may be entertained in revision on the ground of its being without jurisdiction. But where the parties joined issue in the trial Court as to whether the suit should be tried as an original suit or a small cause suit and the District Munsiff found that it should be tried as an original suit and the plaintiff appealed against the decision in the suit but in the appeal itself no question of jurisdiction was raised at all, the circumstances are such that it is not open to the plaintiff to contend in revision that the appellate decree was without jurisdiction. (*Happell, J.*) Srinivasa Varadachariar *v.* Sri Manavala Mahamunigal Temple. 1946 M.W.N. 579=59 L.W. 410=A.I.R. 1947 Mad. 63=231 I.C. 456=(1946) 2 M.L.J. 112.

———**S. 132**—*Exemption from personal appearance—Right of Muslim purdah ladies to claim as of right.*

The time has come when S. 132 (1), C. P. Code, should be given a fresh judicial interpretation to accord with the customs and manners of the country which have greatly changed. As customs and manners stand to-day no Muslim lady or purdanashin lady has an absolute right to claim exemption from personal appearance in Court. It does not mean that no purdanashin lady should be examined on commission. Whether or not this should be done would depend upon the facts of each case, the position of the lady in the litigation, the nature of the evidence she has to give and the circumstances in which she is placed. (*Mack, J.*) Salma Bi *v.* Mohammed Ebrahim Sahib. 1949 M.W.N. 678=A.I.R. 1950 Mad. 151=(1949) 2 M.L.J. 517.

———**S. 132**—*"Personal appearance in Court"—Woman taken to Court in curtained vehicle and examined in private room veiled—If personally appears.*

A woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in such building, suitably and completely veiled in a burkah or some other garment, and is examined in a private room, cannot be said to be making a "personal appearance in Court" under S. 132, C. P. Code. (*Blagden, J.*) Mariambai *v.* Abdul Hamid. 225 I. C. 493=48 Bom.L.R. 73=A.I.R. 1946 Bom. 340.

———**S. 132 (1)**—*Scope—'Customs and manners of the country'—Meaning—Application by woman entitled to exemption from personal appearance for examination on commission—Considerations for grant of—Personal 'appearance' and 'personal attendance'—Distinction, if any.*

"The customs and manners of the country" in S. 132 (1), C. P. Code, mean the customs and manners of the different communities and classes and sections of the people in the country. It may also be that according to the customs and manners of a particular locality, certain families, say of a noble rank, observe Gosha. But it is difficult to speak of the customs and manners of a particular lady. The question whether any woman falls within the category of women mentioned in S. 132 (1) is really one of fact. Once that question of fact is decided and it is found that a particular woman falls within the class mentioned in S. 132 (1), she is entitled to exemption from "personal appearance" in Court. The Code does not make any distinction between "appearance" and "attendance". (1949) 2 M.L.J. 517, dis.

A commission to examine a person who falls within the class of women described in S. 132 (1) should issue as a matter of course, almost as of right both when such a person is a party to a suit or petition as well as when she is a witness summoned by any of the parties to a suit, except when the application for her examination is made *mala fide* and would amount to an abuse of the

process of the Court. The Court can refuse to grant the application of a woman who though she may belong to a community which observe gosha has herself abandoned the custom, to be examined on commission, when she is herself a party to the suit. In such a case there is no question of the Court compelling her to give evidence. If she wants to support her case with her own evidence there is no reason why she should be given the indulgence which she does not deserve.

Though the custom of gosha is not being observed as strictly as before by the members of the Muslim community in the State of Madras it would be rash to hold that the custom has become obsolete and has been entirely abandoned by the Muslim community in the State of Madras.

Quaere.—Whether a woman who belongs to a community which still observes gosha generally but who herself completely abandoned that custom is entitled to claim exemption from personal appearance? A change in the mode of life of a particular lady can be taken into consideration in exercising discretion in the grant of a prayer from her for being examined on commission.

There could be no conceivable objection on the ground of an encroachment on the right conferred by S. 132 (1), to the trial Judge himself, taking evidence, say, in the residence of such a woman. Where such a person submits to an examination on commission outside her residence, there is no reason why she should object to her being examined by the trial Judge himself in his chambers or in the Court room after excluding the general public from it altogether. (*Rajamannar, C.J. and Viswanatha Sastri, J.*) MOHAMMAD ISMAIL MARACAIR *v.* WAZIR BI BI SAHEBA. 1950 M.W.N. 488=(1950) 2 M.L.J. 385.

———**Ss. 136, 60 and O. 21, R. 48**—*Decree passed by Court in India—Execution by Court in Pakistan.*

The Dominions of India and Pakistan are two separate sovereign and foreign states. A Court in India has no authority on any Court or Office Resident in the other Dominion. It is, therefore, not competent for a Court in India which has passed a decree to direct a Court in Pakistan to take necessary steps for its execution.

The provisions contained in S. 60, read with S. 136 and O. 21, R. 48, C. P. Code, *prima facie* apply only to Courts in India. This Code is not attracted or is applicable outside India. It is permissible for the Court to issue a writ of attachment outside the jurisdiction of that particular Court, but that Court must be situated within India where the Code is in force. 18 L. 206 and 53 C.W.N. 817, referred to. (*Mookerjee and Lahiri, JJ.*) SUSHAMA ROY *v.* A. S. M. OSMAN. A.I.R. 1950 Cal. 255=5 D. L. R. (Cal.) 74=54 C.W.N. 491.

———**S. 141**—Applicability and scope—Nature of proceedings contemplated—Abatement proceedings—Applicability to execution proceedings. *See* C. P. C., O. 22, R. 12. 5 D.L.R. (Pat.) 139.

———**S. 141**—Applicability—Revisions. *See* C. P. CODE, O. 22, R. 3 AND S. 141. Pak.L.R. (1948) Lah. 225.

———**S. 144**—*Applicability—Case in which a decree has been varied or reversed by the same Court.*

The language of S. 144, C. P. Code, does not expressly rule out the case of a decree which has been varied or reversed by the same Court. The section seems to be couched in very general terms and there is nothing in it to rule out the case of such a decree from the purview of that section by necessary implication. 1948 A.L.J. 25, foll. (*Harishchandra and Sapru, JJ.*) ALLAHABAD THEATRES, LTD., ALLAHABAD *v.* RAM SAJIWAN MISRA. I.L.R. (1949) A. 313=1949 A. L.J. 263=4 D.L.R. (A.) 135=A.I.R. 1949 A. 730=1949 A.W.R. 406.

———**S. 144**—*Applicability—Decree for ejectment—Execution—Delivery of possession to decree-holder—Subsequent decree against same defendant for ejectment in respect of same property—First decree-holder not party*—Locus standi *of second decree-holder to apply for restitution.*

Where in execution of a decree for ejectment, property has been delivered to the decree-holder, the fact that another person, subsequently obtains another decree for ejectment of the same defendant in respect of the same property, the first decree-holder not being a party to the second decree, and puts it into execution, would not justify the executing Court to dispossess the first decree-holder and to deliver it to the second decree-holder, whose suit and decree were against the defendant in the suit and not against the first decree-holder. The second decree-holder, who was never in possession, has no *locus standi* to apply, as it were for restitution. (*Trivedi, J.C.*) SHAH KUNVARJI LALJI *v.* SHAH KANJI GHELA. A.I.R. 1950 Kut. 13.

———**S. 144**—*Applicability and scope—"Reversal or variation of decree"—If to be necessarily by appeal—Modification or reversal by Court of co-ordinate jurisdiction in separate suit—Power to order restitution.*

S. 144, C. P. Code, is not confined to cases of a reversal of a decree in appeal or second appeal. The section applies to every case of reversal or variation, however or in whatever way the reversal or variation is effected. The section is worded in comprehensive terms and should not be construed in any narrow sense. The Court has therefore jurisdiction to order restitution under S. 144 even if the decree is modified or reversed by a Court of co-ordinate jurisdiction in a separate suit. The section does not provide for any order of restitution in any particular form or proceeding or by any particular Court. 1 P. L.J. 43, overruled; 57 Cal. 226, distinguished; 1928 Pat. 447, declared *obiter*; 49 I.A. 351; 40 M. 299; 10 M.I.A. 203; 1948 All. 252 (F.B.); 44 All. 555; (1940) 2 M.L.J. 877; 17 I.C. 121, relied on. (*Meredith, Sinha and Ramaswami, JJ.*) MAQBOOL ALAM KHAN *v.* KHODAIJA BEGAM. 27 Pat. 873=1949 D.L.R. (Pat.) 1=1949 P.W.N. 25=A.I.R. 1949 Pat. 133=30 P.L.T. 19 (F.B.).

———**S. 144**—*Applicability—"Varied or reversed"—Meaning of—Decree in mortgage suit and sale of property—Decree in different suit holding that sale was not of any effect and bind-*

ing on the parties—Application by decree-holder in later suit under S. 144, against decree-holder purchaser under the sale—Maintainability.

A decree may be "varied or reversed" in various ways. There is no reason why those words, though commonly applicable to a case where a decree has been set aside on appeal or revision by a superior Court, could not be applied to a case where the decree had been set aside or varied by the same court or some other court of concurrent jurisdiction where grounds for variation or reversal exists.

Hence, where after a mortgage decree and sale, in a different suit by the son of the mortgagor claiming that the mortgage decree was not binding on the joint family; it is held in appeal that the amount due was considerably less than the amount decreed and the sale is set aside, the son of the mortgagor is entitled to apply under S. 144, C. P. Code, against the decree-holder purchaser in the mortgage suit for restitution of mesne profits enjoyed by him till the date of the second decree. (*Malik, Waliullah and Mootham, JJ.*) JOGENDRA NATH SINGH *v.* HIRA SAHU. I.L.R. (1948) All. 62=1948 A.L.J. 25=A.I.R. 1948 A. 252=1948 O.W.N. 73=1948 A.L.W. 70=2 D.L.R. 534 (F.B.).

———**S. 144**—Application for restitution—Limitation—Conditional decree—Independent provision regarding costs—Amount paid for costs—Application for restitution. *See* EXECUTION—LIMITATION. (1947) 2 M.L.J. 354.

———**S. 144**—*Application for restitution—Limitation—Starting point—Affirmance of decree in Letters Patent appeal.*

The affirmance of a decree in a Letters Patent appeal does not give a fresh start to the period of limitation for making an application for restitution under S. 144, C. P. Code. The time would begin to run from the date of the first decree. (*Mansur Alam, J.*) KALICHARAN SAINTHWAR *v.* BANKA CHAND. (1946) A.W.R. (H. C.) 576 (1)=1947 A.L.W. 565=1947 A.L.J. 259=A.I.R. 1947 A. 172.

———**S. 144**—Ex parte *decree—Sale in execution*—Ex parte *decree set aside subsequently—Application for restitution—Fresh decree passed in restored suit in the meanwhile—Right to restitution thereafter.*

In execution of an *ex parte* decree for Rs. 948 the properties of the judgment-debtors were sold. Subsequently on an application by the judgment-debtors, the *ex parte* decree was set aside and thereupon they filed a petition under S. 144, C. P. Code, for restitution of their property sold in execution. Before, however, this application was decided, the restored suit had been decided and a fresh decree passed for Rs. 798. On a question whether the judgment-debtors were entitled to ask for restitution thereafter.

Held, it must be taken that where an *ex parte* decree has been set aside, the fresh decree that may subsequently be passed has no relation to the *ex parte* decree and cannot be regarded as varying it. Irrespective of the nature of the fresh decree, a judgment-debtor is entitled to recovery of the property sold in execution of the *ex parte* decree. The purchase of immovable property belonging to the judgment-debtor in execution of an *ex parte* decree becomes *ipso facto* void when the *ex parte* decree is set aside. No doubt, before the judgment-debtor can be allowed to recover, he may, on principles of equity, be directed to pay either what has been paid to him from the proceeds of the sale or the decree amount if a decree has been passed. (*Happell, J.*) BALARAMA REDDI *v.* GOVINDA REDDI. 59 L.W. 413 (2)=1946 M.W.N. 504=229 I.C. 211=1947 Mad. (Rul.) 120=A.I. R. 1947 Mad. 54=(1946) 2 M.L.J. 108.

———**Ss. 144 and 151**—*Restitution—Duty and jurisdiction of Court.*

The jurisdiction of the Court to direct restitution is not limited by S. 144, C. P. Code. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. The duty and the jurisdiction of the Court in directing restitution is to place the parties in the position which they would have occupied but for the act of the Court. The expression "the act of the Court" does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

It is unquestionable that if the possession of property by a party has been disturbed by an order or decree of Court which has been varied or reversed, that party is entitled to be put back to the same position as he had held previous to the disturbance of his possession. It cannot also be disputed that if the opposite party had been in possession of some interest in the property from before the said order or decree of Court, in whatever capacity or under whatever circumstances it might be the Court while allowing restitution is not entitled to affect such possession of his. 49 I.A. 351, ref. to. (*Mookerjee, J.*) NAREN KUMAR GHOSH *v.* BENOD BEHARI DUTTA. 54 C.W.N. 896.

———**S. 144**—*Restitution—Principles — Calculation of compensation—Basis.*

According to S. 144 the restitution to be made should as far as possible place the parties in the position which they would have occupied but for the decree which had been varied or reversed. It would follow from this that a calculation of the compensation on the basis of the crops that might have been sown on the land would be justified. (*Lal, J.M. II.*) MULA SINGH *v.* DHARMA. 1948 R.D. 136.

———**S. 144**—*Restitution—Principles governing—Sale in execution.*

For purposes of S. 144 the Court should "place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed". It cannot be said that in every case where a decree is subsequently reversed or modified, the previous execution proceedings must necessarily be wiped off. The only question to which the Court should direct its attention is as to what would have been the position if the amended decree was in force at the date of the sale sought to be set aside. (*Ghulam Hasan, C.J. and Misra, J.*) SRI KRISHNA

Dass *v.* Lal Bhagwant Singh. 23 Luck. 126=1947 A.W.R. (C.C.) 281=A.I.R. 1949 Oudh 69=1947 O.A. (C.C.) 281=1947 O.W.N. 569.

———**S. 144**—*Restitution—Rents realised by decree-holder pending appeal from decree—Reversal of decree in appeal—Restitution—Amounts refundable.*

Where, pending appeal from a decree, the decree-holder executes the decree and recovers rents from the tenants of the judgment-debtor, and the decree is reversed on appeal, the only amount that can be ordered to be refunded by way of restitution is the amount actually realised from the tenants in execution and not the full amount of the rents due by the tenants. (*Sir Madhavan Nair.*) Mehr Chand *v.* Shiblal. 3 D.L.R. (P.C.) 44=A.I.R. 1948 P.C. 178.

———**S. 144**—*Restitution—Sale in execution of mortgage decree (for about Rs.* 4,120) *of two items of property for Rs.* 1,900 *and Rs.* 2,223 *respectively after rejection of application under S.* 19 *of Madras Act (IV of* 1938) *on the ground that applicant was not possessed of saleable interest in agricultural land—Order on revision after confirmation of sale that the equity of redemption must be deemed to be saleable interest in agricultural land—Subsequent scaling down of decree to Rs.* 2,469*—Restitution—Criterion—Sale if to be set aside—Madras Agriculturists' Relief Act (IV of* 1938), *Ss.* 7 *and* 19*—Sale in execution of decree which is subsequently scaled down—Validity.*

After the rejection of an application under S. 19 of the Madras Agriculturists' Relief Act on the ground that the mortgagors judgment-debtors had no saleable interest in agricultural land and were therefore not "agriculturists" two items of property were sold in execution of the mortgage-decree for Rs. 1,900 and R. 2,223 respectively, the preliminary decree being for Rs. 4,119-7-4. A revision petition against the rejection of the application under S. 19 of Madras Act (IV of 1938), resulted in a decision that to the extent of their interest in the equity of redemption the judgment-debtors must be deemed to have been possessed of a saleable interest in agricultural lands and therefore agriculturists. The decree was then scaled down to a sum of Rs. 1,728-9-0 and Rs. 493 costs with subsequent interest amounting in all to Rs. 2,469. The judgment-debtors claimed by way of restitution the cancellation of the sale on payment by them of the amount of the decree as scaled down or at least that the sale of the second item of property should be set aside on payment of the small balance of the scaled down amount due. Negativing the claim,

Held: (*i*) Unless the decree had been amended by appropriate procedure it was not open to the executing Court to refuse to execute the decree as it stood and the sale did not offend S. 7 of Madras Act IV of 1938.

(*ii*) Had the ultimate decree as scaled down been in existence at the time of the sale the executing Court would have had no option but to proceed with the sale of the second item also as the sale of the first item would have left a balance of approximately Rs. 569 still due under the amended decree.

(*iii*) The judgment-debtors are entitled only to a refund of the difference between the amount due on the decree as scaled down and the amount realized by the sale. (*Wadsworth, J.*) Kuppa Sankara Sastri *v.* Kakumanu Varaprasad. 60 L.W. 307=1947 M.W.N. 626=A.I.R. 1948 Mad. 12=(1947) 1 M.L.J. 369.

———**Ss. 144 and 151**—*Scope—Power of Court—Sale in execution of* ex parte *decree—Subsequent setting aside of* ex parte *decree—Restitution of property sold in execution—Powers of Court—Inherent jurisdiction—Principles—Purchase for value by stranger—When to be set aside.*

Where property is sold in execution of an *ex parte* decree and purchased *bona fide* by a third party for value and the *ex parte* decree is subsequently set aside, restitution will not ordinarily be granted against such a stranger purchaser. This, however, is not an inflexible rule and in exceptional circumstances restitution will be allowed even against *bona fide* purchasers for value, *e.g.,* where the sale itself was without jurisdiction, or where there has been a mistake or material irregularity on the part of the Court. Even if S. 144, C. P. Code, may not in terms apply, the Court has inherent powers to grant restitution under S. 151, C. P. Code. 13 I.A. 106; 15 I.A. 12; 49 I.A. 351; 38 Cal. 622; 11 C.L.J. 254; A.I.R. 1916 All. 159; A.I.R. 1937 Mad. 694; A.I.R. 1943 Pat. 325, rel. on. (*Panigrahi and Narasimham, JJ.*) Biswakesan Ramanuj Das *v.* Krishna Chandra Rout. 16 Cut.L.T. 182.

———**S. 144**—*Scope—Decree executed pending appeal—Decree-holder purchasing judgment-debtor's equity of redemption in mortgaged properties and redeeming mortgage—Right to rebate interest on amount paid for redemption.*

Where, in execution of a decree pending appeal therefrom, the decree-holder purchases the equity of redemption owned by the judgment-debtor in mortgaged properties and redeems the mortgage, he is entitled in proceedings for restitution on reversal of the decrees, to rebate interest on the sums paid by him to the mortgagee from whom he has redeemed the properties, in working out the amounts payable to the judgment-debtor in restitution. (*Sir Madhavan Nair.*) Mehr Chand *v.* Shiblal. 3 D.L.R. (.C.) 44=A.I.R. 1948 P.C. 178.

———**S. 144**—*Scope—Decree-holder purchasing judgment-debtor's property in execution pending appeal—Repairs effected—Subsequent reversal of decree—Restitution—Right to payment of sums spent for repairs.*

Where a decree-holder purchases, in execution of his decree, pending appeal therefrom, property of the judgment-debtor and effects repairs therein, and subsequently the decree is reversed on appeal and the judgment-debtor claims restitution, the original decree-holder is entitled to be paid by the judgment-debtor the amounts spent by him for repairing the judgment-debtor's properties while they were in his possession. (*Sir Madhavan Nair.*) Mehr Chand *v.* Shiblal. 3 D.L.R. (P.C.) 44=A.I.R. 1948 P.C. 178.

———**S. 144**—*Scope—If exhaustive.*

The principle of restitution is not restricted by the exact words of S. 144, C. P. Code. (*Verma and Beevor, JJ.*) NARENDRA NATH SEN *v.* MAHASOY GANESH PRASAD RAY. 227 I.C. 172=13 B.R. 20=12 Cut.L.T. 10=A.I.R. 1946 Pat. 408.

———**S. 144**—*Scope—If exhaustive—Absence of right under the section—Right to relief, matter of discretion.*

Though it can be said that S. 144 of the C. P. Code is not exhaustive of the principle of restitution, when once it is found that an applicant is not entitled to take his stand upon the statute itself, it is a matter of discretion with the Court to grant or refuse the relief. (*Sinha, J.*) UMMATUNNISSA BIBI *v.* SHEIK JUMMAN. 225 I.C. 471=1946 A.L.W. 132=1946 O.W.N. (H.C.) 124=1946 A.W.R. (H.C.) 63=A.I.R. 1946 All. 329.

———**S. 144**—Scope of powers of Court in ordering restitution. *See* C. P. CODE (V OF 1908), O. 21, RR. 98 AND 103 AND S. 144. (1949) 1 M.L.J. 286.

———**S. 144**—Separate suit—If lies. *See* MAD. BUILDINGS (LEASE AND RENT CONTROL) ACT (XV OF 1946), SS. 9 AND 12 AND C. P. CODE (V OF 1908), S. 144. (1949) 2 M.L.J. 699.

———**S. 145**—Applicability—Decree-holder getting delivery of possession of house in execution—Movables found in house, but not attached, made over to decree-holder without bond—Return of movables from decree-holder to judgment-debtor—Remedy—Application to executing Court—Competency. *See* C. P. CODE, SS. 47 AND 145. 4 D.L.R. (Nag.) 47.

———**S. 145**—*Liability as surety under—Entrustment of attached property.*

Where property is entrusted by an attaching officer to a watchman from whom no bond is taken for the safe custody and safe return of the property attached and the arrangement is not approved by Court, the custodian is not responsible as a surety under S. 145, C. P. Code. When a bond is taken from the custodian which bond is approved by the Court, the custodian renders himself liable as a surety under S. 145, C. P. Code. (*Agarwala, J.*) SHEO DHARI PANDEY *v.* NAND KUMAR PANDEY. 1950 A.W.R. 652=A.I.R. 1950 All. 699.

———**S. 145**—Supurdar *who had failed to produce the property entrusted to him after decree-holders had released the property—Remedies open to the judgment-debtor.*

Properties which were attached and entrusted to *supurdars* were not produced by them. The decree-holder released that property and proceeded against other properties of the judgment-debtor. On a question as to the remedy of the judgment-debtor,

Held: The judgment-debtor can enforce the liability of the *supurdar* by an application under S. 145, C. P. Code or by a regular suit. An application by him under S. 145 would be clearly maintainable. 18 A.L.J. 357, distd.; 1931 All. 567, foll. (*Wanchoo and Bhargava, JJ.*) MATHURA DAS *v.* HARI SHANKAR. 1949 A.W.R. 8=A.I.R. 1949 A. 306=1949 A.W.N. 23 =1949 A.L.W. 23.

———**S. 145**—Supurdar *failing to restore property entrusted to him—Decree-holder, if also liable.*

Where it is the *supurdar* who fails to restore the property entrusted to him, it is he that is liable and has to be proceeded against and the decree-holder is in no way liable for the default of the *supurdar.* (*Chandiramani, J.*) HIRA LAL *v.* RAM PHER. 1949 A.W.R. 39=1949 A.L.W. 25=A.I.R. 1949 A. 260=1949 A.W.N. 25.

———**S. 145**—Surety "agreeing to stand surety and to make movable and immovable properties liable for any deficiency"—Personal liability—T. P. Act, S. 68—Applicability. [*See* Q.D. 1941-1945, Vol. I, Col. 1016.] KESAR CHAND *v.* UTTAM CHAND. I.L.R. (1945) Lah. 411=48 P.L.R. 275=I.L.R. (1945) Kar. (P.C.) 269 (P.C.).

———**S. 146**—Requirements. *See* C. P. CODE, O. 21, R. 16, SS. 44-A AND 146. (1946) 2 M.L.J. 132.

———**S. 146**—*Order under—Appeal.*

There is no right of appeal against an order under S. 146, C. P. Code. (*Sen and Chunder, JJ.*) ANIL CHANDRA BANERJEE *v.* GOPINATH MUKHERJEE. 86 C.L.J. 293=5 D.L.R. (Cal.) 108=A.I.R. 1950 Cal. 376.

———**S. 146**—*Transferee of Legal Representative of deceased—If entitled to apply for substitution.*

What S. 146, C. P. Code, means is that an application or proceeding of a like nature can be taken by the transferee as could have been taken by the transferor, not that he should make the identical application. A transferee of the legal representative of a deceased party can, therefore, ask under that section for substitution of his name in place of the transferor though the latter had not applied for such substitution himself. 15 P. 82, Diss. from. (*Sen and Chunder, JJ.*) ANIL CHANDRA BANERJEE *v.* GOPINATH MUKHERJEE. 86 C.L.J. 293=5 D.L.R. (Cal.) 108=A.I.R. 1950 Cal. 376.

———**S. 147**—Scope and effect—Consent decree against minor—Right of latter to avoid. *See* MINOR—DECREE AGAINST. A.I.R. 1946 Lah. 233 (F.B.).

———**S. 148**—*Applicability—Extension of time allowed by final decree—Power of Court.*

S. 148, C. P. Code, has no application when the period for doing any act is fixed by a final decree of the Court. The Court has no power to grant any further extension of time or to make any order which would be really an alteration or modification of the final decree. 39 M. 876; 27 C.W.N. 720; A.I.R. 1935 Rang. 341 and 74 I.A. 573, referred to. (*Chatterjee, J.*) BENGAL CENTRAL BANK, LIMITED *v.* BEZON & CO. 85 C.L.J. 90.

———**S. 148**—*Applicability—Time fixed for payment of redemption money in order made under S. 16 of the U. P. Agriculturists' Relief Act.*

S. 148, C. P. Code, is applicable only to extension of time where a period is fixed for doing of an act prescribed by the Code. It does not apply to a case where the period is fixed under any other statute. Hence the time fixed by an order under

S. 16 of the U. P. Agriculturists' Relief Act cannot be extended even on the principles underlying S. 148, C. P. Code. (*Misra, Kaul and Kidwai. JJ.*) JAGJI SINGH *v.* SANKATHA SINGH. 5 D.L.R. (All.) 121=1950 A.L.J. 424=A.I.R. 1950 A. 675=1950 A.W.R. 565 (F.B.).

———**S. 148 and O. 37**—*Application for leave to defend suit under O. 37—Leave granted on condition that security is furnished within certain time—Order providing for dismissal of application on default—Power of Court to extend time after default.*

On an application for leave to defend suit under O. 37, C. P. Code, the Court granted leave on condition that security was furnished within certain time and ordered that in default the application would stand dismissed. An application was made for an extension of time for furnishing security after expiry of the time given.

Held, that the granting of the application would mean in effect an extension of time for making an application for leave to defend beyond the statutory limit of 10 days and that the Court had no power to do so. If however a decree was passed, the Court would have power to set aside the same under O. 37, R. 4 and in an appropriate case give leave to the defendant to defend the suit on such terms as it might think fit.

Held also, that by virtue of the previous order of Court the application for leave to defend the suit stood automatically dismissed on failure to furnish security within the time limited and therefore there was no application which was pending on which another order extending time could possibly operate. 37 C.W.N. 878, I.L.R. (1938) 2 Cal. 14 and 1936 All. 477, referred to. (*Chatterjee, J.*) PULIN KRISHNA ROY *v.* SUSIL KUMAR DEY. 53 C.W.N. 192.

———**Ss. 148 and 149**—Deficiency in court-fee—Time for payment—Case to stand dismissed on default of payment within time allowed—Default—Furthertime, if could be granted. [*See* Q.D. 1941-1945, Vol. I, Col. 1020.] SHEO PRASAD KUAR *v.* BHANU. A.I.R. 1946 Oudh 52.

———**S. 148**—*Discretion of Court—Power of appellate Court to interfere.*

power conferred upon the Court must be exer-

Under S. 148, C. P. Code, the discretionary cised judicially and reasonably with due regard to all the circumstances of the case, and the effect of such exercise on the rights of the parties, including vested rights as well as those asserted in the suit. It is always open to a superior Court in appeal to correct the exercise of such discretion where it has been wrongful, in that no weight, or insufficient weight, has been given to relevant considerations, although the Appellate Court must refrain from interfering merely because it would itself have exercised such discretion differently, had it been dealing with the case. (*Abdul Rashid, C.J. and Cornelius, J.*) SAEED AHMAD *v.* KARAM SINGH. Pak.L.R. (1948) Lah. 202=A.I.R. 1949 Lah. 121.

———**S. 148**—*Extension of time—Power of Court—Provisional order in proceeding under O. 9, R. 9.*

Where in a proceeding under O. 9, R. 9, C. P. Code, the Court passed an order that the miscellaneous case should be allowed on contest provisionally and that the petitioners should pay a certain sum to the opposite party by a certain date upon which the suit would be restored to file and that in default the miscellaneous case should stand dismissed,

Held, that the order was not a final order but was in part of a provisional nature, that the Court did not divest itself of the power given under S. 148, C. P. Code, to alter the form of its provisional order, that is to say, to extend the time, and that so long as the actual order of dismissal had not operated, the Court had seisin of the case and had jurisdiction to make use of the powers given under S. 148, to extend the time. (*Roxburgh, J.*) BAJRANGLAL JHUNJHUNWALLA *v.* SOLAKI MARWARINI. 54 C.W.N. 933=A.I.R. 1950 Cal. 564=5 D.L.R. (Cal.) 129.

———**S. 148 and O. 9, R. 13**—*Order setting aside* ex parte *decree on payment of costs within stated time—Extension of such time—Power of Court.*

Where on appeal from an order rejecting an application for setting aside an *ex parte* decree under O. 9, R. 13, C. P. Code, the appellate Court passes an order to the effect that the appeal will be allowed and the *ex parte* decree will be set aside on the defendant-applicant depositing a certain amount as costs within a certain time of the arrival of the record in the trial Court and that in case of default the appeal will be treated as dismissed, the trial Court has power to extend the time for deposit. The appellate order is not an order which can be properly said to be decree in the suit without some further subsequent order being passed. Even if the trial Court has only to investigate into the simple question whether the money has been paid within time or not, even this will entail some fresh order of the trial Court before the order of the Appellate Court becomes finally operative as a decree. Apart from that, as the order has been made not in the suit itself or in appeal from the decree, it is not itself a decree and cannot properly be said to be more than an order in subsidiary proceedings. For these reasons, the trial Court has power to extend the time. 37 C.W.N. 878, 36 A. 77, and 55 A. 326, referred to. (*Ormond, J.*) MOZAHARUL HUQ *v.* SULTAN AHMAD. 2 D.R. 235.

———**Ss. 148 and 149**—*Relative scope of—Time for payment of Court-fee fixed by preliminary decree—Power to extend time.*

Ss. 148 and 149 of the C. P. Code deal with the matter of extension of time fixed by the Court for certain purposes. The former relates to the fixing of time of an "act prescribed or allowed by the Code" and provides that the Court may in its discretion from time to time extend such time, even though the period originally fixed may have expired. S. 149 refers specifically to deficit Court-fee paid and authorises the Court in its discretion at any stage to allow the party concerned to pay the balance.

Where a Court in its preliminary decree for partition directs the payment of deficit Court-fee within a particular time without specifying the consequences for non-payment, it is open to the Court under S. 149, C. P. Code to extend time for payment of deficit Court-fees. S. 148 could not apply as the time was fixed in a decree and not 'prescribed or allowed by the Code'. (*Mushtaq Ahmad and Desai, JJ.*) MAKUND LAL *v.* GOPAL DAS. A.I.R. 1950 All. 536.

——S. 149—*Appeal insufficiently stamped—Date of presentation—Single Judge of Lahore High Court allowing deficiency in court-fee to be made up for purposes of admission of first appeal —Order, if amounts to one extending time—Lahore High Court Rules.*

An insufficiently stamped appeal cannot be considered to have been presented till the day on which the memorandum of appeal is properly stamped, unless an extension of time has been given by Court under S. 149, C. P. Code. An order under this section is a judicial order and it must be passed by the Court before which the appeal comes. Where under the rules of the Lahore High Court a single Judge can only admit a regular first appeal but cannot reject such an appeal or decide questions of law arising in the appeal which has to be heard by a Division Bench, an order of a single Judge allowing the deficiency in the court-fee to be made up for the purposes of the admission of the appeal subject to all just exceptions at the hearing, does not amount to an order extending the time within the meaning of S. 149, C. P. Code, and the question of limitation has to be decided by the Bench hearing the appeal. (*Abdul Rashid, A.C.J. and Khosla, J.*) BALWANT SINGH *v.* JAGJIT SINGH. 227 I.C. 95 =48 P.L.R. 393=A.I.R. 1947 Lah. 210=1946 Lah. (Rul.) 521.

——S. 149—*Applicability—Application to appeal as pauper rejected—Court-fee paid beyond limitation but within time granted by Court—Appeal, if competent.*

Where after the rejection of an application to appeal as a pauper the applicant pays the requisite court-fees within the time granted by the Court, the appeal is competent although such court-fees are paid after the expiry of the prescribed period of limitation. (*Edgley and Latifur Rahman, JJ.*) KESHAB LAL RUDRA *v.* IVARANI RUDRA. 50 C.W.N. 872=A.I.R. 1947 Cal. 176 =231 I.C. 270.

——S. 149—Applicability—Death of pauper applicant prior to disposal of pauper application—Application by his legal representatives to continue suit on payment of court-fee. *See* C. P. CODE (V OF (1908), O. 33 AND S. 149. (1947) 1 M.L.J. 119.

——S. 149 and O. 7, R. 11—*Applicability and relative scope—Plaint not under-stamped on face of it—Subsequent discovery of insufficiency of stamp—Procedure—Dismissal without fixing time for making up deficiency—Legality.*

A plaint cannot be rejected under O. 7, R. 11, C. P. Code, for being insufficiently stamped, unless the plaintiff is first called upon to supply the deficiency within a specified time and unless the plaintiff fails to do so within such time. It cannot be said that under S. 149, the Court has a discretion to fix or not to fix a time for making

up the deficiency. S. 149 is only a general section applicable to all cases of under-stamped documents and does not overrule or abrogate the special provision in O. 7, R. 11.

Where a plaint on the face of it is not understamped, and the Court does not refuse to accept it, if subsequently it is discovered that the court-fee paid is insufficient. O. 7, R. 11 comes into play and the Court must give time to the plaintiff to make up the deficiency and cannot straightaway reject the plaint. 1938 Lah. 361; 1941 Oudh 30, dist. (*Pollock, J.*) APPARAO *v.* MT. BHAGUBAI. I.L.R. (1948) Nag. 932=1949 N. L.J. 361=A.I.R. 1949 Nag. 263=1949 D.L.R. (Nag.) 15.

——S. 149—*Discretion and duty of Court—Deficiency in Court-fee—Court, if bound to give opportunity to party to make good.*

S. 149, C. P. Code, does not cast on the Court a definite obligation to give a party an opportunity to make good any deficiency in court-fees. The matter is one entirely for the Court's discretion. (*Nagarkar, J.C.*) DHARAM CHAND *v.* BAHADUR MAL. 4 D.L.R. (A.M.) 21=A.I.R. 1949 Ajmer 46.

——S. 149—*Discretion of Court—Pre-emption suit—Power of appellate Court to review.*

The discretion conferred by S. 149, C. P. Code, needs to be exercised with the greatest care, where extension of limitation is also involved, specially if the suit is one for pre-emption. The right of pre-emption *albeit* allowed by statute is a predatory right, which constitutes a drawback on the recognised principle of freedom of contract, and consequently it is necessary that its exercise should be strictly in accordance with the legal requirements, however technical they may appear to be, in order that it should be legally recognised.

An appellate Court has power to review an order made by an inferior Court in the exercise of discretion under S. 149, C. P. Code. 1938 Lah. 361 (F.B.), ref. (*Abdul Rashid, C.J. and Cornelius, J.*) SAEED AHMAD *v.* KARAM SINGH. Pak.L.R. (1948) Lah. 202=A.I.R. 1949 Lah. 121.

——S. 149—*Powers under—When to be exercised—Deficient Court-fee.*

A Court has under S. 149, C. P. Code, full discretion in the matter of giving time to make up deficient Court-fee, but that discretion should only be exercised where the Court is satisfied that sufficient grounds exist for the full Court-fee not having been paid in the first instance, for the effect of extending the time is to deprive the other party of the right which otherwise arises from the fact that an appeal not filed in due time with the proper Court-fee is barred.

The inability of the applicant to find the requisite money is not, save perhaps in special circumstances as, for example, where he has been robbed,—sufficient ground for extending the period of payment. (*Mootham and Sapru, JJ.*) SHRI KRISHNA *v.* SARASWATI DEVI. 1950 A.W.R. 335=A.I.R. 1950 A. 499=1950 A.L.J. 269.

——S. 149 and O. 33, R. 1—*Scope of S. 149—Time for paying court-fee, if can be granted in revision.*

The provisions of S. 149, C. P. Code, are sufficiently wide and in a proper case could be applied to grant time for payment of court-fee even in a revision against a refusal to grant leave to sue *in forma pauperis*. (*Ghulam Hasan, C.J. and Kaul, J.*) TEJ DAT SINGH *v.* YUVRAJ DAT. 23 Luck. 70=A.I.R. 1948 Oudh 157=1947 O. 1947 O.W.N. 561.
A. (C.C.) 275=1947 A.W.R. (C.C.) 275=

———S. 150—Applicability—Transfer of business due to the creation of two Dominions. *See* INDIAN INDEPENDENCE (LEGAL PROCEEDINGS) ORDER (1947), CL. 4 (2) AND C. P. CODE, S. 150 AND O. 9, R. 13. 52 C.W.N. 491.

———Ss. 151 and 152—*Amending decree in regard to pleaders' fees—Legality.*

Where a judgment has fixed the pleader's fee and the decree has been drawn up in accordance with the judgment, even if the amount fixed is wrong, it is not open to the Court to amend the decree. The only course open to the aggrieved party to set matters right is to apply for a review of the judgment or to prefer an appeal. Ss. 151 and 152, Civil Procedure Code, cannot be invoked in substitution of the specific remedies of review and appeal. (*Rajamannar, C.J. and Somasundaram, J.*) ABDUL RAZACK SAHIB *v.* ABDUL HAMID SAIT. 63 L.W. 759=1950 M.W.N. 616=5 D.L.R. (Mad.) 347=(1950) 2 M.L.J. 282.

———S. 151—*Appeal—Order restoring execution case dismissed for default.*

No appeal lies from an order passed under S. 151, C. P. Code, restoring an execution case which has been dismissed for default. (*Mukherjea and Blank, JJ.*) RADHA KISSEN *v.* KESHABDEO. 50 C.W.N. 592=A.I.R. 1946 Cal. 488=227 I.C. 533=1947 Cal. (Rul.) 31.

———S. 151—*Applicability—Order rejecting plaint for non-payment of deficit court-fee—Inherent power of Court to restore—Remedy of party—Review—C. P. Code, O. 7, R.* 11.

No application for restoration lies under S. 151, C. P. Code, when an order has been made rejecting a plaint under O. 7, R. 11, for non-payment of deficient court-fee within the time allowed for payment. The order rejecting the plaint under O. 7, R. 11 (*c*) operates as a decree, and the Court has no inherent power to alter or add to that order in view of O. 20, R. 3, C. P. Code, except by way of review or amendment. The remedy of the party is therefore to apply for review of the order on payment of the proper court-fee therefor. 20 P.L.T. 883, Dist. 4 P.L.T. 261, foll. (*Agarwala, C.J.*) GANGA PRASAD *v.* GIRJA DEVI. 29 P.L.T. 354=A.I.R. 1949 Pat. 366.

———S. 151 — *Applicability—Other remedy open.*

Relief under S. 151, C. P. Code, should not be granted where there is another remedy available or possible. (*Reuben, J.*) BANSHIDHAR KANUNGO *v.* NABAL KHAN. 14 Cut.L.T. 22=A.I.R. 1949 Pat. 190.

———S. 151—*Applicability—Other remedy open—Fraud between parties—Remedy of suit available—Inherent powers—If can be invoked.*

S. 151, C. P. Code cannot be invoked in a case where the party has another remedy by way of a separate suit, and when it is a case of fraud between the parties and not fraud upon the Court. (1934) Cal. 623; (1929) Nag. 111; 13 Pat. 165, rel. on. (*Sarwate, J.*) ABDUL MAJID KHA *v.* MT. MAHMUDABI. I.L.R. (1949) Nag. 358=A.I.R. 1949 Nag. 366=4 D.L.R. (Nag.) 70=1949 N.L.J. 582.

———Ss. 151 and 152—Applicability to proceedings under U. P. Encumbered Estates Act. *See* P. P. E. E. Act (XXV OF 1934), S. 47 AND C. P. CODE (V OF 1908), Ss. 151 AND 152 AND O. 47. 1950 A.L.J. 64.

———S. 151—*Application under to revise order of dismissal for default of petition to set aside sale under O. 21, R. 90 and Ss. 47 and 151, C. P. Code—Maintainability.*

An application by a judgment-debtor to set aside a sale under O. 21, R. 90 and Ss. 47 and 151, C. P. Code, was dismissed for default. Then the judgment-debtor applied under S. 151, C. P. Code, to revise the order of dismissal, to set aside the sale and to re-open the first petition and enquire into the same. On a question as to its maintainability.

Held, that such an application would not lie in law. It cannot be said that when the Court has inherent power to dismiss, it must also have inherent power to restore. (*Bell, J.*) VENKATARAMUDU *v.* KRISHNAYYA. 1947 M.W.N. 508=60 L.W. 566=A.I.R. 1948 Mad. 204=(1947) 2 M.L.J. 244.

———S. 151 and Court-Fees Act (VII of 1870), S. 13—Belated application for refund of Court-fees—Right to relief. [*See* Q.D. 1941—1945, Vol. I, Col. 1036.] MAHOMED AZIM KHAN *v.* SAADAT ALI KHAN. A.I.R. 1946 Oudh 9.

———S. 151—*Compromise decree—Compromise set aside in a subsequent suit on ground of fraud—Application by plaintiff in original suit to restore it to file—Such restoration if and when can be ordered—Power of Court under S. 151, Civil Procedure Code.*

Petitioner (plaintiff) in a suit to recover properties from her mother (first defendant), her sister (second defendant) and her sister's husband (third defendant) on the basis of a settlement deed had her suit decreed in terms of a compromise. Then the third defendant brought another suit to set aside the compromise on the score of its having been fraudulently susbstituted for the real compromise and it was set aside in appeal on grounds of fraud. The petitioner herein filed an application under S. 151 of the Civil Procedure Code to restore to file the original suit by her to recover her properties.

Held, that the petition had to be dismissed by the Court. The Civil Procedure Code makes no provision for any such application before the trial Court to restore a suit to file which has been decreed on the basis of subsequent findings in another suit. Section 151, Civil Procedure Code gives the Court inherent powers to make such orders as may be necessary for the ends of justice, and can scarcely be invoked by the present petitioner who has been found guilty of a fraud on the Court. Had the position been reversed and had the plaintiff sued to set aside a fraudulent compromise decree filed into Court by defendants, one which was detrimental to her rights in the suit, it would be manifestly inequitable to say that the plaintiff would have no right to have her original suit retried. Consequential relief arising out of her suit to set aside the compromise decree on the ground of fraud could have been asked for in that suit either in the shape of damages or by a prayer for retrial of the original suit. That being not the procedure adopted here it would be improper to restore the original suit to file. (1923) 46 M.L.J. 348 and (1906) 16 M.L.J. 291: L.R. 33 I.A. 128: I.L.R. 28 All. 585 (P.C.) distinguished. (*Mack, J.*) Polamma *v.* Sooramma. 1950 M.W.N. 55=A.I.R. 1950 Mad. 301=(1949) 2 M.L.J. 817.

———S. 151—*Compromise recorded by Court mislead by statement of pleader that he was specially authorised to compromise when in fact he was not—Power to set aside order recording compromise—Right of appeal if bar to exercise of inherent power.*

Where a Court is misled into recording a compromise by the statement of a pleader that he was specially authorised by his client to compromise the suit when, in fact he was not, the Court has inherent power to set aside the compromise decree. The existence of a right of appeal against the order recording compromise is no bar to the exercise of the inherent powers if it was called for in the interests of justice. (*Davis, C.J. and Thadani, J.*) Rijharam Badaldas *v.* Vithaldas Jethanand. I.L.R. (1946) Kar. 251=A.I.R. 1947 Sind 4=225 I.C. 236=1946 Sind (Rul.) 205.

———S. 151—*Consolidation of suits—Inherent power of Court—Procedure after consolidation.*

There is no specific provision of law in the C. P. Code for consolidation of two suits such as is contained in O. 49 of the Rules of Supreme Court requiring one trial and one judgment in consolidated actions. It is under the inherent powers of the Court under S. 151, C. P. Code, that the suits are consolidated. The legal effect of a *de facto* consolidation is usually achieved by two suits being tried together by consent of parties and with the approval of the Court. After consolidation there is only one case and the suit consolidated has no independent existence for trial. Both the suits should be tried in one trial and should be disposed of by one judgment and decree. The fact that two judgments and decrees were passed at best show an irregularity in following a correct and an ideal procedure but not an absence of an intention to consolidate the two suits. (*Grille, C.J. and Padhye, J.*) Manohar Vinayak *v.* Laxman Anandrao. I.L.R. (1947) Nag. 691=A.I.R. 1947 Nag. 248=2 D.L.R. 167=1948 N.L.J. 155.

———S. 151—*Correction of errors—Power of Court.*

A Court may in a suitable case resort to its powers under S. 151, C. P. Code, to correct errors not covered by S. 152, but resort to such powers can only be in exceptional circumstances. S. 151 is not meant to re-open a case on any point which the parties and Courts never contemplated and certainly not those matters which are of a contentious nature. (*Hidayatullah, J.*) Lungya Balya *v.* Bansilal Pusaram. I.L.R. (1950) Nag. 441=A.I.R. 1950 Nag. 95=5 D.L.R. (Nag.) 117=1950 N.L.J. 75.

———S. 151—*Error of Court—Power of Court to rectify—Revision application dismissed for non-prosecution under error—Power of Court to restore application.*

Where a revision application was dismissed for want of prosecution when the applicant had no notice of what was required to be done by him, it is always open to the Court to rectify its error under S. 151, C. P. Code, and restore the application. Art. 168, Limitation Act, does not come into play. A.I.R. 1949 All. 36, relied on. (*Atma Charan, J.C.*) Anandi Prasad *v.* Jhamman Lal. A.I.R. 1950 Ajmer. 6 (1).

———S. 151—*Execution sale—Setting aside of —Inherent power of Court.*

If the decree-holder gets the venue of sale changed by practising fraud on Court and by abusing the process of the Court, the Court can act *suo motu* and declare the sale a nullity under its inherent powers. Even apart from fraud the Court has inherent powers to set aside an auction sale held contrary to its express orders and directions. The Court is not deprived of its powers to exercise inherent powers merely because the sale is confirmed in ignorance of the ground rendering it void. (*Padhye, J.*) Ballabhdas *v.* Sobhaji. I.L.R. (1947) Nag. 344=A. I. R. 1948 Nag. 52=231 I.C. 6=1947 N.L.J. 240.

———S. 151—*Exercise of inherent powers—Other remedy open to party—Principles guiding Courts.*

The Court's jurisdiction to grant relief under its inherent powers may be exercised even though there may be another remedy open to the aggrieved party. This power will be readily exercised where the mistake is that of the Court itself, it would not be so readily exercised where the other party was negligent in the prosecution of his case or did not avail himself of another remedy which was easily available and did not involve greater expense or delay. Case-law discussed. (*Agarwala, J.*) Raj Kumar *v.* Ved Roop Narain. 1950 A.W.R. 35=A.I.R. 1950 A. 293=1950 A.L.J. 34.

———S. 151 and O. 9, R. 13—Ex parte *order —Setting aside—Grounds.*

An *ex parte* order cannot be set aside under S. 151, C. P. Code, on grounds other than those specified in O. 9, R. 13, C. P. Code. S. 151 can be brought into play only when there is no express provision of law applicable to the case. (*Bhandari, J.*) Sharaf Jahan Begam *v.* Yaqub Ali. A.I.R. 1947 Lah. 409.

———S. 151—Ex parte *order—Setting aside of —Inherent jurisdiction.*

A Court has inherent jurisdiction to deal with an application to set aside an order affecting the rights of a person who is not a party to the suit made without any notice to him and without giving him an opportunity of showing cause. 32 C. 253; 55 B. 368; 10 C.W.N. 306, referred to.

(*Sinha, J.*) MAHMUD ISMAIL SALEHJI *v.* AHMED ISMAIL SALEHJI. I.L.R. (1949) 1 Cal. 153.

———**S. 151**—Ex parte *order—Setting aside of—Inherent jurisdiction of Court.*

A Court has inherent jurisdiction to set aside an order made *ex parte* and without notice to the parties to be affected thereby if a proper case is substantiated. (*Sinha, J.*) DESMOND PAUL CHATER, *In the matter of.* I.L.R. (1949) 1 Cal. 187.

———**S. 151**—Expunging remarks, in order of Lower Court—Appeal from order discharging temporary injunction—Remarks on merits of case—Expunging of. *See* PRACTICE—DUTY OF COURT. 4 D.L.R. (A.M.) 28.

———**S. 151**—If can be invoked for directing security for costs to be furnished. *See* C. P. CODE (V OF 1908), O. 25, R. 1 AND S. 151. (1950) 2 M.L.J. 159.

———**S. 151**—*Inherent jurisdiction of High Court to stay independent suit—Conditions necessary for.*

It cannot be said that the High Court has jurisdiction under S. 151, C. P. Code, to stay the trial of a suit out of which the proceedings in the High Court do not arise. The only limitation that can be placed upon the exercise of such jurisdiction would be that the applicant for stay has no other remedy available to him in law which he can seek from a competent Civil Court. For instance, if he can get the particular suit stayed under S. 10 of the C. P. Code it would be necessary for him to adopt that remedy and where he has failed to do this, the High Court would not in exercise of its inherent jurisdiction direct the stay of the suit under S. 151 of the C. P. Code. It should further be established to the satisfaction of the High Court for invoking its inherent jurisdiction that the stay has to be ordered in the ends of justice or to prevent abuse of the process of the Court. If these conditions are satisfied, there can be no question that the trial of an independent suit can be stayed by the High Court in exercise of its inherent powers under S. 151, C. P. Code, in the course of other proceedings pending before it. (*Yahya Ali, J.*) BALAJI RAO *v.* NATESA CHETTY. 60 L.W. 276=1947 M.W.N. 476=A.I.R. 1948 Mad. 138=(1947) 1 M.L.J. 330.

———**S. 151**—Inherent jurisdiction—Stay of suit—Case not falling under S. 10—Inherent power to order stay of later suit. *See* C. P. CODE, S. 10. 224 I.C. 532.

———**S. 151**—*Inherent jurisdiction of High Court to stay independent suit—Conditions necessary for.*

The High Court in the exercise of its inherent jurisdiction can stay the trial of an independent suit in the course of the proceedings before it if (*i*) it is in the interests of justice or to prevent abuse of process of the Court and (*ii*) there is no other remedy available to the applicant.

As the words "the matter in issue" in S. 10, C. P. Code, have to be deemed to denote the entire subject in controversy, relief under that section would not be available where the facts in the two suits are not common except only with regard to one matter in issue. (*Yahya Ali, J.*) KOMARAPPA GOUNDAN *v.* RAMASWAMY GOUNDAN. 1947 M.W.N. 380=60 L.W. 300=A.I.R. 1948 Mad. 150=(1947) 1 M.L.J. 365.

———**Ss. 151 and 10**—*Inherent jurisdiction to stay suit apart from S. 10.*

A subsequently instituted suit could be stayed under S. 151, C. P. Code, even though S. 10 of the Code may not strictly apply. (*Padhye, J.*) LAXMI BANK, LTD., AKOLA *v.* HARIKISAN BALABAKAS. I.L.R. (1948) Nag. 403=1948 N.L.J. 250=A.I.R. 1948 Nag. 297=3 D.L.R. (Nag.) 12.

———**S. 151**—*Inherent jurisdiction to stay suit—Some of issues involved being also issues in another suit—Inherent power of Court.*

Power to stay a suit on account of some of the issues which it involves being also issues in another pending suit, which is clearly not derivable from S. 10, C. P. Code, is not inherently possessed by a Court under S. 151, C. P. Code, except where it is necessary in order to secure the ends of justice or to prevent abuse of the process of the Court. (*Cornelius, J.*) MAHOMED AFZAL *v.* MT. SARDAR BEGUM. Pak.L.R. (1948) Lah. 79=A.I.R. 1949 Lah. 69.

———**S. 151**—*Inherent jurisdiction—Scope of—Rectification of wrong orders based on wrong decrees.*

If a Court rectifies a mistake in a decree in the eercise of its inherent powers, it has jurisdiction to order restitution of any benefit which may have been received wrongly by the persons who were not entitled to such benefits but for the mistake in the decree. Where a Court has wrongly awarded possession to a party under a wrong decree, it has not only got the power but it is also bound to restore possession to the party from whom such possession has been wrongly taken. (*Ghulam Hasan, J.*) SAMAL SINGH *v.* JHUNKOO SINGH. 223 I.C. 250=1946 Oudh (Rul.) 139=1946 O.A. (C.C.) 74=1946 A.W.R. (C.C.) 74=1946 O.W.N. 112=1946 A.L.W. (C.C.) 106=A.I.R. 1946 Oudh 210.

———**S. 151**—*Inherent power of Court—Alteration of order passed by predecessor in office.*

The fact that one officer has ceased to preside over a Court and is succeeded by another officer does not mean that the Court has ceased to exist, or that the Court is another Court. It is the Court, which in the exercise of its inherent power, can, and where necessary should, make orders for the ends of justice. There is no reason to limit this power given by the legislature to the Court by laying down that it is only when the same presiding officer continues that an order already passed can be altered. Whether a succeeding presiding officer can interfere with an order passed by his predecessor in office or not depends entirely on the circumstances of each case. If a case is a suitable one for the exercise of powers under S. 151, C. P. Code, the fact that there has been a change in the officer presiding over the Court would create no difficulty in his way. For the Court remains the same Court though the presiding officer changes. 74 I.C. 110. Expl. (*Das Gupta and Mitra, JJ.*) SUBODHCHANDRA MUKHERJEE *v.* SUDHIR KUMAR BASU. 54 C.W.

N. 106=A.I.R. 1950 Cal. 209.

———S. 151—Inherent powers—Amendment—Scheme decree—Absence of provision for applying for modification—Application for alteration—Maintainability—Power of Court to alter or modify. *See* C. P. Code, S. 92. 49 Bom.L.R. 757.

———S. 151—Inherent powers—Appeal dismissed erroneously as for default—Restoration—Limitation. *See* C. P. Code, O. 41, Rr. 17 and 19. 3 D.L.R. (All.) 96.

———S. 151—*Inherent power—Appeal dismissed for default of prosecution—Inherent power to restore.*

A Court has no inherent power under S. 151, C. P. Code, to restore an appeal which has been dismissed for default of prosecution, apart from O. 41, R. 19, C. P. Code. (*Shearer, J.*) Sukhan Mahton *v.* Bansidhar Sukul. 1946 P.W.N. 136=A.I.R. 1947 Pat. 62=220 I.C. 227=13 B.R. 418=1947 Pat. (Rul.) 293.

———S. 151—*Inherent power—Appeal dismissed for failure to file printing cost—Application for restoring appeal to file—Limitation—Limitation Act, Art.* 168.

If an appeal is dismissed as a result of the failure of the appellant to comply with a peremptory order to file the printing cost an application for vacating the order of dismissal and for restoring the appeal to the file lies under S. 151, C. P. Code, which preserves the inherent powers of the Court to act *ex debito justitiae*. An application of this sort does not come within the provisions of O. 41, R. 19, C. P. Code. 19 P. 159 (F.B.), foll.

Art. 168 of the Limitation Act is inapplicable to the above application. As the Court is called on to exercise its inherent power, that power is not affected by the law of limitation. 45 B. 648, foll.; 7 A. 276 and 8 A. 519, relied on; 8 R. 380 (F.B.), dist. (*Shearer and Reuben, JJ.*) Minnie Lal *v.* Mahadeo Lall. 27 Pat. 745=29 P.L.T. 483=A.I.R. 1949 Pat. 112.

———S. 151—Inherent powers—Appeal—Rejection for failure to furnish copy of judgment of lower Court—Restoration—Powers of Court—Appeal—Competency. *See* C. P. Code, Ss. 2 (2) and 151. A.I.R. 1950 Pat. 443.

———S. 151—*Inherent powers—Application under O. 9, R. 13, dismissed for default—Restoration—Inherent jurisdiction of Court.*

It is open to the Court in appropriate cases to invoke its inherent jurisdiction and to restore an application under O. 9, R. 13, C. P. Code, which had been dismissed for default. 46 All. 144; 1923 Bom. 386; 15 P.L.T. 166; 1922 Pat. 121; 1927 Pat. 240; 1929 Pat. 529; 1946 Pat. 184, dist.; 47 All. 878; 54 Cal. 405, rel. on. (*Sinha and Mahabir Prasad, JJ.*) Mt. Kapura *v.* Narain. 27 Pat. 187=A.I.R. 1949 Pat. 491.

———S. 151—*Inherent power—Co-owners—Absent co-owner—Power to appoint manager for, to join in sale deed of joint property—Ends of justice.*

The petitioner who was one of four co-shares (others being his sister and two brothers) applied to the Court under very extraordinary circumstances to appoint him as manager to represent one of his brothers who was absent abroad, for effecting a sale of their joint property. It appeared that the property was mortgaged to the extent of Rs. 12,000, that there was a chance of selling that property for Rs. 45,000, that the sale would be in the interests of the co-sharers. His sister and one of the brothers were with him; the sister had agreed and the Court also sanctioned the sale on behalf of the brother who was with him but who was a lunatic. The other brother had left for China about 28 years ago, and was heard of about six years ago when a letter had been received from him which would show that he was alive and well. The sale could not be completed because of the absence of that brother who too had to join in the sale deed. The petitioner in the circumstances prayed to the Court to appoint a proper person (manager) to look after the affairs and interests of the absent brother with authority to join in the proposed sale deed.

Held, that in the peculiar circumstances of the case and in view of the facts that the absent brother could not be presumed to be dead as only less than seven years had elapsed after he was last heard of, there was jurisdiction in the Court to make the order asked for and to appoint the petitioner manager of the undivided share of the absent brother in the property to be sold, with power to join in the proposed sale of the property and to sign all deeds or other instruments necessary for the purpose. (*Blagden, J.*) Pirojshaw Adarji Shroff, *In re.* 48 Bom.L.R. 640=A.I.R. 1947 Bom. 92=230 I.C. 222.

———S. 151—*Inherent powers—Cannot be eercised to cure a legal defect.*

The inherent powers of the Court cannot be exercised in order to cure a legal defect. (*Lal, J.M. II.*) Shri Ram *v.* Zahar Singh. 1948 R.D. 294.

———S. 151—*Inherent power—Decree against minor set aside as nullity—Power of Court to revive suit—Order rejecting application to revive suit—Revision—N. W. F. P. Courts Regulation, S.* 34 (1) (a).

A Court setting aside a decree passed in a suit on the ground that it is a nullity having been passed against a minor who was not duly represented in the suit, has not only jurisdiction under S. 151, C. P. Code, to revive the suit so as to restore the minor to the same position in which he was on the date on which the suit was filed against him but should do so. If the Court rejects an application for revival of the original suit, it fails to exercise its jurisdiction and its order comes within the mischief of S. 34 (1) (*a*), N. W. F. P. Courts Regulation and is subject to revision. 63 C. 1227; 1934 Lah. 45; 1928 All. 684 and 52 A. 924, rel. on. (*Malik Khuda Bakhsh, J.*) Abdul Qayum *v.* Mahomed Sadiq. A.I.R. 1949 Pesh. 9.

———S. 151—Inherent power—Exercise of—Appealable order. *See* B. T. Act, S. 174 (3) and (5). 83 C.L.J. 162.

———S. 151—*Inherent power—Exercise of—Fraud practised on Court and fraud between parties.*

Under S. 151, Civil Procedure Code, the inherent powers may be exercised in a case where the Court has been misled by a fraud practised upon it because in such a case the Court would be under a duty to correct its own proceedings which, in the absence of any other provision, it would do by resort to inherent powers. But when it is a case of fraud between the parties and the aggrieved party has another remedy of a suit open to it, there should be no occasion for invoking inherent powers of the Court. 13 P. 165, A.I.R. 1934 Cal. 623 and 46 A. 820, rel. on. (*Sarwate, J.*) ABDUL MAJID *v.* MAHMUDABI. 1949 N.L.J. 582.

——**S. 151**—*Inherent powers—Exercise of—Principle—Laches—Effect of.*

In exercising jurisdiction under its inherent powers, the Court is influenced by the justice of the case in favour of the party who invokes its assistance. Where the party has been guilty of laches or has been negligent in prosecuting his remedy, a Court of law would be most reluctant to exercise its inherent powers in his favour. Such power under S. 151, C. P. Code, has to be exercised to prevent the abuse of the process of Court. Equity aids the vigilant and not the indolent.

Hence where a decree-holder takes no steps to correct his application for execution until nearly two years when the period had run out, he cannot be allowed to amend his application. (*Ghulam Hasan, Kidwai and Chandiramani, JJ.*) JANKI SAHU TRUST *v.* RAM PALAT. 1950 A.L.J. 833=A.I.R. 1950 A. 580=5 D.L.R. (All.) 275 (F.B.).

——**S. 151**—*Inherent powers—Exercise of when other remedy open.*

The rule that S. 151 of the C. P. Code should not be applied when another remedy is available is not an absolute one. There is no doubt that the Court has jurisdiction to exercise its inherent powers in exceptional cases where another remedy is open but where the other remedy for the relief has been once availed of by the parties, S. 151 can no longer be invoked. (*Misra, J.*) MUSTAQ AHMAD KHAN *v.* NOOR ZOHRA BEGAM. 22 Luck. 368=A.I.R. 1948 Oudh 42=1947 O.A. (C.C.) 102=1947 O.W.N. 299.

——**S. 151**—*Inherent powers—Exercise of when other remedy open.*

Though as a general rule S. 151, C. P. Code should not be invoked when a party has another remedy, yet circumstances in some cases may justify a departure from rule. (*Nehru, A.M.*) DEBI DAYAL *v.* LALTA. 1947 A.W.R. (Rev.) 108.

——**S. 151**—*Inherent powers—Exercise of when other remedy open.*

Where a party has neglected to avail himself of a remedy provided by statute, *e.g.*, an appeal under O. 43, R. 1, C. P. Code, it is not open to him to invite the Court, by virtue of its inherent jurisdiction under S. 151, C. P. Code, to disturb a decree or order which he has failed to challenge in the statutory manner. (*Mootham, J.*) CHANDER BHAN SINGH *v.* LALLU SINGH. I.L.R. (1947) A. 389=229 I.C. 26=1947 All. (Rul.) 112=1947 A.L.W. 238=A.I.R. 1947 A. 343.

——**S. 151**—*Inherent powers—Exercise of when other remedy open—Limitation Act (IX of 1908), Art. 181—Order of Appellate Court determining nature of decree—Starting point of limitation for application for refund of money wrongly paid.*

In execution of a decree by the respondent certain sale proceeds were realised and distributed among the respondent and the two appellants in the two appeals who were also decree-holders in two other suits against the same judgment-debtor. One of the appellants got his share on the footing that he was a money decree-holder, but it was held on appeal to the Privy Council that he was entitled to a charge decree only having a vendor's lien and that he had no right to proceed against the general assets of the judgment-debtor. Meanwhile a suit filed by the respondent claiming a first charge over the proceeds was dismissed with a declaration that the abovesaid appellant was not entitled to any rateable distribution. An application by the respondent to direct that appellant to refund the money drawn by him was allowed by the trial Court under its inherent powers under S. 151, C. P. Code.

Held, on appeal by that appellant that (*i*) while the existence of a remedy by suit may be a ground for the Court whose inherent jurisdiction is invoked to say that it will not exercise such jurisdiction and that the party may file a suit, there is no justification in depriving a Court of its inherent jurisdiction to pass appropriate orders revoking, where the ends of justice so require, its own wrong orders based on assumptions which later on have been proved to be baseless; (*ii*) though an appeal may not be maintainable against such an order, treating the appeal as revision, there was no reason to interfere as the order holding that the appellant was entitled only to a charge decree confers upon the respondent the right to apply for a refund of the amount wrongly paid, and as the proper article of the Limitation Act applicable is Art. 181, the respondents having applied within three years from the date of the order, were within time in seeking refund of the amount. (*Chandrasekhara Aiyar, J.*) SRI RAJAH RAVU VENKATA MAHIPATHI SURYARAO *v.* CHALAMAYYA. 1947 M.W.N. 83=A.I.R. 1947 Mad. 339=(1947) 1 M.L.J. 87.

——**S. 151**—*Inherent powers under—Exercise of in favour of party who has not availed himself of other remedy open to him—Propriety.*

The powers under S. 151, C. P. Code, cannot be exercised to confer a benefit on a judgment-debtor who is not entitled to it by reason of his negligence to avail himself of other remedies open to him. (*Pedley, S.M. and Bates, J.M.*) THAKUR PRASAD *v.* RAJA RAM SINGH. 1947 R.D. 147=1947 A.W.R. (Rev.) 77.

——**S. 151**—*Inherent powers—Injunction to restrain party from prosecuting case before another tribunal—Power of High Court to issue.*

The High Court, it is true, has inherent jurisdiction, apart from the C. P. Code, to restrain a person from prosecuting a case before another tribunal in exceptional cases. Such jurisdiction can, however, be exercised only with great caution and on its being satisfied that the prosecution of the case is vexatious or oppressive. (*Ramaswami and Narayan, JJ.*) LILA DEVI *v.* BHATU MAHTON. 5 D.L.R. (Pat.) 186.

———Ss. 151 and 115—*Inherent powers—Interference under, where S. 115 would not apply.*

Courts may exercise powers under S. 151, C. P. Code to correct mistakes and the High Court may interfere in a proper case under S. 151 even if S. 115 is not applicable where the powers were exercised by a Court whose jurisdiction in the matter was not barred by any law. (*Misra and Kidwai, JJ.*) SANKATA PRASAD *v.* RAM KUSHI DEVI. 22 Luck. 207=230 I.C. 25=1947 Oudh (Rul.) 117=1947 R.D. 94=1947 O.W.N. 88=1947 A.W.R. (C.C.) 44=1947 O.A. (C. C.) 44=A.I.R. 1947 Oudh 232.

———S. 151—*Inherent power—Invalid order—Power of Court to recall.*

A Court has inherent power to set aside its own order which is null and void. In such a case the Court does not substitute one decision on the merits for another, but merely finds and records that what had been done was without jurisdiction. No Court is compelled to proceed with any proceeding after finding that the proceeding was without jurisdiction, and the fact that many steps had been taken in the proceeding, before the Court found that it had no jurisdiction, is no ground for persisting in continuing the proceeding. (*Tyabji, C.J. and Meher, J.*) MAHOMED HUSSAIN KHAN *v.* RASOOLBUX. I.L.R. (1947) Kar. 194=A.I.R. 1948 Sind 124.

———S. 151—Inherent powers—"Justice"—Meaning of—Petition filed for relief instead of suit in order to evade S. 80, C. P. Code—Maintainability. [*See* Q.D. 1941-1945, Vol. I, Col. 1027.] HUBLI ELECTRICITY CO., LTD. *v.* GOVERNMENT OF BOMBAY. 221 I.C. 422=1946 Bom. (Rul.) 55=I.L.R. (1945) Bom. 665.

———S. 151—*Inherent powers—Mistake or oversight on part of Court resulting in defective and unjust order—Duty to relieve injured party from injustice.*

It is the duty of a Court to relieve parties against injustice occasioned by its own acts and oversight. This principle finds expression in S. 151, which in terms is very wide. The Court has inherent powers to set right any mistake or injustice.

Where, by oversight, a decree in terms of a compromise is passed even against defendants not joining in the compromise, and an order is passed which is defective, irregular and inoperative against all the defendants, the Court not only has the power but owes a duty to relieve the plaintiff from the injustice done to him by its own acts, mistakes and oversights. 39 All. 8; 45 All. 606; 54 All. 924; 12 Bom. 174; 10 Pat. 516, ref. (*Ramaswami and Narayan, JJ.*) RAM SWARUP SINGH *v.* KAMALA PRASAD SINGH. A.I.R. 1950 Pat. 350=5 D.L.R. (Pat.) 182.

———S. 151—Inherent powers—Mortgage suit—Final decree with wrong legal representatives substituted by mistake—Execution sale or delivery of possession—Dispossession by rightful heirs under O. 21, R. 100—Application by decree-holder for fresh final decree with rightful heirs on record—Inherent jurisdiction to entertain and allow. *See* C. P. CODE, O. 34, R. 4. 1949 D.L.R. (Pat.) 10=A.I.R. 1949 Pat. 259.

———S. 151—*Inherent powers—Order directing withdrawal of counsel from suit—Evidence of counsel material in suit.*

A Court has inherent power to direct a counsel to withdraw from a suit if it comes to the conclusion that his evidence is material and his appearance in the Court in the capacity of a lawyer would embarrass the trial of the suit. If a counsel is a material witness it will not be right for a Court to ask a party not to examine him as a witness. The proper course would be to ask the counsel to withdraw provided the Court is fully satisfied that his evidence will not be of a formal character. It should bear in mind that this power is not to be lightly exercised. It should closely examine the object of the application of the party seeking withdrawal of a counsel of the opposite party. If the object is to prejudice his opponent the application should be turned down. If, however, the application is *bona fide* and the Court is satisfied that the evidence will be relevant and important and the withdrawal will be conducive to the proper trial, it may direct withdrawal of the counsel. The Court is the final authority in all matters affecting smooth and proper trial of a suit. A Court has also the power to punish a party by awarding heavy costs irrespectively of the result if ultimately he does not examine the counsel whose withdrawal was ordered at his instance or the evidence turns out to be formal. A.I.R. 1939 Rang. 342 and A.I.R. 1939 Bom. 150, foll. (*Sen, J.*) ALL INDIA REPORTER, LTD. *v.* G. D. MOGHE. 5 D.L.R. (Nag.) 92=A.I.R. 1950 Nag. 110=1950 N.L.J. 187.

———S. 151 and O. 39, R. 1—***Inherent powers of Court—Order under O. 39, R. 1—Application to sue in 'forma pauperis' pending decision.***

The Court has no jurisdiction to pass any order under O. 39, R. 1, C. P. Code, pending the disposal of an application to sue in "forma pauperis", as there is no pending suit at that time. But in such a case the Court may, in the exercise of its inherent jurisdiction under S. 151, C. P. Code, pass an order which partakes of the nature of an order under O. 39, R. 1, if such an order is really necessary for the ends of justice. In the exercise of its jurisdiction which is saved to it by the provisions of S. 151 the Court should be extremely careful in passing orders and it is only when no other relief is possible and when relief is urgently called for, that the Court should exercise its inherent powers, and when it does exercise such powers it should limit the scope of such exercise to as narrow a compass as possible. 21 C.W.N. 870, Dist.; A. I. R. 1940 All. 185 and A.I.R. 1943 Bom. 143, referred to. (***Sen and Chunder, JJ.***) **MANORAMA DASI *v.* SABITA DASI.** 54 C.W.N. 848.

———S. 151—Inherent powers—Recall of proceedings taken without jurisdiction and setting aside of illegal orders—Numerous steps take in proceeding—If bar to recall of illegal orders. *See* C. P. Code, O. 20, R. 12. I.L.R. (1947) Kar. 194.

———S. 151—Inherent power—Refund of Court-fees. *See* Court-fees—Refund. (1950) 1 M.L.J. 222.

———S. 151—*Inherent powers—Refund of court-fee—Inherent powers of Court—Court-Fees Act, Ss.* 13, 14 *and* 15.

The power of the Court to issue a certificate of refund of court-fees is not confined to cases falling under Ss. 13, 14 and 15 of the Court-Fees Act. Even in cases not covered by these sections, the Court can order refund of court-fees paid in excess, either by mistake inadvertence or oversight. I.L.R. (1943) Bom. 25; (1942) 2 Cal. 253; 1940 Mad. 208; 6 Pat. 599, rel. on. (*Gajendragadkar and Jahagirdar, JJ.*) Vishnuprasad Narandas Modi *v.* Narandas Mohanlal Modi. 51 Bom.L.R. 602=A.I.R. 1950 Bom. 4.

———S. 151—*Inherent power to grant refund—Court auction sale and affixing of necessary stamp on the sale certificate—Sale subsequently set aside—Application for refund of value of stamp after six months of the setting aside of the sale—If can be ordered.*

Standing Order 92 was passed by the Government amending the Madras Stamp Manual allowing a refund of stamp duty to the purchaser (when a Court auction sale is set aside) only if an application was made within six months of the setting aside of the sale. No Court has an inherent power to direct a refund of stamp duty when the application is made beyond the period fixed for the granting of a refund. (*Horwill, J.*) Province of Madras *v.* Audemma. 1949 M.W.N. 145=A.I.R. 1949 Mad. 895=4 D.L.R. (Mad.) 118=(1949) 1 M.L.J. 179.

———S. 151—*Inherent power to order refund of court-fee even where there are no specific provisions for the purpose.*

The petitioner filed a suit against his own father for recovery of about Rs. 3,000. He paid a court-fee of Re. 0-12-0 on his plaint and was given on 13th September, 1946, seven days' time for payment of deficit court-fee. He re-presented the plaint only on 7th November, 1946, accompanied by an application for condonation of the delay in re-presentation and also with deficit court-fee of Rs. 276-11-0. The application for condonation of delay was dismissed and on an application for refund or court-fee under S. 151, C. P. Code,

Held, in a case of this kind where no specific provision is made for the refund of court-fee, S. 151, C. P. Code, can be invoked to meet the ends of justice. The petitioner tendered the court-fee only on the basis that his application for condonation of the delay would be admitted. As such application however was rejected, the court-fee tendered should be refunded on equitable principles. (1942) 1 M.L.J. 226, rel. (*Mack, J.*) China Varahalu *v.* Reddayya. 1949 M.W.N. 338 (1)=(1949) 2 M.L.J. 12.

———S. 151—Inherent powers—Restitution—Application for possession of property sold in execution, dismissed for default. [*See* Q.D. 1941-1945, Vol. I, Col. 1029.] Karam Chand *v.* Umar Bakhsh. 1946 Pesh. (Rul.) 1.

———S. 151—*Inherent powers—Restoration of execution application—Notice to judgment-debtor—If necessary—Order of restoration—Effect of.*

An executing Court has an inherent power not only of dismissing an application for execution but also of restoring the application to the file. Since the decree-holder can bring successive applications for execution, Courts would be slow to resort to their inherent powers and would only exercise their inherent powers *ex debito justitiae* to prevent a miscarriage of justice.

Where an application for execution is dismissed for default in the absence of the judgment-debtor, it can be restored without notice to him.

Once an order of restoration is made, it has the effect of restoring not only the application but also all ancillary orders. (*Grille, C.J. and Hidayatullah, J.*) Dawoolal *v.* Kheduprasad. I.L.R. (1948) Nag. 631=A.I.R. 1949 Nag. 160.

———S. 151—*Inherent powers—Setting aside decree—Commissioner directed to ascertain mesne profits instead of net income as directed by decree—Final decree on basis of Report of Commissioner as to mesne profits—Setting aside—Powers of Court.*

It is manifest that there is a great difference in principle between calculating "mesne profits" recoverable from a person and "a share of the net income" due from one person to another. Where instead of determining the total net income of the properties, the Court issues a writ to Commissioner "for ascertainment of mesne profits" for a certain period, and the Commissioner ascertained mesne profits and the Court mechanically accepts such report and passes a final decree on the basis of such a report, the same would result in injustice, and the Court in such a case can exercise its inherent jurisdiction to set aside the final decree so made. 1 Pat. 277; A.I.R. 1949 Pat. 68, dist.; 35 Cal. 331 (P.C.); A.I.R. 1924 All. 818, foll. (*Ramaswami and Narayan, JJ.*) Balmatkuari *v.* Jagbandhan Nath. 5 D.L.R. (Pat.) 219=A.I.R. 1950 Pat. 497.

———S. 151—*Inherent power of Court—Setting aside* ex parte *final decree for foreclosure.*

A Court cannot set aside an *ex parte* final decree for foreclosure in exercise of its inherent power. It is only for granting relief against abuse of process of Court that inherent power is given. Inherent power is not intended to be exercised by way of spinning out a new procedure for a particular suit or proceeding. As under the law no notice is necessary of the application for making the preliminary decree final, there is no abuse of the process of the Court. Further, the ends of justice cannot be served by setting aside the *ex parte* decree which would necessarily involve loss of vested right of the decree-holder. (*Ray, J.*) Surendra Kumar

Singh *v.* Mukund Lal Sahu. A.I.R. 1949 Pat. 68.

——S. 151—Inherent powers—Setting aside sale brought about by an abuse of the process of Court. *See* Execution—Abuse of Process of Court. (1947) 2 M.L.J. 357.

——S. 151—*Inherent powers—Stay of proceedings—Court other than High Court, whether could exercise.*

Where the lower Court ordered stay in a suit for damages for malicious and wrongful institution of insolvency proceedings on the ground that the existence of plaintiff's liability to the defendants was itself the subject of appeals before the High Court, on the question whether a Court other than a High Court could invoke power under S. 151 of the C. P. Code, and stay the suit,

Held, that there was no reason why the powers should be restricted to the High Court. The word 'court' in S. 151 is wide enough to include any Court and that in the circumstances, the order of stay passed by the lower Court was well within its competence. Case-law reviewed. (*Somasundaram, J.*) Ahamed Abdul Sukkoor *v.* Vallabhadas Kanji Firm. 1949 M.W.N. 813=A.I.R. 1950 Mad. 219=62 L.W. 795=(1949) 2 M.L.J. 645.

——S. 151—*Inherent powers—Stay of suit—Rent suit against tenant in civil Court—Proceedings for commutation under S. 40, Bihar Tenancy Act, pending before Revenue Officer—Stay of civil Court—Right of tenant to order—S. 10, C. P. Code—Applicability—Order refusing stay—Revision—Grounds.*

S. 10, C. P. Code, does not apply and cannot be availed of where a tenant, who has applied for commutation of rent under S. 40, Bihar Tenancy Act, is sued in the civil Court for rent of the holding, so as to entitle him to a stay of the rent suit in the civil Court. An application for stay can, if at all, be entertained only under S. 151, C. P. Code, and if the Court in its discretion rejects the application for stay, the decision cannot be interfered with in revision unless there has been material irregularity or illegality or a serious miscarriage of justice.

There is no hard and fast rule that there should necessarily be a stay of the rent suit pending in the civil Court, merely because there is an application under S. 40, Bihar Tenancy Act, pending before the Revenue Officer. Whether a stay should or should not be granted would depend upon the facts and circumstances of each case. Though, if the commutation claimed by the tenant under S. 40 is allowed, the Revenue Officer has a discretion to direct the period from which the commutation will take effect, that is no reason why the landlord who has instituted a suit for rent because of the tenant's failure to divide the produce as required by law, should be compelled to wait until the proceedings under S. 40 are decided. (*Das and Sarjoo Prasad, JJ.*) Baso Beldar *v.* Parameshwar Narayan Singh. 5 D.L.R. (Pat.) 192=A.I.R. 1950 Pat. 363.

——S. 151 and O. 21, R. 90—*Inherent power of Court to cancel a sale in execution after confirmation on the ground of the fraud of the decree-holder—No application under O. 21, R. 90 filed in time—Time for deposit of sale amount—No inherent power in the Court to extend—New plea under S. 18, Limitation Act—Not raised and necessary facts not pleaded in execution application—If can be raised in Letters Patent Appeal.*

As regards the inherent powers of Court, the general rule is that the Court should not presume the existence of an inherent power to do that for which a statutory provision has been made and outside the limited discretion conferred by the Limitation Act, in certain cases, a Court has no general discretion to relieve a suitor from the operation of the provisions of the Limitation Act.

A Court has not the power under S. 151 of the C. P. Code, to cancel a sale in execution after it has been confirmed on the ground of a fraud on the Court in the matter of the valuation of the property sold, which fraud had not been the subject of an application under O. 21, R. 90 of the C. P. Code, preferred within the time allowed. The Code having given a specific remedy, the Court cannot be presumed to have an inherent power overlapping or running parallel to the procedure laid down in the Code.

Similarly in the matter of depositing the sale amount in Court, the Code clearly provides a definite period of limitation for such payments and there cannot be an inherent power in the Court to extend that period beyond the limits prescribed by the Code.

There is no reason why the principle of O. 7, R. 6 of the C. P. Code should not be applied to an application to set aside a sale in execution and it would be improper to treat an apparently time-barred application as being within time by calling in aid S. 18 of the Limitation Act when the pleading does not show how the exemption under the section is available to the petitioner and particularly when the plea is raised for the first time in Letters Patent Appeal. (*Wadsworth, O.C.J. and Govindarajachari, J.*) Bojjanna *v.* Kristappa. I.L.R. (1947) Mad. 72=60 L.W. 20=1947 M.W.N. 58=A.I.R. 1947 Mad. 268=(1947) 1 M.L.J. 10.

——**S. 151 and O. 39, R. 1**—*Inherent power of High Court to grant interim injunction in its appellate jurisdiction.*

In the exercise of the appellate jurisdiction of the High Court over mofussil proceedings, the High Court has no inherent power to pass an order of interim injunction outside the scope of Order 39 of the Civil Procedure Code. Such an order cannot be passed merely because it is in accordance with equity and good conscience, when O. 39 of the Code does not apply to the facts of the case. (*Horwill and Balakrishna Ayyar, JJ.*) Nagabhushana Reddy *v.* Reddivari Narasamma. 63 L.W. 961=1950 M.W.N. 690=5 D.L.R. (Mad.) 363=(1950) 2 M.L.J. 482.

——S. 151—*Jurisdiction—Mortgage suit—Death of guardian* ad litem *of minor defendant—Preliminary decree in ignorance—Appeal—Final decree as against major parties—Application for setting aside both decrees and for restoring suit—Jurisdiction of trial Court.*

Where a Court passes a final decree in a mortgage suit, when the preliminary decree passed by it is bad by reason of the fact that the guardian *ad litem* of a minor defendant had died before the preliminary decree which was made in ignorance of that death, it has jurisdiction to set aside the final decree. But it cannot restore the suit to the stage at which the guardian *ad litem* died when the preliminary decree has been appealed from and the appeal is pending. The question of the validity of the preliminary decree has to be considered by the appellate Court. (*Reuben, J.*.) BANSHIDHAR KANUNGO *v.* NABAB KHAN. 14 Cut.L.T. 22=A.I.R. 1949 Patna 190.

——S. 151—*Order for restitution or refund under—If appealable—Right of appeal—If can be extended to analogous cases—Order for restitution under inherent powers—When proper—Desirability of giving right of appeal by making suitable rule.*

As there is no specific appeal provided under the C. P. Code against orders of restitution and refund under S. 151 of the Code and as an order under that section does not amount to a decree, an appeal against such an order does not lie. [Case-law discussed.]

It is really inequitable that an order of this description under S. 151 should not be appealable. It is for the High Court to consider whether a rule may be so framed as to give at least one right of appeal against orders of this description by adding a suitable clause to O. 43, R. 1 of the Code of Civil Procedure.

Per *Viswanatha Sastri, J.*—Courts exercising inherent powers may, and often do, act on the analogy of statutory provisions which, though not applicable *proprio vigore*, are nearest to the point to the circumstances before them. A Court has, however, no inherent power to entertain an appeal from an order of an inferior Court, nor can it extend by analogy statutory provisions giving a right of appeal in particular cases to analogous cases not falling within those provisions. The statutory provisions providing for appeals must be considered to be exhaustive of all the matters which are considered to be fit for appeal by the Legislature or rule-making body. There is no provision either in the body of the Code or in O. 43, R. 1, making an order for refund or restitution passed by a Court in the exercise of its inherent powers appealable. If the order for restitution satisfies the requirements of S. 47 of the C. P. Code, it might be appealable as if it were a decree.

It is essential that Courts professing to exercise inherent powers and make orders for restitution, should exercise such powers only in very clear cases where the rights of parties do not admit of serious doubt or dispute. In other cases it is desirable to refer the parties to a separate suit so as to give them a right of appeal.

Per *Raghava Rao, J.*—The principle (assuming it to be sound) that "where a Court in the exercise of its inherent power makes an adjudication, which *conclusively* determines the rights of the parties and that adjudication is not given in a suit under section 47 or under section 144, Civil Procedure Code, it would only be fair and in the fitness of things that the party whose rights are adversely affected should have a right to reagitate the matter in appeal and second appeal" cannot cover a case of what is only a summary order liable to challenge in a regular suit. (*Satyanarayana Rao, Visvanatha Sastri and Raghava Rao, JJ.*) SAYYED USMAN SAHEB *v.* SIVARAMARAJU. 1950 M.W.N. 196=63 L.W. 283=5 D.L.R. (Mad.) 174=A.I.R. 1950 Mad. 463=(1950) 1 M.L.J. 363 (F.B.).

——S. 151—*Order under—Appeal—Revision.*

No appeal lies from an order passed by a Court in the exercise of its inherent jurisdiction under S. 151, C. P. Code, and the remedy of the aggrieved party is to move the High Court direct under the provisions of S. 115, C. P. Code. (*Sen and Chunder, JJ.*) MANORAMA DASI *v.* SABITA DASI. 54 C.W.N. 848.

——**Ss. 151 and 2 (2)**—*Order under S. 151 allowing amendment of execution application—Appealability.*

An order passed by an executing Court under S. 151, C. P. Code, allowing an amendment of an execution application is an order relating to the execution, discharge or satisfaction of the decree and is a decree within the meaning of the word in S. 2 (2) of the Code and would therefore be appealable. (*Ghulam Hasan, Kidwai and Chandiramani, JJ.*) JANKI SAHU TRUST *v.* RAM PALAT. 5 D.L.R. (All.) 275=A.I.R. 1950 A. 580=1950 A.L.J. 833 (F.B.).

——S. 151—*Other remedy open—Exercise of inherent powers—Principles guiding Courts.*

The Court's jurisdiction to grant relief under its inherent powers may be exercised even though there may be another remedy open to the aggrieved party. This power will be readily exercised where the mistake is that of the Court itself; it would not be so readily exercised where the other party was negligent in the prosecution of his case or did not avail himself of another remedy which was easily available and did not involve greater expense or delay. Case-law discussed. (*Agarwala, J.*) RAJ KUMAR *v.* VED ROOP NARAIN. 1950 A.W.R. 35=A.I.R. 1950 A. 293=1950 A.L.J. 34.

——S. 151—*Other remedy open—Order due to serious mistake of Court—Inherent power of Court to set it aside.*

Ordinarily speaking the Court should not interfere under S. 151, Civil Procedure Code, with orders against which the parties have other redress in law. Ordinarily, the exercise of inherent jurisdiction under the section should be limited only to cases where the parties have no other redress in law. But where an order is passed as a result of a serious mistake of the Court, it is not only the right but the duty of the Court to correct its own mistake, and it would be a proper use of the power under S. 151, Civil Procedure Code, to set aside that order. (*Das Gupta and Mitra, JJ.*) SUBODH CHANDRA MUKHERJEE *v.* SUDHIR KUMAR BASU. 54 C.W.N. 106=A.I.R. 1950 Cal. 209.

——S. 151—*Other remedy open—Order restraining execution of decree at instance of one not party to suit—Inherent power of Court.*

A decree made in a suit cannot be executed against one who is not a party to the suit unless the latter is bound to obey the decree. If such execution is attempted, O. 21, C. P. Code, provides a complete procedure for protection of the rights of a person who is not bound by the decree. Where the Code provides a procedure for protection of such rights, it is not ordinarily right for the Court to exercise its inherent power and make an order restraining execution of the decree at the instance of one who was not a party to the suit in which the decree was made. (*Harries, C.J. and Sinha, J.*) Narendra Krishna Bose *v.* Great Eastern Hotel, Ltd. 86 C.L.J. 72.

———S. 151—*Other remedy open—Setting aside of consent decree against minor—Minor challenging legality of appointment of his guardian*-ad-litem—*Inherent power of Court.*

The proper, if not the only, course for a minor, who is aggrieved by a decree consented to by his guardian-*ad-litem* whose appointment, according to him, had been improper or illegal or whose consent was given or procured by fraud or collusion between him and the other parties to the suit or a stranger and where the rights of third parties have intervened subsequent to the decree, is to proceed by way of a suit. As the minor can properly obtain relief in a separate suit, he cannot invoke the inherent powers of the Court and invite it to exercise such powers on a summary application. 57 C. 154, rel. on. (*Das, J.*) Heeralal Dhandhania *v.* Choteylal Dhandhania. I.L.R. (1947) 2 Cal. 73.

———S. 151—Power of Court in claim suit to stay sale in execution of decree in a suit against third party. *See* C. P. Code (V of 1908), Ss. 94 (*e*) and 151 and O. 21, R. 58 (2). (1950) 2 M.L.J. 492.

———**S. 151 and O. 20, R. 3**—*Power of Court to set aside an order passed on the merits.*

If strict regard be had to the language of O. 20, R. 3, C. P. Code, no judgment can be set aside under the inherent powers of the Court under S. 151, C. P. Code. But certain exceptions have been made, *e.g.*, judgment delivered by mistake, etc. Where an application to set aside an *ex parte* decree is *dismissed on the merits* and the party aggrieved does not appeal against it but applies under S. 151 to set aside that order, in the circumstances, the Court has no inherent power to set aside its own order passed on the merits. (*Bind Basni Prasad and Agarwala, JJ.*) Chandra Mohan *v.* Raghunath Prasad. 1950 A.W.R. 181=1950 A.L.J. 82=5 D.L.R. (A.) 198=A.I.R. 1950 A. 339.

———S. 151—*Powers under—Failure of Court to appoint guardian*-ad-litem—*Rectification by Court—Appointment of new guardian—If amounts to addition of new party.*

Failure to appoint a guardian-*ad-litem* for a minor can be rectified by the Court under S. 151, C. P. Code. The restoration of the case which had been dismissed and the appointment of a new guardian cannot amount to the addition of a new party to the suit. A.I.R. 1930 All. 644, Rel. on. (*Zaidi, J.M. I and Prasad, J.M. II.*) Badlu *v.* Mahomed Ilyas. 1950 R.D. 11.

———S. 151—*Powers under—Grave irregularities in Court auction sale—Judgment-debtor not taking proper steps to set it aside—Fresh sale, if can be ordered under the powers conferred by S.* 151.

Where there have been grave irregularities in connection with the sale proceedings ending in auction which results in the property being sold for an inadequate price and where no proper notice was given of the adjourned date of sale, the Court could interfere under S. 151, C. P. Code, to direct fresh sale proceedings even though the judgment-debtor had not taken the proper steps to set aside the sale. (*Pedley, J.M.*) Ambika Charan *v.* Brijrani. 1947 A.W.R. (Rev.) 45=1947 R.D. 114.

———S. 151—Powers under—Order under—If revisable. *See* C. P. Code (V of 1908), Ss. 115 and 151. A.I.R. 1950 Ajmer 27.

———S. 151—*Refund of purchase money—Execution sale a nullity—Power of Court.*

Under S. 151, C. P. Code, a Court has jurisdiction to order refund of the purchase money to an auction-purchaser if the execution sale is a nullity. (*Lodge, J.*) Dwijendra Kumar Roy *v.* Ram Ranjan Hati. 51 C.W.N. 255.

———S. 151 and O. 41, R. 23—*Remand under inherent powers of Court—Appealability.*

Where an appellate Court passes an order of remand under its inherent powers under S. 151, C. P. Code and it does not fall under O. 41, R. 23, the order is not appealable. (*Allsop, Mulla and Dayal, JJ.*) Bishwanath Singh *v.* Sheik Abdul Jabbar. I.L.R. (1947) A. 582=1947 A.L.J. 518=A.I.R. 1948 A. 19=1947 A. W.R. (H.C.) 360 (F.B.).

———S. 151—*Remand—Powers of appellate Court apart from O. 41, Rr. 23 and 25—Jurisdiction to order remand—Extent of.*

While an appellate Court undoubtedly has jurisdiction to make an order of remand under S. 151, C. P. Code, in cases not covered by O. 41, R. 23 and R. 25, such remand must not be contrary to any express provision of the Code, *e.g.*, O. 41, R. 27, C. P. Code. In a case where the appellate Court ought not to give facilities for adducing further or additional evidence, the fact that the Court desires to do so would not give it jurisdiction to set aside the decree of the lower Court and remand the case for re-trial. 43 Cal. 148; 15 P.L.T. 142; 16 P.L.T. 795, rel. (*Reuben, J.*) Prithwichand Lal *v.* Oramba Sundari Dasi. 4 D.L.R. (Pat.) 17=A.I.R. 1949 Pat. 338.

———S. 151—Re-opening of decrees under S. 151—When proper. *See* C. P. Code, O. 22, Rr. 4 and 11 and S. 151. (1947) 2 M.L.J. 587.

———S. 151—*Resort to, to defeat the objects of O. 47, Rr. 1 and 2.*

S. 151, C. P. Code, cannot be used to defeat the objects of O. 47, Rr. 1 and 2, C. P. Code. (*Acton, S.M. and Pedley, A.M.*) Radhey Shiam *v.* Azam Ali Khan. 1946 A.W.R. (Rev.) 29=1946 R.D. 160.

———S. 151—Restitution—Inherent powers—Sale in execution of *ex parte* decree—Subsequent order setting aside *ex parte* decree—Sale—Setting aside—Inherent power of Court to order restitution. *See* C. P. Code, Ss. 144 and 151. 16 Cut.L.T. 182.

———S. 151—Restitution—Power of Court—Application for mesne profits after restoration of property under S. 144, C. P. Code—Limitation. *See* Limitation Act, Art. 181. 51 C. W.N. 302.

———S. 151—Restoration of appeal—Court-fee—Order directing dismissal of appeal for non-payment of deficit Court-fee payable on plaint in lower Court—Order becoming final—Application for restoration—Inherent power to entertain and allow. *See* Court-Fees Act, Ss. 10 (ii) and 12 (ii). A.I.R. 1950 Pat. 358.

———S. 151—*Restoration of suit—Order dismissing suit in default without jurisdiction—Inherent power of Court.*

Where a Court dismisses a suit in default in circumstances when it has no jurisdiction to do so, it can rectify its error by resorting to its inherent jurisdiction. (*Mudholkar, J.*) Mt. Khatizabai *v.* Mt. Akhtara Begam. A.I.R. 1950 Nag. 194=1950 N.L.J. 419.

———S. 151—*Restitution—Order for—Appeal.*

When in a case to which S. 144, C. P. Code, does not apply, the Court acting under S. 151 exercises the same jurisdiction which S. 144 gives it, the order of restitution so made is appealable. (*Lodge, J.*) Gopal Laskar *v.* Harihar Mukherjee. 51 C.W.N. 302=A.I.R. 1948 Cal. 37.

———S. 151—*Restoration—Execution petition dismissed for default—Powers of Court—High Court, when may interfere.*

In view of the express provisions of S. 151, C. P. Code, it cannot be said that the Court is altogether incapable of exercising its inherent powers in regard to the restoration of execution petitions dismissed for default. But there must be clear justifying necessity for exercising such extraordinary powers. When the Court passes an order of dismissal inadvertently or without being aware of certain facts which ought to have been brought to its notice, it can certainly correct its own error, in exercise of its inherent powers. But there is no justification for the exercise of such powers where the dismissal was due primarily to the negligence of a party. It has also got to consider whether the other side has or has not justice on his side or has acquired a valuable right under the law of limitation which it may not be just to override. Ordinarily, the High Court would not interfere with the exercise of discretionary powers by the Court below, but it may do so if it is satisfied that the lower Court misdirected itself on a material point of law or fact or failed to advert to and consider such matters as are essential for the proper disposal of the case. (*Mukherjea and Blank, JJ.*) Radha Kissen *v.* Keshardeo. 50 C.W.N. 592 =A.I.R. 1946 Cal. 488=227 I.C. 533=1947 Cal. (Rul.) 31.

———S. 151 and O. 9, Rr. 8 and 9—*Restoration—Suit dismissed for default—Inherent power of Court—"Ends of justice"—Meaning of.*

S. 151, C. P. Code, does not formulate any new doctrine but is only a legitimate recognition of the well-known principle that every Court has inherent power to act *ex debito justitiae* and to do that real justice for the administration of which alone it exists. The words "ends of justice" in the section, wide as they are, do not mean vague and indeterminate notions of justice, but justice according to the statutes and laws of the land. They cannot mean that express provisions of the statute can be overridden at the dictates of what one might by private emotion or arbitrary preference call or conceive to be justice between the parties. The words "ends of justice" do not therefore permit the Court to take a step or a procedure which defeats a statutory provision of the law of the land. When the plaintiff does not appear and the defendant only appears O. 9, R. 8, C. P. Code, makes the clear and mandatory provision that the Court shall dismiss the suit, and O. 9, R. 9, C. P. Code, lays down a particular procedure by which the dismissal could be set aside. It is not open to the Court to say that nevertheless the defaulting party may choose not to adopt that procedure and yet ask the Court to set aside the dismissal by invoking its inherent jurisdiction. It is well-established law that there is no room for the application of the inherent power where there is an express provision in the C. P. Code. 19 C.W.N. 25, foll.; 34 A. 426, Diss. from; 44 C. W. N. 576, rel. on. (*P. B. Mukharji, J.*) Debendra Nath Dutt *v.* Satyabala Dassi. 54 C.W.N. 110=A.I.R. 1950 Cal. 217.

———S. 151—*Restoration—Suit dismissed for want of prosecution under O. 11, R. 21—Power of Court.*

A Court has no jurisdiction to set aside its order dismissing a suit for want of prosecution under O. 11, R. 21, C. P. Code. O. 43, R. 1 provides an appeal from such an order and O. 47, R. 1 provides for a review. As two distinct remedies are provided in the Code against an order dismissing a suit for want of prosecution, it is not possible to attract the provisions of S. 151 and invoke the inherent jurisdiction of the Court. (*Bose, J.*) Krishnakumar *v.* Jawand Singh. I.L.R. (1947) Nag. 190=231 I.C. 24=1947 N.L.J. 221=A.I.R. 1947 Nag. 236.

———S. 151—*Review application—Misuse of the section.*

Where after the rejection of three applications for review of an order by the Board rejecting summarily an appeal in a suit under S. 59 of the Tenancy Act, a fresh application for review is filed, the Board cannot entertain it and thereby allow S. 151, C. P. Code, to be so misused. (*Sultan Ahmad, S. J. M.*) Hanuman Prasad *v.* Binda. (1948) A.W.R. (Rev.) 41 (1)= 1948 R.D. 393 (2).

———S. 151—*Review—Modification of order—Inherent jurisdiction of Court.*

A Court has inherent jurisdiction to review or modify its orders while it is still seized of a case and retains jurisdiction. (*Sen, J.*) All India Reporter, Ltd. *v.* G. D. Moghe. 5 D. L. R. (Nag.) 92=A.I.R. 1950 Nag. 110=1950 N.L. J. 187.

———S. 151—*Review under S.* 151 *of a review application already dismissed—Maintainability.*

S. 151 of the C. P. Code is obviously meant for very special and extraordinary cases of injustice. Where there is no obvious mistake in an order rejecting a review application, it cannot be sought to be reviewed under the provisions of S. 151, C. P. Code. (*Sultan Ahmad, S.J.M.*) Jagannath Lonia *v.* Kalicharan. 1948 A.W.R. (Rev.) 10.

———**Ss. 151 and 152**—*Scope—Amendment—Powers of Court—Decree already executed—If bar to amendment to correct mistake—Duty of Court.*

Ss. 151 and 152, C. P. Code, give the Court very wide powers of amendment of a decree, and when a mistake has cropped up, the Court is bound to correct it either of its own motion or on the application of any of the parties. Merely because the decree stands already executed is no ground for rejecting an application for amendment, if it is fit to be allowed under Ss. 151 and 152. The fact that the decree has been executed is of no importance so far as the question of amendment is concerned. (*Narayan, J.*) Khudu Mahto *v.* Bhim Mahto. 5 D.L.R. (Pat.) 60=A.I.R. 1950 Pat. 183.

———**S. 151**—*Scope—Preliminary decree for dissolution of partnership and accounts—Death of defendant (to whom a considerable amount would be due) before final decree could be passed—Failure of plaintiff to bring the legal representatives on record—Order dismissing suit—Legality—Application by son of deceased defendant after attaining majority to set aside order—Limitation.*

After the passing of a preliminary decree for dissolution of partnership and accounts the defendant died before the final decree could be passed on the findings of the Commissioner. The plaintiff failed to bring the legal representative on record as a considerable sum would be due to the defendant. The suit was thereupon dismissed on 24th October, 1940. The elder son of the defendant attained majority on 16th November, 1941 and applied on 15th November, 1944, to set aside the order of 24th October, 1940.

Held: Once a preliminary decree has been passed the Court has no jurisdiction to dismiss the suit for default as the Court has a duty to work out the details of the preliminary decree independently of the conduct of the parties. A wrong order dismissing the suit can be set aside under the inherent powers of the Court under S. 151 of the Code of Civil Procedure.

Where the ex-minor was not shown to have had any special means of knowledge, it cannot be said that he was guilty of any gross laches, if he applies within three years of attaining majority to have the wrong order set aside. Three years from the date when the minor attains majority is a reasonable time within which he may be expected to take action. (*Horwill, J.*) Ankamma *v.* Raghavamma. 60 L.W. 535=1947 M.W.N. 551=A.I.R. 1948 Mad. 201=(1947) 2 M.L.J. 233.

———**S. 151**—Scope—Restoration of appeal dismissed for non-payment of printing charges—Inherent power—Limitation for application. *See* Limitation Act, Art. 168. 27 Pat. 745.

———**S. 151**—Setting aside of *ex parte* decree under—If justified. *See* C. P. Code (V of 1908), O. 9, R. 13 and S. 151. 5 D.L.R. (A. M.) 23 (1).

———**S. 151**—*Setting aside sale—Inherent power—Court misled by decree-holder.*

If a Court misled by the fault of the decree-holder passes an order for sale in execution of a decree when it has no jurisdiction, it has inherent jurisdiction to correct its own proceedings. The only way in which it can do so is to set aside the sale. (*Harries, C.J. and Sarkar, J.*) Benoy Krishna Mukerjee *v.* Mohanlal Goenka. A. I.R. 1950 Cal. 287.

———**S. 151, O. 41, R. 5 and O. 39, R. 1**—*Stay of proceedings—Temporary injunction—Inherent powers—If may be invoked.*

Inherent powers cannot be called in aid when the subject-matter is dealt with by the Code or when other remedies are available. The matter of stay of proceedings and temporary injunctions are dealt with by the code, and inherent powers cannot be resorted to if the matter does not fall within the limits prescribed therein. (*Bose, J.*) Fakira *v.* Rumsukhibai. I.L.R. (1946) Nag. 908=1947 N.L.J. 43=224 I.C. 562=1946 Nag. (Rul.) 172=A.I.R. 1946 Nag. 428.

———**S. 151**—Substitution of parties—Execution proceedings—Inherent power of Court. *See* C. P. Code, Ss. 47, 146 and 151. I.L.R. (1947) 1 Cal. 22.

———**S. 152**—*Amendment of decree—Permissibility—Method of assessment of costs wrong.*

Under S. 152, C. P. Code, a decree can be amended where the method of assessment of costs is wrong, (*e.g.*), where assessment of costs is based on an erroneous valuation of the suit. A.I. R. 1936 Pesh. 196, Foll.; A.I.R. 1940 Lah. 182, Not Foll. (*Atma Charan, J.C.*) Jainti Devi *v.* Basanti Ram. 4 D.L.R. (A. & M.) 88=A.I. R. 1950 Ajmer 5 (2).

———**S. 152**—*Applicability—Conditions—Application for correction on the strength of a new point—If can be ordered.*

The provisions of S. 152 of the C. P. Code are attracted only when there is a clerical or arithmetical mistake in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The section would be inapplicable where there is any error in the principle applied in the judgment. It follows that an application for correction of a judgment on the strength of a new point not raised before cannot be ordered under S. 152. (*Bind Basni Prasad, J.*) Triloki Nath *v.* Dalsinger Naik. 1946 A.L.W. 482=1946 A.W.R. (H.C.) 545=A.I.R. 1947 All. 22=230 I.C. 225=1947 All. (Rul.) 181=1946 A. L.J. 477.

———**Ss. 152 and 153**—*Applicability—Mistake in description of item in plaint schedule and decree schedule—Application to amend description of item in the schedules after disposal of second appeal by the High Court—Permissibility.*

Where an application was filed to amend the description of an item of property in the plaint schedule and the decree schedule in a suit which was ultimately disposed of by the High Court in second appeal by substituting for a wrong survey number the correct survey number, the objections raised were (1) that there was a long delay and (2) that High Court could not grant the application to amend the plaint schedule after the disposal of the suit.

Held, that the application to the High Court was not to amend the pleadings as such but only to correct an error which had crept into the decree by way of clerical mistake or accident and as on the merits there was no valid objection to the grant of the relief the application must be allowed in spite of the long delay as there was no avoidable delay on the part of the applicant and as by the delay circumstances have not intervened which would make it inequitable to grant the application. (*Rajamannar, O.C.J.*) Katamraju *v.* Paripurnanandam. 1948 M.W.N. 629 (2)=61 L. W. 622=A.I.R. 1949 Mad. 282=(1948) 2 M.L.J. 301.

———**S. 152**—*Applicability—Sale certificate—Amendment by Court—Permissibility when question is of contentious nature.*

S. 152 of the C. P. Code cannot be invoked to amend a sale certificate when the questions involved are of a contentious nature in the absence of any authoritative determination of the rights of the parties. (*Beevor, J.*) Ramasan Rai *v.* Raghunath Sahu. 222 I.C. 617=1946 Pat. (Rul.) 117=12 B.R. 288=1945 P.W.N. 394=A.I.R. 1946 Pat. 190.

———**S. 152**—*Correction of mistakes—Power of Court.*

Under S. 152, C. P. Code, a Court has power to make a slip order at any time, but under the guise of correcting mistakes it cannot begin adjudicating upon matters which had not been before it at an appropriate moment. (*Hidayatullah, J.*) Lungya Balya *v.* Bansilal. I.L.R. (1950) Nag. 441=1950 N.L.J. 75=A.I.R. 1950 Nag. 95=5 D.L.R. (Nag.) 117.

———**S. 152**—*Correction of survey numbers of the property in the schedule to the plaint and decree—Permissibility.*

Where there is no dispute as regards the identity of the property nor as regards the boundaries to it and there was no controversy at all at the time of the suit as to the identity of the property which has been the subject of a deed, and it is only the errors as regards the survey numbers that have crept into the decree and plaint that are sought to be amended, the amendment does not go to the root of the claim, nor is it in respect of any matter which has been a subject of controversy between the parties, and so it can be made. (1948) 2 M.L.J. 301, relied on. (1947) 2 M. L.J. 72, distinguished. (*Krishnaswami Nayudu, J.*) Krishna Poduval *v.* Lakshmi Nethiar. A.I.R. 1950 Mad. 751=(1950) 1 M.L.J. 120.

———**S. 152**—*Correction under—Clerical mistake.*

Where a mistake is purely a clerical one in giving a wrong number it can be corrected under S. 152, C. P. Code, even *suo motu* by the Court. (*Haider, J.M.*) Sukhdar Singh *v.* Badam Singh. 1949 R.D. 152.

———**S. 152**—*Decree on award—Power of Court to amend.*

When the meaning of the arbitrator as well as of the Court is clear from the award and the decree, the Court has jurisdiction under S. 152, C. P. Code, to amend the award and its decree so as to carry out that meaning. (*Niyogi, J.*) Sudharamsao *v.* Gendramsao. I.L.R. (1946) Nag. 348=225 I.C. 34=1946 Nag. (Rul.) 188=1946 N.L.J. 304=A.I.R. 1946 Nag. 257.

———**S. 152**—*Dismissal of appeal* in limine—*Application for amendment of decree—To which Court to be made.*

An order dismissing an appeal *in limine* under O. 41, R. 11 of the C. P. Code, has precisely the same effect as an order dismissing an appeal after notice under R. 32 and an application for amendment of the decree must be made to the Court which has dismissed the appeal and not to the lower Court whose decree has thereby been confirmed. (*Horwill, J.*) Subbamma *v.* Madhavarao. 227 I.C. 247=59 L.W. 294=1946 M.W.N. 313=A.I.R. 1946 Mad. 492=(1946) 1 M.L.J. 393.

———**S. 152**—*Jurisdiction to amend—Decree not drawn up according to judgment—Amendment—Power of trial Court after decision of appeal from decree—Rule.*

It is fairly well-established that, where a decree has been varied, affirmed or reversed on appeal, it is the appellate Court alone which can amend the decree under S. 152, C. P. Code. But where the case is one of pure omission to draw up the decree in conformity with the judgment, the power of amendment, so as to make the decree in conformity with the judgment, may be exercised by the trial Court even though the decree has been appealed against and the appeal decided. (*Mukherjea and Ormond, JJ.*) Sachindra Nath *v.* Probodh Chandra. 2 D.L.R. 222=A. I. R. 1948 Cal. 126.

———**Ss. 152 and 151**—*Mistake in plaint—Application for correction of decree—If lies—Proper prayer to be made.*

Where the mistake is in the plaint, an application under S. 152, C. P. Code, for the correction of the judgment and the decree is entirely misconceived. The only prayer which could reasonably be made under S. 151, C. P. Code, is that the decree obtained in the suit should be set aside and that the applicant should be allowed to amend the plaint and have the case retried. (*Henderson, J.*) Hamid-ud-din Ahmad *v.* Moyezuddin Mondal. 225 I.C. 623=A.I.R. 1946 Cal. 336.

———**S. 152**—*Powers of amendment—Amendment of order by Judge.*

A Judge has undoubted powers to amend his own order to the extent that it is a clerical mistake or is a 'slip order' falling under S. 152, C. P. Code. (*Stone, C.J. and Chagla, J.*) Velji Shivji *v.* Mathuradas Haridas. 49 Bom.L.R. 645=A.I.R. 1948 Bom. 47.

———**S. 152**—*Power of Court—Clerical mistake in order sheet—Notice to other party—Necessity.*

A Court has power to correct and is perfectly justified in correcting a mistake or clerical error in its order sheet without notice to the opposite party, under S. 152, C. P. Code, where it was wrongly stated in the order sheet that a vakalat was filed on behalf of party A, while in fact the vakalat was on behalf of party B, the Court can correct the mistake on application by a party without notice to the opposite party. (*Atma Charan, J.C.*)

Khalil Ahmed *v.* Mt. Wafatan. 4 D.L.R. (A. & M.) 85.

———**S. 152**—*Scope and applicability—Application to correct an error in a mortgage deed and the judgment and decrees in a suit thereon in which the mistake was copied—Maintainability—S. 151, if applies.*

S. 152, C. P. Code, corresponds to O. 38, R. 11 of the Rules of the Supreme Court; it is known as the "Slip Rule". The alterations, amendments or corrections which the section authorises are limited by its provisions. They are clerical or arithmetical mistakes in judgments, decrees or orders, and in addition errors arising in judgments, decrees or orders from any accidental slip or omission.

The survey number of an item of property mortgaged was wrongly mentioned in the mortgage deed. The mistake was repeated in the plaint in a suit on the mortgage and from it copied on in the judgment, and the preliminary and final decrees. An application was made under S. 152, C. P. Code, to correct the mistake in the mortgage deed, the judgment, the preliminary decree and the final decree. On a question as to its maintainability,

Held, that S. 152 does not give to a Court jurisdiction and authority to modify documents particularly documents upon which a suit is instituted. There is a remedy by way of suit and there is nothing in S. 152 which confers upon the Court similar powers as are conferred by S. 31 of the Specific Relief Act. S. 152 is for the purpose of correcting errors directly involved in the proceedings themselves and not for correcting errors which are anterior to the proceedings particularly in documents upon which proceedings are brought. Property wrongly described in a deed cannot be included in any of the mistakes which the section allows to be corrected. Hence the application was not maintainable. Neither could S. 151, C. P. Code, help the applicant. (*Gentle, C.J. and Happell, J.*) Ramakrishnan Chettiar *v.* Radhakrishnan Chettiar. I.L.R. (1948) Mad. 263=A.I.R. 1948 Mad. 13=60 L.W. 401=1947 M.W.N. 382=(1947) 2 M.L.J. 72.

———**S. 153 and O. 6, R. 17**—*Court's power of amendment.*

It is not open to a Court under S. 153 and O. 6, R. 17, C. P. Code, to allow an amendment which alter the real matter in controversy between the parties. 48 I.A. 214, foll. (*Sir Lionel Leach.*) Kanda *v.* Waghil. 77 I.A. 15=1950 A.L.J. 326=1950 A.W.R. 292=1950 R.L.W. 31=52 Bom.L.R. 498=85 C.L.J. 352=63 L.W. 232=1950 M.W.N. 168=A.I.R. 1950 P.C. 68=(1950) 1 M.L.J. 417 (P.C.).

———**S. 153**—*Scope of the exercise of inherent power.*

The inherent powers of the Court under S. 153, C. P. Code, to amend a defect or error in a proceeding are not to be exercised in favour of a particular party and in order to benefit it as against another party or to fill up a gap or to remove a lacuna arising from negligence or omission of one of the parties. (*Lal, J.M. I.*)

Chunni Kuer *v.* Daya Shankar. 1948 R.D. 433.

———**O. 1, R. 1 and S. 115**—*Issues common to all plaintiffs—Joining in one suit—Permissibility—Order holding suit bad for misjoinder—Revision—Competency.*

Where in a suit by 30 plaintiffs to have their occupancy rights declared to several items of property detailed in one of the plaint schedules, it is contended for the defence that all the plaintiffs could not be said to be interested in all property in that schedule and that some of the plaintiffs were not in actual possession of the lands claimed and there is also a dispute as to the actual extent in the case of some plaintiffs and that as such the suit was bad for multifariousness and misjoinder of parties,

Held, in the circumstances, as the main issues which the plaint and written statements raised were common to all the plaintiffs, the plaintiffs should not be referred to separate suits, except in the case of those between whom and the defendants different issues arise.

Held further, that the High Court could in the exercise of its revisional jurisdiction interfere when the lower Court has wrongly held a suit as bad for misjoinder of causes of action. 43 M.L.J. 218, foll. (*Mack, J.*) China Venkatasubba Naidu *v.* Sundara Varadacharlu. A.I.R. 1950 Mad. 12=(1949) 1 M.L.J. 207.

———**O. 1, R. 1**—*Joinder of plaintiffs—Permissibility—Conditions.*

It is not necessary for joinder of plaintiffs in one suit that they must be interested in the entire relief or reliefs claimed in the suit or in the grounds on which those reliefs are based. If all the plaintiffs are interested in prohibiting the defendant from dealing with the plot in suit to their prejudice either in respect of their private rights or in respect of their rights as members of the public, there is no reason why all of them could not join in the same suit and claim a relief in which all of them are interested. 1928 Cal. 92, referred to. (*Padhye, J.*) Khirsingh *v.* Brijlal. I.L.R. (1949) Nag. 94=A.I.R. 1949 Nag. 314=1949 N.L.J. 499.

———**O. 1, R. 1**—*Question of misjoinder—Allegations in plaint—Deciding factor.*

All questions of misjoinder and non-joinder must be decided on the basis of allegations in the plaint. 1919 Pat. 381, foll. (*Padhye, J.*) Khirsingh *v.* Brijlal. I.L.R. (1949) Nag. 94=A.I.R. 1949 Nag. 314=1949 N.L.J. 499.

———**O. 1, R. 3**—*Applicability—Compensation assessed by Government for land compulsorily acquired—Suit for declaration that defendants claiming to be occupancy tenants are not entitled to any share—If bad for multifariousness.*

In a suit for a declaration that the plaintiff alone is entitled to the entire compensation assessed by Government for land compulsorily acquired by it and that the defendants who claim to be occupancy tenants are not entitled to any share therein, the right to relief of both the plaintiff and the defendants arises as a result of the amount fixed by Government as compensation. In this view, it is plain that if separate suits are brought against the defendants or each of them, common questions of law and fact would arise. The suit therefore comes within the purview of O. 1, R. 3, C. P. Code, and is not bad for multifariousness. (*Thadani, C. J. and Ram Labhaya, J.*) LALIT KUMAR *v.* BHAGABAN CH. SARMA. A.I.R. 1950 Assam 133.

———**O. 1, R. 3**—*Applicability—Conditions of —"Common question of law or fact"—Meaning of.*

In order that the operation of O. 1, R. 3, C. P Code, may be attracted, two conditions have to be fulfilled: (1) the relief claimed must be in respect of the same act or transaction or series of acts or transactions; (2) a common question of law or fact will arise if separate trials were held.

Where the claim against each defendant is a distinct one, and the claim against one has no connection whatsoever with the claim against another, it cannot be said that the relief claimed is in respect of the same act or transaction or series of acts or transactions, so as to attract the application of the rule. The words "common question of law or fact" do not mean similar question of law or fact. The question of law and the question of fact must be common to all the defendants. The mere fact a similar element or circumstance would have to be proved in the separate suits does not connote that there is any common question of law or fact involved, so as to entitle the plaintiff to join all the defendants under O. 1, R. 3, C. P. Code. 45 Cal. 111; I.L.R. (1947) Nag. 159, dist. 49 Mad. 836, expl. (*Amarendra Nath Sen, J.*) CORPORATION OF CALCUTTA *v.* RADHAKRISHNA DEV. 4 D.L.R. (Cal.) 172.

———**O. 1, Rr. 3 and 5 and O. 2, R. 3**—*Joinder of several defendants—When permissible.*

From O. 1, R. 3, O. 1, R. 5 and O. 2, R. 3 (1), C. P. Code, it appears that there may in one suit be a number of defendants; and a diversity of reliefs may be claimed; and some of the defendants will not necessarily be interested as to all the relief claimed in the suit. But there must at the same time be some nexus, and what is required in that respect has been specified: there must be one act or transaction or one series of acts or transactions in respect of or arising out of which the right to relief against the several defendants is alleged to exist. There must also be present the further circumstance that if separate suits were brought against the defendants some common question of law or fact would arise. The common question of law or fact must be of sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time. (*Edgley and Clough, JJ.*) ANUKUL CHANDRA CHAKRAVARTHY *v.* PROVINCE OF BENGAL. I.L.R. (1947) 1 Cal. 559=51 C.W.N. 295=A.I.R. 1947 Cal. 374=83 C.L.J. 182.

———**O. 1, R. 3 and O. 2, R. 3**—*Misjoinder of parties and causes of action—Suit for partition by a member of a joint Hindu family—Plaintiff claiming a share in certion leases standing in the name of a stranger to the family who was impleaded as a defendant to the suit—Stranger*

claiming title paramount—Suit, if bad for misjoinder of parties and causes of action.

O. 2, R. 3, C. P. Code, should be read with O. 1, R. 3 in deciding what constitutes a misjoinder of parties and misjoinder of causes of action and in considering such a question, the Court should be guided principally by the averments in the plaint.

The plaintiff in a suit for partition claimed a share in certain leases standing in the name of a stranger to the family who was also impleaded as a defendant along with the members of the family. The plaintiff alleged that with reference to these leases the title vested in the family and the defendant in whose name they stood was only a benamidar for the head of the family. But that defendant's claim was one of title paramount.

Held, on the averments in the plaint, it was a clear case of misjoinder of parties and misjoinder of causes of action. The claim to a share in the leases is not based *under the same right* under which partition is sought. Such a claim cannot be tacked on to a general suit for partition. (*Rajagopalan, J.*) NILAKANTA IYER *v.* RAMANARAYANA IYER. 61 L.W. 768=A.I.R. 1949 Mad. 410=(1948) 2 M.L.J. 504.

———**O. 1, R. 3**—*Suit for declaration—Revenue authorities settling land on plaintiff and defendant in equal shares—Suit against defendant for declaration that plaintiff alone is entitled to settlement of whole plot—Government not impleaded—Maintainability.*

A suit for a declaration presupposes that the plaintiff has an existing character or an existing right as to property, which he wishes the Court to declare. Where the plaintiff sues for a declaration that he alone is entitled to get a settlement of the suit land and that the action of the revenue authorities in settling it on the plaintiff and the defendant in equal shares is wrong, there is no question of any legal character involved in the suit. If the plaintiff has any cause of action, it is against the Government and not against the defendant. The plaintiff's suit against the defendant without impleading the Government is wholly misconceived and is liable to be dismissed. (*Lodge, C.J. and Thadani, J.*) CHANDRA NATH SARMA *v.* GUNA RAM KALITA. A.I.R. 1949 Assam 21.

———**O. 1, R. 3**—*Suit for declaration of right of way—Person interested in servient tenement not made party—Decree, if infructuous.*

If in a suit for a declaration of a right of way over a certain land, a person interested in the servient tenement is not made a party, a decree, if made, is infructuous and is liable to be set aside. (*Bannerji, J.C.*) HAROO *v.* MAN DASS. A.I.R. 1949 H.P. 4.

———**O. 1, Rr. 7 and 10**—*Suit for damages for injuries sustained by rash driving of bus against driver and owner—Insurance company with whom bus is insured against "third party risk"—If may be impleaded.*

In a suit for damages for injuries sustained by the plaintiff as a result of the rash driving by defendant 1 of a motor bus belonging to defendant 2, the joinder by the plaintiff in the first instance of defendant 3 with whom the bus is insured against "third party risk" is warranted by the principle underlying O. 1, Rr. 7 and 10 (2), C. P. Code. (*Sen, J.*) Neptune Assurance Co., Ltd. *v.* Lakhiram. I.L.R. 1950 Nag. 955=5 D.L.R. (Nag.) 178.

———**O. 1, R. 8**—Applicability—Case likely to affect large number of persons having similar rights proper procedure. [*See* Q.D. 1941-1945, Vol. I, Col. 1042.] Bhikaji Yeshwant *v.* Secretary of State. 224 I.C. 148=1946 Bom. (Rul.) 167=A.I.R. 1946 Bom. 293.

———**O. 1, R. 8**—*Applicability to appeals—Practice—Amendment—Plaint in individual capacity—Amendment into one in a representative capacity—If permissible at the stage of appeal.*

An amendment of a plaint can be made at any stage so long as it does not alter the nature or the character of the suit or the cause of action and there is nothing which prevents a Court from permitting persons suing in their individual capacity to sue as representatives of a larger group even during the stage of appeal. When the appellate Court finds that an amendment of this kind which does not materially change the substance of the suit is necessary in the ends of justice, it should be allowed to overcome a technical difficulty in the way of the plaintiffs. O. 1, R. 8 of the C. P. Code, applies to appeals as well as suits. (*Chandreaskhara Aiyar, J.*) Mooka Pillai *v.* Valavanda Pillai. 59 L.W. 707=1947 M.W.N. 33=A.I.R. 1947 Mad. 205=(1946) 2 M.L.J. 462.

———**O. 1, R. 8**—*Applicability—Suit under S. 53, T. P. Act.*

A suit under S. 53, T. P. Act, does not necessarily attract the application of O. 1, R. 8, C. P. Code; the latter rule refers to numerous persons, while the creditors in a suit under S. 53, T. P. Act, may not be numerous. O. 1, R. 8, C. P. Code, is an enabling provision; S. 53, T. P. Act, on the other hand, is mandatory. (*Davis, C.J. and Thadani, J.*) Bhojraj *v.* Verharam. I.L.R. (1946) Kar. 98=A.I.R. 1946 Sind 78=221 I.C. 626.

———**O. 1, R. 8**—Applicability to suits under S. 180 of the U. P. Ten. Act. *See* U. P. Ten. Act, S. 180. 1950 R.D. 97.

———**O. 1, R. 8**—*Application for leave to sue in representative capacity—Large numbers on both sides contending respective rights—Duty of Court—Leave if can be refused on the ground of parties being equally balanced.*

In an application for leave to sue in a representative capacity, it was contended that the plaintiffs did not represent the general body of persons they purported to represent and each side produced about a hundred affidavits in support of their respective contentions. The lower Court refused leave simply because the parties were equally balanced.

Held, in revision, it was the duty of the Court to decide the question as to whether the plaintiffs' request was a *bona fide* one and whether they were agitating a proper claim. If the request was *bona fide* and the claim a proper one, leave should be granted. A decision without going into the question of the *bona fides* is materially irregular and has to be set aside. (*Govinda Menon, J.*) Mohammad Hassan Sabib *v.* Podanur Sunnath Jamath. 61 L.W. 381=A.I.R. 1948 Mad. 516=1948 M.W.N. 342=(1948) 1 M.L.J. 379.

———**O. 1, R. 8**—*Granting of permission under—Conditions—Application by member of society—Other members opposing application and filing affidavits—No attempt by applicant to refute allegations in those affidavits—Leave, if can be granted.*

The first condition for the operation of O. 1, R. 8, C. P. Code, is that there should be "numerous persons having the same interest in one suit." In such a case, one or more such persons may, with the permission of the Court, sue or be sued on behalf of all persons so interested. It is not necessary that all members of a sangham or an Association should have an identical interest in the suit. There may be opposition between two groups and *bona fide* representatives of each group can file a representative suit to have such disputes resolved under O. 1, R. 8 to save multiplicity of suits. The sole criterion is whether the plaintiff or the plaintiffs are representatives of numerous persons having the same interest in one suit.

Where a member of a sangham applied to sue on behalf of the members of that sangham and after the Court had given publicity to it as required by O. 1, R. 8, twelve members file affidavits strongly opposing the applicant's right to represent them or the majority of the members of the sangham and no attempt was made by the applicant to rebut those statements,

Held, that though the opposition by the other members would not *per se* deprive the plaintiff of his right to file a representative suit, in the circumstances, it was not a case where permission to file a representative suit should be granted. 40 Bom. 158, not followed. (*Mack, J.*) Chandappa Indra *v.* Jagathpala. 62 L.W. 380=A.I.R. 1949 Mad. 653=(1949) 1 M.L.J. 540.

———**O. 1, R. 8**—*Leave under—Granting by appellate Court—Propriety—Single creditor—Failure to sue in representative capacity—Power of appellate Court to grant leave to change frame of suit.*

In a suit to set aside a summary order the question involved was whether an alienation was in fraud of creditors. Though the plaintiff was the only creditor, on an objection being raised as to the frame of the suit the trial Court dismissed the suit as it was not filed in a representative capacity. The first appellate Court granted the plaintiff leave to file it as a representative suit and decreed the suit. On a contention in second appeal that the lower appellate Court ought not to have granted leave to change the frame of suit after the objection was taken and upheld by the trial Court.

Held, that as the failure to sue in a representative capacity was due to a *bona fide* mistake, the first appellate Court was right in granting leave to the plaintiff to sue in a representative capacity. (*Kuppuswami Ayyar, J.*) Kamaraju *v.* Mallayya. 59 L.W. 699=1947 M.W.N. 35=A.I.R. 1947 Mad. 194=(1946) 2 M.L.J. 432.

———**O. 1, R. 8**—*Permission under—Necessity—Benamidar's suit against trespasser for possession.*

A benamidar holds the property as a trustee for the beneficiary. The legal title vests in him and as a legal owner the benamidar has the right to sue, for possession against a trespasser. There is no warrant for the proposition that a benamidar must obtain the permission of the Court under R. 8 of O. 1 of the C. P. Code, in order to maintain a suit for ejectment. (*Ghulam Hasan, J.*) Gur Prasad *v.* Hansraj. 21 Luck. 292=222 I.C. 630=1946 Oudh (Rul.) 97=1946 O. W.N. 100=1946 A.L.W. (C.C.) 94=1946 O. A. (C.C.) 62=1946 A.W.R. (C.C.) 62=A. I.R. 1946 Oudh 144.

———**O. 1, R. 8**—*Permission under—Necessity—Suit by* panches authorised by a community *to deal with its properties.*

Though the *panches* of a *biradari* might have been authorised to look after the properties of the community, a suit by the *panches* for ejectment in respect of such property cannot be filed without the permission of the Court under O. 1, R. 8, C. P. Code. (*Bhargava, J.*) Ahmad Sayed *v.* Bashir Ahmad. 1948 A.L.W. 395=A.I.R. 1949 A. 215=1948 O.W.N. 397.

———**O. 1, R. 8**—*Representative suit—Grant of leave to person not really interested—Variance of order of later stage—Permissibility.*

O. 1, R. 8, C. P. Code, presupposes the existence of a right of suit in the plaintiff who instituted the suit. Where a person is wrongly granted permission to represent a body that decision is not final and can be reagitated at a later stage by the trial Court, or at any rate the order can be set aside in appeal. (*Horwill, J.*) Subramania Vadiar *v.* Sreenivasa Vadiar. 59 L.W. 499=1946 M.W.N. 596=230 I.C. 220=1947 Mad. (Rul.) 178=A.I.R. 1947 Mad. 100=(1946) 2 M.L.J. 221.

———**O. 1, R. 8**—*Representative suit—Leave—Effect of grant of—Death of one plaintiff—Right if survives to his legal representatives—Right of remaining plaintiffs to prosecute or defend suit or appeal—Proper procedure.*

Where the plaintiffs (the creditors of the estate of a deceased) did apply under O. 1, R. 8 of the Code of Civil Procedure and did obtain an order permitting them to proceed with their suit for administration challenging the alienations made by the administrator, it is impossible thereafter for the defendants to contend that the suit was not brought by them in a representative capacity on the ground that there were no other creditors whom the plaintiffs could be said to represent, (1945) 2 M.L.J. 318, distinguished.

When a suit is brought by several persons in a representative capacity, and if one of them dies, the suit does not abate, because, the right to represent others of a class is not a right which *ipso facto* survives to the legal representative of the deceased party. The source of that right is the order of the Court permitting the party to represent others. In such a contingency, namely, the death of one of the parties to whom originally permission was granted to institute a suit in a representative capacity, it is for the Court to decide whether the suit can be allowed to be continued by the surviving person or persons or whether other person or persons should be joined. The proper procedure is for the remaining person or persons to apply to the Court for directions and it is for the Court to decide whether the person or persons to whom the original sanction was given to continue to prosecute or defend the suit or appeal or it will give directions to bring on record additional person or persons. 61 M.L.J. 135=54 Mad. 527 and A.I.R. 1937 Pat. 149, rel. on. (*Rajamannar, C.J. and Balakrishna Ayyar, J.*) Foulkes *v.* Suppan Chettiar. I.L.R. (1950) Mad. 607=63 L.W. 1101=(1950) 2 M.L.J. 220.

———**O. 1, R. 8**—*Representative suit—Maintainability—Conditions.*

In order that a suit may be brought in a representative capacity, the body of persons represented by the plaintiffs must be sufficiently definite for the Court to recognise as participants in the suit. Each case must depend upon and be judged in the light of its own relevant facts. (*Lord Porter.*) Hasanali *v.* Masoorali. 75 I.A. 1=I.L.R. (1948) Nag. 179=52 C.W.N. 479=A.I.R. 1948 P.C. 66=62 L.W. 1=50 Bom.L.R. 389=1948 N.L.J. 89 (P.C.).

———**O. 1, R. 8**—*Representative suit—Maintainability—Conditions—What the plaintiff have to plead and prove—Proof of special damage—Necessity.*

The plaintiffs in a suit under O. 1, R. 8, C. P. Code, must plead and prove that they sue not only on behalf of a public generally, but on behalf of a limited and clearly defined class with which they have a common interest and a common right of suit. Persons of an immediate community or section of the public who are deprived of an amenity provided for that particular community or section, (*e.g.*, a village cart track used by the residents of one or more adjacent villages) may be deemed to have suffered loss without proof of such loss. No special damage need be proved in such a case. It will be sufficient if it is shown that a particular section of the public have been deprived of certain advantages which they had been enjoying for a long time. A suit under O. 1, R. 8, would be maintainable in such a case. (*Sinha and A. P. Mukharji, JJ.*) Balgobinda Mahota *v.* Khatu Mahata. 2 D.L.R. 805.

———**O. 1, R. 8**—*Representative suit—What is—Test—Frame of suit as a whole to be considered—Relief claimed not decisive test.*

The question whether a suit has been brought in a representative capacity or not has to be decided on a consideration of the whole frame of the suit and the averments made in the plaint, and does not depend upon the relief claimed in the plaint. There must be something to indicate that the plaintiffs (or petitioners) desire to represent a class of persons and institute the suit in a representative as distinct from their individual capacity. The fact that the relief claimed, if granted, would benefit also persons other than the actual plaintiffs would be no criterion to judge the representative character. (*Kaul and Chandiramani, JJ.*) Mohan Kishan *v.* Seth Ramprasad. 4 D.L.R. (Luck.) 25=A.I.R. 1949 A. 761.

———**O. 1, R. 8**—Scope—If controls S. 11, Expl. VI. *See* C. P. Code, S. 11, Expl. VI. 4 D.L.R. (Luck.) 25=A.I.R. 1949 A. 761.

———**O. 1, R. 8**—*Scope—Non-compliance—Effect—Suit brought by persons both in personal right and as representatives of community—Nature of decree to be passed.*

Where the plaintiffs bring a suit claiming a right both in their individual capacity and also as representing the entire community to which they belong, but they have not taken the necessary steps under O. 1, R. 8, C. P. Code; no decree can be passed in favour of the community as a whole in such suit, though the plaintiffs are entitled to a decree in their individual capacity, for their personal relief. 1929 All. 806, dist. (*Mushtaq Ahmad, J.*) Parbhu Dayal *v.* Rahimullah. 4 D.L.R. (All.) 250.

———**O. 1, R. 8**—*Scope of rule as to "numerous" persons.*

The word "numerous" in O. 1, R. 8, C. P. Code, is by no means a term of art. It has an ordinary meaning implying a group of persons, such as would make it inconvenient to implead all of them individually. The word is not synonymous with "numberless" or "innumerable". The true scope of it in each case must depend on its own facts including not only the nature of the controversy but also the volume or the quantum of the subject-matter in dispute.

Where a plaint claims relief on behalf of a large body of co-sharers in common with the plaintiff, the suit would be covered by O. 1, R. 8. (*Mushtaq Ahmad, J.*) Kailashpat *v.* Goswami Brij Gopal. 1950 A.W.R. 233=A.I.R. 1950 A. 405=1950 A.L.J. 258.

———**O. 1, R. 8**—Suit under in regard to a village pathway—Maintainability. *See* C. P. Code, S. 91 and O. 1, R. 8. (1949) 1 M.L.J. 56.

———**O. 1, Rr. 9 and 10**—*Addition of parties—Stage—Suit by one of the co-mortgagees without impleading the others—Failure to implead even after objection—Application to implead in second appeal—If can be allowed after their right is barred.*

Where one of the co-mortgagees sues alone and even after objection does not choose to implead the other mortgagees and applies at the stage of a second appeal to implead them, he cannot be allowed to have them added at such a late stage when their rights have also become barred. (*Ghulam Hasan, Misra and Kidwai, JJ.*) Rameshwar Bux Singh *v.* Ganga Bux Singh. 5 D.L.R. (All.) 211=1950 A.L.J. 632=A.I.R. 1950 A. 598=1950 A.W.R. 584 (F.B.).

———**O. 1, R. 9**—*Non-joinder of necessary parties—Dismissal of suit—Propriety.*

O. 1, R. 9, C. P. Code, cannot be interpreted to mean that a suit shall not be dismissed, even if the necessary parties are not impleaded. If the plaintiff refuses to implead the necessary parties in spite of a direction by the Court, his suit is liable to be dismissed. (*Ram Chandra, F. C.*) Barkat Ali Shah *v.* Wadhawa Singh. 26 L. L.T. 18.

———**O. 1, R. 9**—*Non-joinder of parties—Suit, if liable to dismissal.*

Although the non-joinder of a necessary party cannot be a ground for dismissing a suit, the Court has no option but to dismiss the suit where a decree, if passed, could be rendered nugatory at the instance of the persons who have not been made parties to the suit. 57 A. 445, cons. (*Atma Charan, J.C.*) Bhuralal *v.* Kasim. A. I. R. 1950 Ajmer 1.

———**O. 1, R. 10**—*Act of Legislature called in question—Government, whether a necessary party—When the Court should order the addition of a party.*

The addition of a party should be ordered only if in the absence of that party, the Court cannot effectually and completely adjudicate and settle all questions in the suit.

Where in a suit between private parties the question of the competency of the Madras Legislature to enact S. 44-B of the Madras Hindu Religious Endowments Act and jurisdiction of the Revenue Divisional Officer and the Collector acting under that section, are raised, though the Government may be a proper party, it is not a necessary party as no relief is asked against the Government and the Court is only considering an order passed by an authority constituted under the Endowments Act, in this case the Collector, whose order is attacked as being without jurisdiction. (*Krishnaswami Nayudu, J.*) Doraiswami Goundan *v.* Subramania Mudaliar. 63 L.W. 381=1950 M.W.N. 395=5 D. L. R. (Mad.) 239=A.I.R. 1950 Mad. 659=(1950) 1 M.L.J. 521.

———**O. 1, R. 10**—*Addition of defendants—Discretion of appellate Court.*

A suit against some only of the persons in actual possession of land is not competent where the plaintiff claims *khas* possession. If the Courts below decree the suit without considering the objection of the defendants to the competency of the suit, the second appellate Court may remand the suit to the trial Court for fresh decision after impleading the persons who are in possession of the suit land and who have not been impleaded as defendants. In exercising the discretion conferred by O. 1, R. 10 (2), Civil Procedure Code, it is proper to consider the convenience of both parties as well as the necessity of providing conditions in which a full and final adjudication may be made of the dispute between the parties. A.I.R. 1928 Cal. 138 and A.I.R. 1929 Cal. 669, Foll. (*Cornelius, J.*) Imam Din *v.* Mt. Fazlan. A.I.R. 1949 Lah. 248.

———**O. 1, R. 10**—*Addition of Government as a party—When can be ordered.*

The Government should not be ordered to be made a party unless it is necessary for deciding the suit. In a suit for ejectment where the plaintiff alleges that he is a tenant from Government and that the defendant is his cultivator and the defendant alleges that he is the tenant from Government, the latter need not be made a party to the suit because the only question is:

whether defendant is a cultivator of the plaintiff or not and the question of as to who is the tenant of the Government does not arise for decision in that suit. (*Trivedi, J.C.*) GORDHANDAS *v.* ALI OSMAN. A.I.R. 1950 Kut. 56.

——**O. 1, R. 10**—*Addition of not necessary parties to avoid multiplicity of proceedings—If justified—Suit for specific performance of agreement to sell—Sons of executants of agreement—If necessary parties to the suit.*

In an application under O. 1, R. 10, C. P. Code, the Court should consider mainly whether the presence of the proposed parties would be necessary for adjudicating upon the questions that are involved in the suit and an order for addition of parties should not be made merely with a view to avoid multiplicity of suits if otherwise their presence is not necessary for determining the real questions involved in the suit.

In a suit for the specific performance of an agreement to sell against the executants of the agreement, the sons of the latter would not be necessary parties to such a suit and cannot be added as parties under O. 1, R. 10, C. P. Code, even though they may plead that the agreement would not bind them. (*Krishnaswami Nayudu, J.*) PALANISAMY CHETTIAR *v.* KOMARA CHETTIAR. 1949 M.W.N. 663=62 L.W. 722=A.I.R. 1950 Mad. 91=(1949) 2 M.L.J. 568.

——**O. 1, R. 10 (2)**—*Addition of parties—Power of Court.*

The powers conferred by O. 1, R. 10 (2), C. P. Code, are extremely wide, and the expression "all the questions involved in the suit" does not mean only the questions as between the parties to the litigation. The Court ought to endeavour, if possible, to settle as effectually as may be, all the matters in controversy arising out of one subject-matter by impleading all the parties interested in the dispute. In this way alone can a multiplicity of suits and a conflict of decisions be avoided. A.I.R. 1926 M. 836; A.I.R. 1935 M. 394 and A.I.R. 1935 S. 194, Not Foll.; A.I.R. 1940 M. 69 and 225, A.I.R. 1935 M. 353, A.I.R. 1934 P. 370 and A.I.R. 1934 P. 425, Rel. on. (*Bhandari, J.*) INDAR SINGH *v.* HAZARA SINGH. 5 D.L.R. (Simla) 37=52 P. L.R. 88.

——**O. 1, R. 10 (2)**—*Addition of parties—Principles governing.*

A party should not be added so as to change the nature of the suit. (*Kidwai, J.*) SHRI NATH *v.* NAND LAL. 1947 O.A. (C.C.) 167=1947 A. W.R. (C.C.) 167=A.I.R. 1948 Oudh 44=1947 O.W.N. 236.

——**O. 1, R. 10**—*Applicability—One of two plaintiffs dead at time of presentation of plaint—Right of surviving plaintiff to implead his legal representatives as co-plaintiffs.*

If the sole plaintiff or all the plaintiffs instituting a suit is or are dead, the plaint is one that is presented by a dead person or persons. The institution of the suit therefore is void and is of no effect. No question of mistake or misdescription of party is involved in such a case so as to attract the application of O. 1, R. 10, C. P. Code. But where one of two plaintiffs was dead at the time of the presentation of the plaint and the plaint was properly presented so far as the surviving plaintiff was concerned, the latter can prosecute the suit as if he was the sole plaintiff in the case. The suit *vis-a-vis* the deceased plaintiff will certainly be void and his legal representatives cannot be brought on the record under O. 22, R. 3, C. P. Code. But if the surviving plaintiff thinks that his suit is likely to fail in the absence of the representatives of the deceased plaintiff, it is perfectly open to him to apply to the Court under O. 1, R. 10, for his legal representatives being impleaded in the suit as his co-plaintiffs provided the cause of action in their favour is not extinguished by efflux of time. (*Niyogi, J.*) RANGRAO VYANKATESH *v.* KASHINATH DHONDU. I.L. R. (1947) Nag. 39=1946 Nag. (Rul.) 279= A.I.R. 1947 Nag. 73=227 I.C. 127=1946 N.L. J. 492.

——**O. 1, R. 10**—*Applicability—Suit against dead man—Application under O. 1, R. 10—Competency—O. 22, Rr. 4 and 9.*

A suit filed against a dead man is nullity. The Court in such a case has no jurisdiction to grant an application under O. 1, R. 10, C. P. Code, or under O. 22, Rr. 4 and 9. (*Thadani, J.*) KARACHI MUNICIPAL CORPORATION *v.* BARADIO. I.L.R. (1945) Kar. 321=223 I.C. 233=1946 Sind (Rul.) 141=A.I.R. 1946 Sind 20.

——**O. 1, R. 10 (2)**—*Applicability—Suit bad for misjoinder of causes of action.*

O. 1, R. 10 (2), C. P. Code, refers to a case where a defendant has been improperly joined, that is to say, where a defendant against whom no relief can be claimed has been made a defendant; in such a case his name may be struck out. The rule has no application to a case where the suit is bad for misjoinder of causes of action and not because of misjoinder of defendants. (*Amarendra Nath Sen, J.*) CORPORATION OF CALCUTTA *v.* RADHAKRISHNA DEV. 4 D. L. R. (Cal.) 172.

——**O. 1, R. 10**—*Applicability—Suit by Hindu widow against divided brothers of her husband asking for declaration that she had succeeded to her husband's property and injunction restraining defendants from causing her obstruction—Plead that son of one of the defendants had been adopted by plaintiff's husband and had title and possession—Addition of alleged adopted son as defendant—Legality.*

The plaintiff laid the suit in the first instance against her deceased husband's three brothers who were divided in status from her husband. She claimed that on the death of her husband she succeeded to her husband's properties and asked for a declaration of her title and injunction restraining the defendants from causing obstruction or hindrance to her. The defendants denied the plaintiff's allegations and the second defendant alleged that his son was the adopted son of the plaintiff's husband and that on the latter's death succeeded to and was in possession of his adoptive father's properties. The adopted son also applied to be impleaded as a party defendant to the suit and was added as a proper party. In revision,

Held: The lower Court was right in holding that the adopted son was a proper party whose "presence was necessary for the determination of the real matter in dispute" within the meaning of O. 1, R. 10 of the C. P. Code. On the pleadings of the plaintiff and the original defendants both the issues of title and possession arose for determination and the Court had to decide whether the widow or the adopted son had title and possession. The right of the adopted son to be impleaded in the suit cannot be taken away merely on the ground that the plaintiff was *dominus litus* and did not seek as against such adopted son any relief or any adjudication of his rights. (*Rajagopalan, J.*) Lakshmidevamma *v.* Nagayya. 1948 M.W.N. 692=61 L.W. 659=A.I.R. 1949 Mad. 369=4 D.L.R. (Mad.) 181=(1948) 2 M.L.J. 362.

———**O. 1, R. 10**—*Impleading of a new party—Remedy.*

An amendment under S. 152, C. P. Code, is not appealable and hence an application for revision would be in order. (*Pedley, S.M. and Bates, J. M.*) Dwarika Prasad *v.* Lala Ram. 1947 R. D. 137=1947 A.W.R. (Rev.) 73.

———**O. 1, R. 10**—*Impleading of a new party as a defendant at the instance of the plaintiff—Newly added party setting up title in himself as against both the plaintiff and the defendants—Transposition of that party as co-plaintiff at the fag end of the trial and suit being decreed in his favour—Propriety.*

Where *A* and *B* are disputing title to a property setting up rival claims, it is not open to a third party *C* to come on the scene and insist on his title which is contrary to that set up by *A* and *B* being investigated and it would not be right for a Court to implead such a person as a defendant and to transpose him subsequently at the fag end of the trial as a co-plaintiff and pass a decree in his favour. (*Chandrasekhara Iyer, J.*) Ramaswami Reddi *v.* Deivasigamani Pillai. 60 L.W. 380=1947 M.W.N. 426=A.I.R. 1947 Mad. 395=(1947) 1 M.L.J. 371.

———**O. 1, R. 10**—*Necessary and proper parties—Who are.*

Rule 10 of O. 1, C. P. Code, empowers a Court at any stage of the proceedings to implead the necessary and proper parties. Necessary parties are parties 'who ought to have been joined', that is, parties necessary to the constitution of the suit without whom no decree at all can be passed; and proper parties are those whose presence enables the Court to adjudicate more 'effectually and completely' on the points involved in the case. (*Bhandari, J.*) Ranjit Singh *v.* Santokh Singh. 52 P.L.R. 313.

———**O. 1, R. 10**—*Necessary parties—Partition suit.*

Where in a suit which is essentially one for partition the plaintiff claims 10 as. share and prays for separate possession of it after division of the whole property, the owners of the remaining 6 as. share have to be made parties to the suit as a decree for partition cannot be passed in their absence. (*Trivedi, J.C.*) Lukamanji *v.* Badruddin. A.I.R. 1950 Kut. 46 (2).

———**O. 1, R. 10**—*Necessary parties—Suit for partition by minors against their father—Father adjudicated insolvent—Right of simple creditors to be added as parties to the suit.*

All simple creditors need not be brought on record as parties in a partition suit. O. 1, R. 10, C. P. Code, uses the word "may" and not "shall".

In a suit for partition by minor plaintiffs against their father who has been adjudicated an insolvent and the Official Receiver is a defendant, the simple creditors of the father whose debts have been shown in the schedule in the insolvency petition are not entitled to be made parties as the Official Receiver can protect the interest of all creditors, and especially where the debts of such creditors are not mentioned *eo nomine* and attacked in the plaint as not binding on the plaintiffs. (*Panchapakesa Ayyar, J.*) Rattamma *v.* Venkata Rao. 63 L.W. 474 (1)=1950 M. W. N. 381=A.I.R. 1950 Mad. 694=(1950) 1 M.L.J. 649.

———**O. 1, R. 10**—*Object of provision—Suit against owner for specific performance of agreement to sell—Person alleging agreement for sale between himself and defendant—If entitled to be added as party.*

The provisions contained in O. 1, R. 10 (2), C. P. Code, have been enacted for the purpose of enabling the Court effectually and completely to adjudicate upon the matters involved in the suit. The avoidance of multiplicity of suits is not the object of these provisions, though it will often be a result of their application. A person should be added as a party to the suit only when the Court is unable effectually and completely to adjudicate upon and settle all the questions involved in the suit in the absence of that person; that is to say, it must be shown that his presence is not merely convenient, but is necessary. In a suit against an owner of property for specific performance of an agreement to sell, a person who alleges that an agreement for sale of the same property was entered into between himself and the defendant, is not entitled to be added as a party, as his presence is not necessary to enable the Court effectually and completely to adjudicate upon and to settle the several questions which are involved in the suit. (*Clough, J.*) Gosto Behari Sarkar *v.* Sur's Estate, Ltd. I.L.R. (1946) 1 Cal. 656.

———**O. 1, R. 10 and O. 41, Rr. 4 and 33**—*Power of appellate Court—Transposition of respondent to category of appellant—Limitation Act, S. 22—Effect of.*

S. 22 of the Limitation Act does not, no doubt, apply to appeals, but its non-application to appeals cannot be in the way of an appellate Court exercising its power to transpose a respondent to the category of an appellant in proper cases. The effect of that section not applying to appeals is that where a respondent is transposed to the category of an appellant, the appeal as regards him will not be deemed to have been instituted when he was so made an appellant. The appeal is one and the date of its filing even as regards him will be the date on which it was originally filed. The only cases where the appellate Court will not exercise its power and will not allow a respondent to be transposed to the category of an appellant, is, where the result of such transposition is likely to be, that new grounds not common to the appellants already on the record, may have to be determined for disposing of the appeal. The appellate Court having under O. 41, Rr. 4 and 33, C. P. Code, large powers to pass whatever decree it considers just and proper in the case that comes before it can certainly allow transposition of a respondent to the category of an appellant in cases where ends of justice require it. (*Manohar Lall and Mahabir Prasad, JJ.*) Bhubneshwar Prasad *v.* Sidheswar Mukherjee. 27 Pat. 956=A.I.R. 1949 Pat. 309.

———**O. 1, R. 10**—Power of Court under—Addition as parties, persons not parties to either the agreement of reference or award when award is filed into Court. *See* Arbitration Act (X of 1940), S. 14. (1950) 1 M.L.J. 237.

———**O. 1, R. 10**—*Scope—Mortgage—Suit for redemption—Death of one of two mortgagees defendants—Failure to implead heirs—Order declaring abatement of suit against deceased—Application by plaintiff to add heirs of deceased as parties—Power of Court to add parties—Principles.*

Where, in a suit for redemption of a mortgage against two mortgagees, one of the mortgagees (defendants) dies and, on the plaintiff's omission to implead the legal representatives of the deceased defendant, the Court orders that the suit had abated as against the deceased defendant, that order cannot be construed as one that the suit had abated as a whole or as extinguishing the right of the mortgagor to redeem the mortgage and will not preclude or debar the plaintiff from successfully applying under O. 1, R. 10, C. P. Code, to implead the heirs of the mortgagor as parties to the suit for redemption; since the plaintiff would in any case be entitled to institute a fresh suit for redemption against the surviving mortgagor and against the heirs of the deceased mortgagor and no question of limitation would arise, the Court can properly add the heirs of the deceased as parties and allow the suit to continue, instead of driving the plaintiff to a fresh suit, thereby avoid additional litigation. A.I.R. 1936 Pat. 420, ref. (*Agarwala, C.J.*) Ramjatan Bhagat *v.* Babu Net Lal. 5 D.L.R. (Pat.) 85=A.I.R. 1950 Pat. 281.

———**O. 1, R. 10 (2)**—*Scope of the power of Court under.*

O. 1, R. 10 (2) of the C. P. Code, gives power to the Court to direct any person to be joined as a party. (*Davies.*) Municipal Committee, Ajmer *v.* Roop Chand. 1946 A.M.L.J. 42 (2).

———**O. 1, R. 10**—*Transposition of parties—Question of limitation—Stage for consideration—Limitation Act, S. 22.*

When an application for transposition is made, the Court should consider whether it should be allowed, and if so, on what terms. It is only after the order for transposition has been made and the party is transposed that the Court shall consider whether the claim of the transposed party, if he is transposed to the category of the plaintiff, or the claim against him if transposed to the category of defendant, is barred by time. (*Mitter and Sharpe, JJ.*) Moniruddin Ahmed *v.* Sarat Chandra Ray. I.L.R. (1949) 1 Cal. 85.

———**O. 1, R. 10 (5) and S. 107 (2)**—*Minor respondents shown as majors—Application to add name of guardian after limitation—Maintainability.*

Under sub-R. (5) of R. 10 of O. 1 the proceedings as against a person added as a defendant during the pendency of a suit are deemed to have begun only on the service of the summons. The same rule would apply by analogy to appeals according to S. 107 (2), C. P. Code. Hence, when an appeal is filed against some minor respondents as majors and an application is made to add the name of their guardian long after limitation for filing an appeal, the application cannot be granted. (*Lal, J.M. I.*) Sagiva *v.* Ragho Singh. 1949 R.D. 15.

———**O. 2, R. 1**—*Suit for possession of property on pre-emption or on declaration that sale was not binding on plaintiff—Whether bad for misjoinder—Berar Land Revenue Code, S. 183.*

The father of the plaintiff sold certain lands in Berar. The plaintiff sued for their possession contending that the property in suit was his joint family property and its sale by his father was not binding on him for want of legal necessity. He claimed that he, as son of the vendor, had a preferential right to pre-empt. He further claimed in the alternative that in the event of his being not allowed to pre-empt the sale be held not binding on him and he should be put in possession of the property either on pre-emption or on declaration as stated above. The defendants contended that the suit was bad for misjoinder of causes of action and defendants. Their main contention was that the plaintiff could not in the same suit claim alternative reliefs on inconsistent facts. Overruling their contention,

Held, that the facts on which the plaintiff's suit was based, were the same though the reliefs claimed were inconsistent and this was permissible in law. Assuming that two causes of action were joined in the suit, such joinder was perfectly unobjectionable as it would not render the suit in any way vexatious or harassing to the defendants. The rule that a pre-emptor should not be permitted to deny the title of the vendor was not rigid. O. 2, R. 1, C. P. Code, required that every suit should as far as practicable, be so framed as to afford grounds for final decision upon the subject in dispute and to prevent further litigation concerning it. It was moreover neither necessary nor even advisable that the plaintiff should be obliged to file separate suits when in those suits common questions of fact and law would arise. (*Padhye, J.*) Aambhau Wamanrao *v.* Ganesh Deorao. I.L.R. (1947) Nag. 288=A.I.R. 1948 Nag. 32=1947 N.L.J. 249.

———**O. 2, R. 2**—Applicability after the sale of the hypotheca. *See* C. P. Code (V of 1908), O. 34, R. 5. (1948) 1 M.L.J. 68.

———**O. 2, R. 2**—*Applicability—Conditions—'Cause of action'—Meaning of.*

Identity of the cause of action is the *sine qua non* to the application of O. 2, R. 2, C. P. Code. By the phrase 'cause of action' is meant all those facts which the plaintiff has to prove as part of his case to entitle him to judgment. (*Pollock and Hidayatullah, JJ.*) Amarsingh Gajjansingh *v.* Tulsiram Ramdayal. I.L.R. 1948) Nag. 853=A.I.R. 1949 Nag. 195=1948 N.L.J. 277.

———**O. 2, R. 2**—*Applicability—Conditions—Second suit when barred by first—Identity of cause of action—Necessity—Prior suit based on allegation of apprehension of damage by illegal act of defendant and praying for prevention—Second suit based on actual damage caused by wrongful act—Bar.*

In order that O. 2, R. 2, C. P. Code, may operate as a bar to a second suit the cause of action in that suit must be the same as in the first suit which is pleaded as a bar. It is the identity of the cause of action that matters. Where in a prior suit, which was a *quia timet* action, the plaintiff, on the allegation that he had reasonable apprehension that the defendant had been harbouring the intention of causing injury to the plaintiff's reversionary rights in certain movable property, had asked the Court to prevent the defendant from carrying into effect that wrongful intention, and in the second suit alleged that after the first suit, the defendant in fact destroyed his reversionary right to that movable property by wrongful acts, it cannot be held that the second suit would be barred under O. 2, R. 2, C. P. Code, by reason of the first suit. The causes of action in the suits are entirely different and totally distinct from each other. O. 2, R. 2, C. P. Code, would not apply to such a case. (*Mitter and Sharpe, JJ.*) Patta Kumari Bibi *v.* Nirmal Kumar Sinha. 229 I.C. 373=1947 Cal. (Rul.) 151=A.I.R. 1948 Cal. 97=82 C.L.J. 173=51 C.W.N. 544.

———**O. 2, R. 2**—*Applicability—Correct test—Cause of action—Meaning—What are different and identical causes of action.*

O. 2, R. 2, C. P. Code, enacts that if a plaintiff fails to sue for the whole of the claim which he is entitled to make in respect of a cause of action in the first suit, then he is precluded from suing in a second suit in respect of the portion so omitted. The object of the rule is clearly to avoid splitting up of claims and to prevent multiplicity of suits.

The correct test in cases falling under O. 2, R. 2 is whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit. The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. It has no relation whatever to the defence that may be set up by the defendants nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action, or in other words to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

If the evidence to support the two claims is different, then the causes of action are also different. The causes of action in the two suits may be considered to be same if in substance they are identical. (*Sir Madhavan Nair.*) Mohammad Khalil Khan *v.* Mahbub Ali Mian. 75 I.A. 121=I.L.R. (1948) All. 571=1949 A.L.J. 574=A.I.R. 1949 P.C. 78=51 Bom.L.R. 9=4 D.L.R. (P.C.) 73=61 L.W. 686=52 C.W.N. 812=(1948) 2 M.L.J. 318 (P.C.).

———**O. 2, R. 2**—*Applicability—Earlier suit by plaintiff as lessor to eject defendant, dismissed—Later suit based on title to eject defendant as trespasser—If barred.*

Where the earlier suit brought by the plaintiff as lessor to eject the defendant on the allegation that the tenancy had been terminated by the expiry of notice to quit was dismissed, a subsequent suit by the plaintiff based on his title to eject the defendant as trespasser is not barred by O. 2, R. 2, C. P. Code, as the causes of action are different. 12 I.A. 116, appl. (*Shearer and Reuben, JJ.*) Ram Lakshman Janki *v.* Makund Lal Sahu. 27 Pat. 751=A.I.R. 1949 Pat. 358.

———**O. 2, R. 2 and O. 34, R. 14 (1)**—*Applicability—Earlier suit for money embezzled—Non-realisation—Subsequent suit on surety bond for the same amount—Maintainability—O. 34, R.* 14 (1) *if applies to such a suit.*

An accountant in the service of a District Board who had executed a surety bond in favour of the Board embezzled the moneys of the Board and died. A suit was instituted against his widow for the amount embezzled and though a money decree was obtained nothing was realized. A second suit was therefore brought on the surety bond executed. While it was contended that it was not maintainable in view of O. 2, R. 2; O. 34, R. 14 (1) was relied upon by the Board.

Held, that as the first suit was brought only on the obligation arising out of the embezzlement, and the collateral security—the surety bond—which was part of the same cause of action was ignored, the latter would not be available for the subsequent suit which was clearly barred by O. 2, R. 2, C. P. Code. Nor could O. 34, R. 14 (1), C. P. Code, help the plaintiff for it is only if the earlier suit was based on the personal liability contained in the surety bond that that provision would apply. One of the essential ingredients for the application of R. 14, O. 34, is that the earlier decree for payment of money must have been "for satisfaction of a claim arising under the mortgage." (*Misra and Kaul, J.*) District Board Fyzabad *v.* Ram Kishore. 22 Luck. 26=A.I.R. 1947 Oudh 135=1947 Oudh (Rul.) 19=228 I.C. 201=1946 O.A. (C.C.) 234=1946 A.W.R. (C.C.) 234=1946 O.W.N. 337.

———**O. 2, R. 2**—*Applicability—Failure to sue for alternative relief in first suit—Subsequent suit for such alternative relief—If barred—Cumulative reliefs under same cause of action—Failure to sue for all—Effect.*

The operation of O. 2, R. 2, C. P. Code, must be confined to cases where the plaintiff is entitled to more than one relief in respect of the same cause of action and not to cases where he is entitled to one relief out of many reliefs to which he may be entitled. In other words, O. 2, R. 2, creates a bar where only cumulative reliefs can be, but are not, asked for, and not where one of the two alternative reliefs can be and is, asked for in the first suit. 1 Lah. 457 (F.B.), foll.; A.I.R. 1932 Lah. 523, not foll.; A.I.R. 1939 Lah. 112, rel. on. (*Rajadhyaksha and Shah, JJ.*) GOPAL KRISHNA CHANDAVARKAR *v.* SIDRAM SATAPPA. 52 Bom.L.R. 594=5 D.L.R. (Bom.) 144.

———**O. 2, R. 2**—*Applicability—First suit against defendant 1 to recover rent for one year when rent for three years had become due—Second suit against defendant Nos. 1 and 2 to recover rent for remaining two years.*

The plaintiff sued for recovery of arrears of *durpatni* rent from defendants 1 and 2 for the years 1343 and 1344 B. S. Previously the plaintiff's predecessor brought a suit against defendant 1 claiming rent due in respect of the same *durputni* for the year 1342 B. S. although at the rate when the suit was filed rents for the years 1343 and 1344 B.S. had already become due.

Held, that so far as defendant 1 was concerned O. 2, R. 2, C. P. Code, operated as a complete bar to the present suit, but so far as defendant 2 was concerned, O. 2, R. 2, was not directly applicable. The previous judgment could operate as a bar against him only if the cause of action against him was merged in the judgment, but as the claim for rent for the years 1343 and 1344 B.S., was not the subject-matter of the earlier suit at all, the cause of action against defendant 2, so far as the claim in the suit was concerned could not be merged in the judgment, even assuming that the liability of the two defendants was a joint and not a joint and several liability. (*Sharpe and B. K. Mukherjea, JJ.*) PHANI BHUSAN MUKHERJEE *v.* RAJENDRA NANDAN GOSWAMI. I.L.R. (1946) 2 Cal. 605=228 I.C. 555=1947 Cal. (Rul.) 107=51 C.W.N. 261=A.I.R. 1947 Cal. 11=82 C.L.J. 108.

———**O. 2, R. 2**—*Applicability—Omits to "sue"—Certificate proceedings to recover royalty—No claim for cess—Subsequent suit for cess—If barred.*

Certificate proceedings for recovery of royalty in respect of a coal mine are not a suit within the meaning of O. 2, R. 2, C. P. Code; hence a suit for recovery of cess on the royalty payable cannot be held barred by the provisions of O. 2, R. 2, C. P. Code, on the ground that in the prior certificate proceedings no cess but only royalty alone was claimed and recovered. (*Manohar Lall and Mukharji, JJ.*) KAMAKSHYA N. SINGH *v.* BURNETT. 26 Pat. 312=A.I.R. 1948 Pat. 313.

———**O. 2, R. 2**—*Applicability—Test of—Mortgage—Mortgagee deprived of part of security—Suit for part of mortgage money—Decree—Subsequent deprivation of remaining property—Second suit for balance of mortgage-money—Bar if applies.*

The test to find out whether a subsequent suit is barred by O. 2, R. 2, C. P. Code, is to see whether the cause of action in the previous suit and the subsequent suit is the same, and whether the plaintiff could have and should have claimed in the former suit the relief which he claims in the subsequent suit.

A prior suit for a part of the money on the ground of the mortgagee having been dispossessed of part of the mortgage security does not operate as a bar under O. 2, R. 2, to a subsequent suit by him for the balance of the mortgage money when dispossessed of the remaining mortgaged property. The cause of action in the later suit is not the same as in the former suit. 75 I. A. 121, dist. and expl. 49 I.A. 9, ref. (*Manohar Lall and Mahabir Prasad, JJ.*) MT. PARBATI KUAR *v.* DURGA PRASAD MISSIR. 28 Pat. 359=4 D.L.R. (Pat.) 166=A.I.R. 1949 Pat. 487.

———**O. 2, R. 2**—*Applicability to proceedings before the Madras Hindu Religious Endowments Board—Framing of scheme by Board—Piecemeal inquiry into charges—Validity.*

O. 2, R. 2 of the C. P. Code has no application to proceedings before the Madras Hindu Religious Endowments Board. However undesirable it might be for the Board to take up charges against trustees piecemeal that is purely a question of administrative expediency. When the Board has investigated one charge against a trustee and found it proved and has framed a scheme in consequence of that finding, subsequently when the scheme is set aside, there is no legal bar to prevent the Board from investigating another charge which might have been but was not gone into at the time when the earlier scheme was framed and making an adverse finding thereon a basis for framing a fresh scheme. (*Wadsworth and Patanjali Sastri, JJ.*) KOTHANDARAMA REDDI *v.* LAKSHMINARASA REDDI. I.L.R. (1947) Mad. 828=A.I.R. 1948 Mad. 152=60 L.W. 329=1947 M.W.N. 374=(1947) 2 M.L.J. 23.

———**O. 2, R. 2**—*Scope and effect—Suit by co-sharer for accounts for years* 1931 *to* 1933—*Subsequent suit for year* 1933-34—*If barred—Cause of action for subsequent suit ripe on date of first suit.*

A co-sharer sued his lambardar for an account of village profits for the year 1933-34. The same plaintiff had filed a previous suit against the same defendant in respect of the profits for the years 1931 to 1933. The lower Courts dismissed the plaintiff's suit under O. 2, R. 2, C. P. Code. On appeal,

Held, that the causes of action in respect of the year 1931-33, were separate and distinct from the cause of action in respect of the year 1933-34, and even if it be assumed that the cause of action in respect of the latter suit had arisen at the date of the previous suit, the plaintiff was not bound to include this cause of action in the other suit, and accordingly, O. 2, R. 2 did not shut him out. A plaintiff may have many causes of action ripe at any particular point of time, but he is not bound to sue in respect of them all. He can sue in respect of one or more as he chooses and leave the others for later suits. What O. 2, R. 2 states he cannot do is to split up any claim arising in respect of any one cause of action and sue in respect of part of that claim first and then in respect of the rest of the claim in a later suit. The condition is that these various claims should arise in respect of the same cause of action. (*Bose, J.*) SHEOSHANKAR DAYAL *v.* SHEOSHANKAR SAHAI. I.L.R. (1947) Nag. 235=229 I.C. 575=1947 N.L.J. 71=1947 Nag. (Rul.) 135=A.I.R. 1947 Nag. 176.

———**O. 2, R. 2**—Scope of the bar under. *See* T. P. ACT, S. 76 AND C. P. CODE, O. 34, R. 8, O. 2, R. 2 AND O. 43, R. 1. (1949) 1 M.L.J. 116.

———**O. 2, R. 2 and O. 9, R. 9**—*Suit for rent for certain year dismissed under O. 9, R. 8—Subsequent suit for rent for subsequent years falling due at time of earlier suit—Whether barred.*

Where a suit for rent for a certain year has been dismissed under O. 9, R. 8, C. P. Code, a subsequent suit for rent for the subsequent years which had already fallen due at the time of the institution of the earlier suit, though not barred by O. 9, R. 9, is barred by O. 2, R. 2, C. P. Code. (*Roxburgh and Blank, JJ.*) JIBAN KRISHNA GHOSE *v.* SANTIMOYEE DEVI. A.I.R. 1948 Cal. 366.

———**O. 2, R. 2 and S. 20 (c)**—*Suit for refund of price paid and for damages for failure to supply goods contracted for—Single suit—Necessity—Jurisdiction.*

Where a suit is filed for the refund of the price paid as well as for damages for the failure to supply a portion of the goods contracted for the Court where a part of the cause of action arose has jurisdiction to entertain the suit. Not only are the plaintiffs entitled but they are bound under O. 2, R. 2 of C. P. Code to include in a single suit the whole of the claim which they are entitled to make in respect of the cause of action alleged by them. (*Verma and Sankar Saran, JJ.*) HAZARIRAM *v.* UMRAO SINGH SEWATI LAL. I.L.R. (1947) All. 3=225 I.C. 96=1946 A. (Rul.) 417=1946 A.L.W. 378=1946 A.W.R. (H.C.) 551=A.I.R. 1946 All. 512.

———**O. 2, R. 2 (2)**—*Plea of bar of suit under—If can be raised for the first time in appeal.*

As the plea that a suit is barred under O. 2, R. 2 (2), C. P. Code, is a mixed plea of fact and law, it should nont be allowed to be raised for the first time in appeal. (*Lal, J.M. I and Haider, J.M. II.*) AMIRUDDIN *v.* GHAFOOR. 1948 A.W.R. (Rev.) 193=1948 R.D. 343 (2).

———**O. 2, R. 3**—Applicability to notice under S. 163 of the U. P. Tenancy Act. *See* U. P. Tenancy Act, S. 163 and C. P. Code. O. 2. R. 3. (1946) A.W.R. (Rev.) 20.

———**O. 2, Rr. 3 and 4 and Registration Act, S. 77**—*Joinder of claim for specific performance with claim to enforce registration—Permissibility.*

A claim for specific performance or any other claim cannot be coupled with a prayer to enforce registration under S. 77 of the Registration Act. In a claim for specific performance the cause of action is based on the defendant's refusal to carry out his part of the contract, while in the case of a claim under S. 77 of the Registration Act, the cause of action is based on the refusal of the registrar to register document. The causes of action are quite different and dissimilar in nature and cannot be joined in one suit. 9 M.L.J. 107, A.I.R. 1924 Cal. 600 and A.I.R. 1933 Cal. 196, referred to. (*Sen, J.*) MADANLAL KEWALCHAND *v.* RADHAKISAN. I. L. R. (1950) Nag. 344=A.I.R. 1950 Nag. 101=5 D.L.R. (Nag.) 108=1950 N.L.J. 49.

———**O. 2, R. 3**—*Suit for accounts—Claim against several defendants in respect of same property—Causes of action different—Suit, if maintainable—Amendment of plaint—Duty of plaintiff.*

A plaintiff will not be allowed to bring a suit for accounts against several defendants merely because the claims against them are in respect of the same property, when the causes of action are different not only for the different groups of the defendants but even for different persons within the same group in some cases. The plaintiff must elect against which of the defendants he wants to proceed and specifically state in the plaint as to the common cause of action giving rise to his claim against such defendants. If he does not take the necessary steps to amend his plaint at the earliest possible opportunity, he must be put to terms for having an opportunity to amend his plaint at a later stage. (*R. P. Mookerjee, J.*) KRISHNA CHANDRA KABIRAJ *v.* SANKARSAN KABIRAJ. A.I.R. 1950 Cal. 128.

———**O. 2, R. 3**—*Suit for assessment and arrears of rent—If maintainable.*

A suit for both assessment of rent and recovery of arrears of rent at the rate assessed, is maintainable. (*Sharpe, J.*) ANIL KUMAR RAY *v.* PROMATHA NATH. I.L.R. (1948) 1 Cal. 488=52 C.W.N. 316.

———**O. 2, R. 4 (b) and (c) and O. 20, R. 12**—*Suit for possession of immovable property and mesne profits—Claim for damages for period subsequent to suit—If can be joined.*

Under O. 2, R. 4 (*b*) and (*c*), C. P. Code, a claim for damages can, in a proper case, be joined with a claim for possession of immovable property and mesne profits, although the claim for damages relates to a period subsequent to the institution of the suit. O. 20, R, 12, C. P. Code, does not prohibit the joinder of such claims. (*Khundkar, J.*) GOPALDAS KHETTRY *v.* PHULCHAND. I.L.R. (1946) 1 Cal. 411=50 C.W.N. 229=80 C.L.J. 259=A.I.R. 1946 Cal. 357.

———**O. 2, R. 4 (c)**—*Suit for specific performance and damages—Maintainability.*

A suit for specific performance of an agreement for sale and for damages based on (*a*) delay in completion of sale and (*b*) for failure to deliver vacant possession, is not bad for misjoinder of causes of action and is protected by O. 2, R. 4 (*c*), C. P. Code. The claim for damages arises out of the same cause of action and on the breach of the agreement for sale. (*Mukherji, J.*) SASHI BHUSAN DEY *v.* RAICHAND, BURAL. A.I.R. 1950 Cal. 333.

———**O. 2, R. 6**—*Applicability—Misjoinder of causes of action.*

O. 2, R. 6, C. P. Code, applies to cases of proper joinder of causes of action. Where causes of action have been properly joined power has been given to the Court to order separate trials or make such other order as may be convenient if it is of opinion that it cannot be conveniently tried or disposed of together. It does not apply to cases of misjoinder of causes of action. (*Sen, J.*) MADANLAL KEWALCHAND *v.* RADHAKISAN. I.L.R. (1950) Nag. 344=A.I.R. 1950 Nag. 101=5 D.L.R. (Nag.) 108=1950 N.L.J. 49.

———**O. 2, R. 6**—*Applicability—Misjoinder of causes of action—Effect.*

O. 2, R. 6, C. P. Code, pre-supposes a valid joinder of causes of action. It has no application to cases where there has been a misjoinder of causes of action. All that the rule says is that on grounds of convenience the Court may order separate trials or make such order as may be expedient in a suit where several causes of action have been validly joined. 27 Mad. 80, appl. 55 Cal. 164, dist. (*Amarendra Nath Sen, J.*) CORPORATION OF CALCUTTA *v.* RADHAKRISHNA DEV. 4 D.L.R. (Cal.) 172.

———**O. 2, R. 6**—*Plaintiff joining several causes of action against same defendant—Order of Court asking him to elect one of them—Legality.*

O. 2, R. 3, C. P. Code, permits a plaintiff to unite in the same suit several causes of action against the same defendant jointly. If it appears to the Court that any of them cannot be conveniently tried together, it may under O. 2, R. 6 at the most order them to be tried separately but in the same suit. O. 2 R. 6, does not contemplate that the plaintiff should be asked to file separate suits. An order of Court calling on the plaintiff to elect one of the causes of action faillure whereof would result in the dismissal of his suit, is there fore without jurisdiction. (*Puranik, J.*) PARASHRAM SAO *v.* HIRALAL. I.L.R. (1947) Nag. 159=229 I.C. 241=1947 Nag. (Rul.) 91 =1947 N.L.J. 41=A.I.R. 1947 Nag. 86.

———**O. 3, R. 1**—*"Acting"—Meaning of—Recognised agent of party—Right to examine witnesses and to cross-examine witnesses of apposite party.*

"Acting" in R. 1, O. 3, C. P. Code, includes all acts which one is expected to take for the proper conduct of the case, including examination of witnesses and cross-examination of the witnesses of the opposite party. A recognised agent of a party can therefore lead evidence on behalf of his principal and also cross-examine the witnesses of the opposite party. (*Teja Singh, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* BHAGWAN SAHAI. 3 D.L.R. (Simla) 45=A.I.R. 1948 E. P. 61.

———**O. 3, Rr. 1 and 2**—*Execution application presented by unauthorised person—Irregularity, if curable—Subsequent appearance of counsel for decree-holder—If cures initial defect.*

The fact that an execution application is presented by a person who is not a recognised agent of the decree-holder, does not deprive the Court of its jurisdiction to act in the matter. The subsequent appearance of a counsel for the decree-holder would cure the initial defect, if there is any, and the application can be treated as having been presented by the counsel on the date on which the counsel put in his appearance. 54 A. 57 and 47 B. 227, rel. on. 1929 Lah. 478 and 118 P.R. 1912, appl. I.L.R. (1944) Bom. 66, Dist. (*Ram Labhaya, J.C.*) PANCHULAL *v.* MT. NAJJO. A. I.R. 1949 Ajmer 32=1949 A.M.L.J. 14.

———**O. 3, R. 1**—*Recognised agent—Power to examine and cross-examine witnesses.*

It is true that a recognised agent appointed under O. 3, R. 2, C. P. Code, stands on a different footing from a pleader duly authorised and appointed to conduct a case. It is also true that a pleader in so far as the conduct of the case is concerned, possesses more rights than the recognised agent of a party, but it does not follow therefrom that because the pleader possesses the right to cross-examine witnesses produced by the opposite side and lead the evidence of his own side, a recognised agent must be denied these rights for this reason alone. (*Teja Singh, J.*) GOVERNOR-GENERAL IN COUNCIL *v.* BHAGWAN SAHAI. 3 D.L.R. (Simla) 45=A.I. R. 1948 E. P. 61.

———**O. 3, R. 1**—Scope and object of. *See* EXECUTION PETITION. (1950) 2 M.L.J. 256.

———**O. 3, R. 2**—Authority given to agent to compromise—If includes power to refer suit to arbitration. *See* POWER OF ATTORNEY—CONSTRUCTION. I.L.R. (1946) Nag. 824=1947 N.L.J. 1 (F.B.).

———**O. 3, R. 4**—*Appointment of counsel—Termination—Leave of Court subject to payment of fees to counsel—If may be granted—Appointment terminated at counsel's request.*

Under O. 3, R. 4, C. P. Code, no leave of Court is necessary for the appointment of a counsel by a party. A party can engage as many counsel as he desires and are willing to appear and act for him. The leave of the Court is, however, necessary for the termination of the appointment of a counsel once made. The granting of leave being within the power of the Court, the Court may grant the leave, having regard to the circumstances of a particular case, subject to the condition of payment of fees to the counsel whose appointment the party wants to terminate. But the Court cannot direct a party to pay his counsel's fee when the appointment is terminated at the request of the counsel himself. No order can be made by the Court for payment of the fees to an advocate after his retirement from the case. (*Mangalmurti and Kaushalendra Rao, JJ.*) APPLICATION OF AN ADVOCATE TO RETIRE FROM THE CASE. I.L.R. (1950) Nag. 613=5 D.L.R. (Nag.) 102=1950 N.L.J. 254.

———**O. 3, R. 4**—*Discharge of lawyer—Provision for payment of sums due to him—Power of Court.*

Before a Court grants leave to discharge a lawyer under O. 3, R. 4, C. P. Code, it is entitled to make suitable provisions for the payment of the sums due to him in respect of the services rendered by him and in respect of the costs incurred by him on behalf of his client. A party cannot engage another lawyer without formally discharging the previous lawyer and without arranging for payment of the sums due to him. (*Das and Guha, JJ.*) Mohanlal Sewlal *v.* Probodh Krishna Shome. 54 C.W.N. 733=A.I.R. 1950 Cal. 576.

———**O. 3, R. 4**—*Pleader—Authority to compromise—Vakalat—Express power to compromise—If to be given.*

A compromise by an advocate on behalf of his client, in order to be binding, must be shown to be authorised by the client, and it has to be shown that the *vakalatnama* given to the advocate conferred on him power or authority which extended to the compounding of the case on behalf of his client. Whatever be the general powers of advocates appearing without a *vakalatnama,* where the advocate derives his authority to act under a *vakalatnama,* his powers depend upon the instrument which empowers him. Further the advocate signing and filing the compromise petition must indicate that he files it in exercise of the authority to compromise on behalf of his client. 34 C.W.N. 452 (P.C.), ref. (*Reuben and Das, JJ.*) Shital Prasad Singh *v.* Surendra Nath. A.I.R. 1950 Pat. 253.

———**O. 3, R. 4**—*Power of attorney—Construction—Pleader engaged in Trial Court authorised to prefer appeal or to engage another for that purpose—Appeal to High Court—Pleader not empowered to appear in High Court—If can get appeal filed through another.*

A person who applied to be impleaded as a party under O. 22, R. 10, C. P. Code, appointed one *A*, a vakil, to appear for him in the trial Court. The power of attorney expressly authorised the vakil to prefer an appeal in regard to any matter arising out of the suit or to engage another Vakil or Barrister for that purpose. As the application was disallowed, an appeal had to be preferred to the High Court, the valuation of the suit being above Rs. 5000. *A* appointed *B* to file the appeal. It was contended for the respondent that as *A* was only a pleader and could not appear in the High Court, the power of attorney must be so construed as to permit him to file an appeal or to get an appeal filed before the District Judge only and not in the High Court. It was also contended that if he could not file an appeal himself in the High Court, he could not appoint another vakil or Barrister to present an appeal to the High Court. Overruling these contentions,

Held, that assuming that *A* had no power to appear in the High Court, he could under the power of attorney appoint *B* to file the appeal and that, therefore the presentation of the appeal by *B* could not be held to be defective. (*Abdur Rahman, J.*) Kartar Singh *v.* Sanjhe Khan. 224 I.C. 129=1946 Lah. (Rul.) 145=A.I.R. 1946 Lah. 263.

———**O. 3, R. 4**—Scope—Advocate of High Court (O. S.)—Right to act in moffusal Court without vakalat—Presentation of plaint without vakalat—Effect—Irregularity—Decree — If Invalid—C. P. Code, S. 99. [*See* Q.D. 1941-1945, Vol. I, Col. 1061.] Hirabai *v.* Bhagirath & Co. I.L.R. (1945) Bom. 819=224 I.C. 210=1946 Bom. (Rul.) 180=A.I.R. 1946 Bom. 174.

———**O. 3, R. 4 and U. P. Revenue Court Manual, Para. 56**—*Proceedings under U. P. Land Revenue Act—Third appeal—Applicability of R. 4 of O. 3, C. P. Code, in regard to vakalat—Proper law applicable.*

R. 4 of O. 3, C. P. Code, does not apply to proceedings under U. P. Land Revenue Act. Hence where a third appeal is filed, a fresh vakalat is necessary for the pleader to file it even though he might have filed a vakalat in second appeal. The question is governed by R. 56 of the U. P. Revenue Court Manual. (*Lal, J.M. J.*) Janki *v.* Sugriva. **1949 R.D. 185.**

———**O. 3, R. 4**—*Vakalat—Power under—Duration of—Advocate reporting of no instructions—Effect on vakalat filed—Same vakalat, if can be used for filing application to set aside* ex parte *decree passed in the suit.*

Where an advocate reports no instructions, it means he withdraws his vakalat.

Hence, the same vakalat filed in a suit cannot be used to file an application to set aside the *ex parte* decree passed in the suit on the advocate's withdrawal. 47 M.L.J. 398; I.L.R. 47 Mad. 819 (F.B.), ref. (*Horwill, J.*) Krishna Pillai *v.* Ranganatha Pillai. 1950 M.W.N. 776 (1)=(1950) 2 M.L.J. 759.

———**O. 3, R. 4 (2)**—Order directing withdrawal of counsel from suit—Evidence of counsel material in suit—Inherent power of Court. *See* C. P. Code, S. 151. 1950 N.L.J. 187.

———**O. 3, R. 4 (2)**—*Partial revocation of power of attorney—Writing and leave of Court—Necessity for.*

Under O. 3, R. 4 (2), C. P. Code, a power of attorney can be revoked either wholly or partially only by a writing and with the leave of the Court. The words "shall be deemed" leave no option and the Court is bound to regard the power of attorney to be in force until it has been brought to an end in the manner provided in the sub-clause. (*Abdul Rahman, J.*) Sant Singh *v.* Rattan Singh. 225 I.C. 343=48 P.L.R. 20=A.I.R. 1946 Lah. 266.

———**O. 4, R. 1**—*Scope—Suit when "instituted"—Compliance with O. 6, Rr. 14 and 15—Necessity—If condition precedent.*

The Court has always got the discretion if a plaint is not properly presented or is not signed and verified in accordance with the provisions of Rr. 14 and 15 of O. 6, C. P. Code, to allow the plaintiff to remedy the defect at a later stage even though the period of limitation may already have expired. But that is a matter of discretion of the Court which the Court exercises after due consideration of all the facts and circumstances of the case before it. Where, while granting the amendment or the opportunity to the plaintiff to cure the defect, the Court reserves unto the defendant the right to plead the bar of limitation the defendant would not be deprived of his right to plead the bar of limitation, and the plaint has to meet that point when properly raised by the defendant at any subsequent stage. In order, however, that a plaint can be properly presented to the Court it must comply with the provisions of O. 6, Rr. 14 and 15; and unless and until a plaint is presented to the Court complying with that a proper plaint is presented to the Court, and unless such a proper plaint is presented to the Court, it cannot be said that the suit has been instituted in the Court by a party. A plaint which has not been properly signed and verified in accordance with O. 6, Rr. 14 and 15, is not a proper plaint presented to the Court and no suit is therefore instituted within the meaning of O. 4, R. 1. 34 Bom. L. R. 628, commented; 47 I.A. 255; 46 All. 637; 54 All. 57: 17 Cal. 580; 54 Cal. 380, dist. and expl.; 46 Bom. 150, foll. (*Bhagwati, J.*) PRINCE LINE, LTD. *v.* TRUSTEES OF THE PORT OF BOMBAY. 51 Bom.L.R. 1004=A.I.R. 1950 Bom. 130.

———O. 5, R. 10, Proviso (Lahore)—*Service by registered post after trying other modes—Permissibility.*

Under the proviso to R. 10 of O. 5, C. P. Code, which has been added by the High Court of Lahore service of summons can be effected by registered post before and not after any other mode of service has been tried. It follows as a consequence that it is not open to a Court to effect service by post if an attempt has been made to effect service by another mode. (*Bhandari, J.*) MOHAN LAL KAJRIWAL *v.* SUNDARLAL NAND LAL. 4 D.L.R. (Simla) 142=A.I.R. 1949 E.P. 295 =51 P.L.R. 57.

———O. 5, R. 17—*Refusal to accept notice—Procedure to be followed.*

Where there is a refusal to accept service there is no due service and hence substituted service has to be effected. (*Ram Labhaya.*) YASIN KHAN *v.* BALU RAM. 1949 A.M.L.J. 21.

———O. 5, R. 17 (as amended by Calcutta High Court)—*Service by affixture—Validity—Conditions—Summons to pardanashin lady.*

Under O. 5, R. 17, C. P. Code (as amended by Calcutta High Court) service of summons by affixation of a copy on the outer door can only be done, either, where the defendant refuses to sign the acknowledgment as mentioned in the first part of the rule, or, in the circumstances mentioned in the second part. To allow it to be done within the second part of the rule several conditions have to exist. Firstly, the defendant must be absent from his residence at the time when service is sought to be effected on him, secondly, there is no likelihood of his being found thereat within a reasonable time, and thirdly, there must be no agent or other persons upon whom service can be made. The Rule and the facility for service by affixation is not intended to be universally applicable in every case where the party to be served with the summons is a *pardanashin* lady. It is clear that if such lady is present in her house at the time when the summons is sought to be served by the peon on her, there can be no proper service of the writ of summons on her by the peon reading aloud the purport of the summons and thereafter affixing a copy of the summons on the outer door of her house, although no adult male member of the family was found who is residing with her. 51 C.W.N. 189, rel. on. (*Ormond, J.*) DISTRICT BOARD OF TIPPERAH *v.* SARAFAT ALI. 2 D.R. 242.

———O. 5, R. 17—*Service of summons by affixation—Validity—Conditions.*

O. 5, R. 17, C. P. Code, makes it quite clear that the service of summons by affixation would be valid if one or the other of the following two conditions are satisfied, namely, (1) if the defendant or his agent or such other person as is mentioned in Rr. 13 to 15 refuses to sign the acknowledgment, or (2) if the serving officer after using all due and reasonable diligence cannot find the defendant and there is no agent or other person on whom service can be made. A serving officer cannot be deemed to have exercised due and reasonable diligence unless he has made a real and substantial effort after proper enquiries to find the defendant. 19 C. 201, 43 C. 447, 1924 Oudh 237, 1924 Cal. 1004, 1925 Cal. 627 and 801, 1930 Lah. 192, 1939 All. 180 and 1923 Pat. 433, rel. (*Bhandari, J.*) MOHAN LAL KAJRIWAL *v.* SUNDAR LAL NAND LAL. 4 D.L.R. (Simla) 142=A.I.R. 1949 E.P. 295=51 P.L.R. 57.

———O. 5, R. 17 (as amended by Calcutta High Court)—*Service on business man at his residence—Rule, when complied with.*

Per *Gentle, J.*—O. 5, R. 17, C. P. Code, as amended by the Calcutta High Court is no less stringent than it was prior to the amendment. If the defendant is a businessman, there is no compliance with this rule unless the serving officer goes to his business premises to find him during business hours or if he goes to his private residence, he should go there during such hours of the day when ordinarily he would be expected to be found at those premises.

Per *Ormond, J.*—If it is desired to serve a writ of summons at the defendant's residence in a case where the defendant is known or expected to be or likely to be away from his residence during business hours, suitable arrangements should be made in the sheriff's office for process-servers to serve writs of summons either early in the morning or in the evening after office hours. (*Gentle and Ormond, JJ.*) JHABARMULL DUDHWALLA *v.* BHAGATRAM. I.L.R. (1946) 2 Cal. 495=51 C. W.N. 189.

———O. 5, R. 19 and O. 9, R. 13—Ex parte *decree—Duty of Court to record finding that summon has been duly served.*

The only material on which a Court could come to a conclusion that a summons has been duly served is the endorsement verified on oath on the summons itself, and the Court is not entitled to proceed with the inquiry *ex parte* and pass a decree without an order that the defendant had been duly served. (*Rajagopalan, J.*) MANICKA GOUNDAN *v.* KRISHNA GOUNDAN. 61 L.W. 853=1949 M.W.N. 54=A.I.R. 1949 Mad. 396=(1948) 2 M.L.J. 574.

———O. 5, R. 19—*Omission to declare due service in respect of some defendants—Effect of—Jurisdiction of Court over parties present.*

Under O. 5, R. 19, Civil Procedure Code, the declaration of due service in express terms is not imperative and the declaration may be implied in the proceedings. Even if an express declaration of due service is necessary, the omission to declare due service in respect of some defendants under the rule would be an irregularity on the basis of which those defendants may ask for an opportunity to be heard. It would not affect the jurisdiction of the Court as regards parties that are present before the Court. A.I.R. 1932 Oudh 326 and A.I.R. 1934 Lah. 985, approved. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Sampatlal Keshan *v.* Baliprasad Shah. 54 C.W.N. 92=A.I.R. 1950 Assam 6.

———**O. 5, R. 20**—*Order for substituted service without recording reasons—Legality.*

Where substituted service is ordered without even mentioning that the officer was satisfied that a contingency provided for in R. 20 of O. 5, C. P. Code, did exist, the order is defective. (*Lal, J.M. I.*) Ram Dayal *v.* Narain Das. 1948 A.W.R. (Rev.) 222=1948 R.D. 366.

———**O. 6, R. 2**—*Adverse possession—Mode of pleading.*

Where a plaintiff alleges hostile title and leads evidence of possession for the statutory period which, if accepted, would extinguish the title of a true owner, it is not necessary for him to plead in terms advevrse possession, for, whether such possession is adverse or not is a question of evidence and not a matter of pleading. 1947 P.C. 15, rel. on. (*Thadani and Constantine, JJ.*) Aboobucker *v.* Sahibkhatoon. I.L.R. (1947) Kar. 224=A.I.R. 1949 Sind 12.

———**O. 6, R. 2**—*Issue in suit if plaintiff has title to property—Case of plaintiff that he purchased it from full owner—Plea that he is atleast ostensible owner—If covered by the issue.*

Where the case of the plaintiff is that he purchased the suit property from one who is a full owner and the issue framed in the suit is whether the plaintiff had acquired any right, title and interest to and in the suit property, it is open to him to urge that if the transferor was not the full owner he was atleast an ostensible owner who conveyed the property to him under the circumstances which bring his case under S. 41 of the T. P. Act. Such a plea can be taken as involved in the issue and its consideration would be permissible. (*Thadani, C.J. and Ram Labhaya, J.*) Abdul Gafur *v.* Nawab Ali. A.I.R. 1949 Assam **17**.

———**O. 6, Rr. 2 and 4**—Pleadings—Statement of necessary particulars—Object. [*See* Q.D. 1941-1945, Vol. I, Col. 1064.] London and Lancashire Insurance Co., Ltd. *v.* Benoi Krishna Mitra. 18 R.C. 143.

———**O. 6, R. 7**—*New case—Permissibility—Issue wide enough to cover new case.*

Where the issue as settled is sufficiently wide to cover the case newly set up by the defendant and which is a departure from the position adopted by him in his written statement, and all the documents relating to it are before the Court so that no prejudice could be caused to the plaintiff, the Court may dispose of the case on the new plea. (*Ghulam Hasan, C.J. and Kidwai, J.*) Parbhu Narain Singh *v.* Jitendra Mohun Singh. 22 Luck. 522=1947 O.W.N. 421=1947 A.W.R. (C.C.) 301=1947 O.A. (C.C.) 301=A.I.R. 1948 Oudh 307.

———**O. 6. Rr. 7 and 17 and O. 8, R. 9**—*New plea—Proper mode of raising.*

Under R. 7 of O. 6, no pleading, except by way of amendment, is allowed to raise any new ground or claim. Amendment of pleadings is

permissible under R. 17 of O. 6. Subsequent pleadings may also be filed by the leave of the Court under R. 9 of O. 8, C. P. Code. (*Lal, J.M. I.*) Dasrath Singh *v.* Ram Ugra Narain Singh. 1949 R.D. 188.

———**O. 6, Rr. 7 and 17**—*Scope—Amendment changing subject-matter of suit at late stage—Permissibility.*

There is no hard and fast rule of law which forbids the making of a amendment to a plaint, if necessary for the ends of justice, even at a late stage, though, in general, such amendments are disallowed. At the same time it must be held that there is no power in the Court to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit. Where a suit has been instituted for dissolution of a partnership on the terms of a particular deed of partnership relied in the plaint, it would not be right or permissible to allow an amendment, especially at a late stage, to set up a partnership on terms different from those relied on in the plaint, originally filed. Such an amendment would infringe the rule against a departure in pleadings. (*Blagden, J.*) Ramjohn Mehomoodin *v.* Yahyabhai Abdul Kayum. 231 I.C. 182=48 Bom. L.R. 723=A.I.R. 1947 Bom. 149.

———**O. 6, R. 14 and S. 99**—*Plaint not signed by all the plaintiffs—Effect—Decree—If to be interfered with on appeal.*

Where a plaintiff has not signed a plaint filed with his knowledge and consent it is an omission which can be cured and should be corrected in the interests of justice. The omission to sign or verify a plaint is not such a defect as could affect the merits of a case or the jurisdiction of the Court. The curing of the defect comes within the provisions of S. 99 of the C. P. Code. (*Gentle, C.J. and Yahya Ali, J.*) Subbiah Pillai *v.* Sankarapandiam Pillai. 61 L.W. 220=A.I.R. 1948 Mad. 369=1948 M.W.N. 190=(1948) 1 M.L.J. 227.

———**O. 6, Rr. 14 and 15**—Scope—Non-compliance—Effect—Plaint not properly signed and verified—If duly presented or instituted in Court. *See* C. P. Code, O. 4, R. 1. 51 Bom.L.R. 1904.

———**O. 6, Rr. 14 and 15**—*Signing and verification by all plaintiffs—Necessity.*

There is no rule that all persons named as co-plaintiffs should sign and verify the plaint and so the absence of such verification and signing cannot be used as a ground for dismissing the suit. I.L.R. 17 Cal. 580, rel. on. (*Atma Charan, J.C.*) Ladu Lal *v.* Mangu. A.I.R. 1950 Ajmer 30 (2).

———**O. 6, R. 14 and O. 30, Rr. 1 (2) and 6**—*Written statement of firm—If may be signed by agent of one of partners.*

There is no provision in the C. P. Code, restricting in any way the application of O. 6, R. 14, C. P. Code, to suits against firms under O. 30, C. P. Code. Consequently, when under O. 30, R. 6, a partner appears individually in his own name and files a written statement on behalf of the firm, it would be competent for him to authorise another person to sign such written statement although that person is not a duly authorised agent of the firm. (*Majumdar, J.*) Kanhyalal Kanodia *v.* Select Pictures Circuit. 50 C.W.N. 850.

———O. 6, R. 15—*Pauper application not properly verified—Proper procedure.*

A Court should not reject a pauper application on the ground that it is not properly verified without giving the applicant an opportunity of amending the application. 55 A. 216, 1936 All. 475, 1937 Nag. 108 and 1932 Lah. 548, foll. (*Ramabhadran, J.C.*) Mt. Sobhag Kanwar *v.* Jugraj. 4 D.L.R. (A.M.) 50=A.I.R. 1949 Ajmer 37=1949 A.M.L.J. 53.

———O. 6, R. 15—*Verification of pauper application—Proper mode.*

The proper course to verify a pauper application is to specify separately which paragraphs are verified on applicant's knowledge and which other paragraphs upon information received or believed to be true. A verification to the effect that all the paragraphs in the application except the paragraph containing the prayer are true to the best of the applicant's knowledge and instructions is not proper. (*Ramabhadran, J.C.*) Mt. Sobhag Kanwar *v.* Jugraj. 4 D.L.R. (A.M.) 50=A.I.R. 1949 Ajmer 37=1949 A.M.L.J. 53.

———O. 6, R. 17—*Amendment—Stage.*

Where the petition for amendment of the plaint is made after the issues have been struck but before the recording of evidence had begun, it could not be said that in such circumstances, the plaintiff had put in the application for leave to amend with any delay and leave ought not to be refused. (*Atma Charan, J.C.*) Mt. Kasturi *v.* Sundar Lal. 5 D.L.R. (A.M.) 32 (1).

———O. 6, R. 17—*Amendment allowed—If to be subject to law of limitation.*

An amendment allowed under R. 17 of O. 6, C. P. Code, has to be subject to the law of limitation. (*Lal, J.M. I.*) Chunni Kuer *v.* Daya Shankar. 1948 R.D. 433.

———O. 6, R. 17—*Amendment allowing new plea or defence—Permissibility.*

An amendment of a written statement which seeks to introduce a new or inconsistent plea, and which is in the nature of a complete change of front in the defence ought not to be allowed. It is true the Court has wide powers of amendment, but amendments will be allowed only for the purpose of determining the real questions in controversy between the parties. (*Puranik, J.*) Chunnilal *v.* Deoram. 229 I.C. 63=A.I.R. 1948 Nag. 119=1947 Nag. (Rul.) 71.

———O. 6, R. 17—*Amendment by way of addition of prayer for possession in a suit for declaration—If can be allowed.*

Where in a suit for declaration in respect of a sale-deed and gift-deed the plaintiff wants to add a prayer for possession (if it is found that he was out of possession) it is not a new plea, nor a new case and as such there is reason for refusing leave to amend the plaint. (*Atma Charan, J.C.*) Mt. Kasturi *v.* Sunder Lal. 5 D.L.R. (A.M.) 32 (1).

———O. 6, R. 17—*Amendment in appeal—Introduction of new causes of action—Permissibility*

It is true that Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. But it would introduce endless confusion and embarrassment if litigants are allowed to agitate in appeal causes of action on which they have not relied at the trial. (*Davis, C. J. and Constantine, J.*) Lutufallar Khudabakhsh *v.* Mahomed Sidik. I.L.R. (1946) Kar. 207=223 I.C. 307=1946 Sind (Rul.) 149 =A.I.R. 1946 Sind 117.

———O. 6, R. 17—*Amendment of plaint—Alternative claim flowing from cause of action alleged—Bar of limitation—Question to be decided after evidence is taken—Amendment to be allowed.*

In a suit for declaration of the plaintiff's title to plaint mentioned properties and for recovery of possession and mesne profits based on the strength of a sale deed executed by the defendants in his favour, the contention of the defendants was that the document in favour of the plaintiff was a nominal one and unenforceable. The plaintiff filed an application for amending the plaint by introducing a new paragraph claiming an alternative relief for a decree for the refund of the amount of the consideration alleged by him to have been paid to the defendants. It was dismissed on the ground that the claim for refund was barred by limitation. In revision,

Held, that the question whether the claim for refund was barred by limitation or not should be decided after the evidence was taken and that as the alternative claim of the plaintiff flowed from the cause of action already alleged in the plaint, leave to amend the plaint should be granted. (*Satyanarayan Rao, J.*) Doddana Gowd *v.* Sankarappa. 1947 M.W.N. 613 (1)=(1947) 2 M.L.J. 335.

———O. 6, R. 17—Amendment of pleadings—Alteration in nature and complexion of suit—Suit for possession of partitioned property—Alternative case on footing of parties being joint—Whether can be brought in by amendment. [*See* Q.D. 1941-1945, Vol. I, Col. 1067.] Seshacharyulu *v.* Lakshminarayanacharyulu. 224 I. C. 90=A.I.R. 1946 Mad. 105.

———O. 6, R. 17—*Amendment of plaint—Amendment altering form of relief in view of subsequent decision of Privy Council—Grant of.*

The Court has power to grant an amendment of the plaint seeking alteration in the form of the relief to be granted, which has become necessary in view of a subsequent judgment of the judicial committee, when the facts constituting the cause of action as stated in the body of the plaint remain unaffected. (*Bose, J.*) Someswar Banerji *v.* Union of India. 85 C.L.J. 364.

———O. 6, R. 17—Amendment of plaint Amendment in appeal—Plaintiff suing to recover property in personal capacity—If can be allowed to sue as trustee. [*See* Q.D. 1941-1945, Vol. I, Col. 1069.] Kalayani Prosad Singh *v.* Borrea Coal Co. 223 I.C. 515=1946 Cal. (Rul.) 189=A.I.R. 1946 Cal. 123.

———O. 6, R. 17—*Amendment of plaint—Amendment seeking to add another ground of ex-*

emption from limitation—If may be disallowed on ground of delay.

An amendment of plaint which seeks to add one more ground of exemption from limitation to the grounds already shown in the plaint should be readily allowed, particularly when that ground is based on a letter of the defendant on which he himself relies in his written statement. Neither delay nor the non-production of the letter by the plaintiff can be a valid ground for disallowing it. Such an amendment does not introduce a fresh cause of action or change the cause of action. It is only when the amendment applied for is of a fundamental character that the question of delay becomes material. On the other hand where the amendment is not of a fundamental character it should be allowed readily and at any stage except that the other side may in suitable cases be compensated by the award of costs. (*Bose and Padhye, JJ.*) FATECHAND *v.* WASUDEO. I.L.R. (1947) Nag. 477=A.I.R. 1948 Nag. 334=1947 N.L.J. 417.

——O. 6, R. 17—*Amendment of plaint—Amendment when suit would be barred—If can be allowed.*

***Quaere*: whether it is open to the Court to grant leave to amend a plaint where the proposed amendment would deprive the defendant of the plea of limitation? 11 M.I.A. 468, 47 I.A. 255; 43 Cal. 95; 45 Cal. 305; 22 C.W.N. 104; 26 C.W.N. 73; 29 P.L.T. 201, ref. (*Sinha and Ramaswami, JJ.*) GAJADHAR SINGH *v.* RADHA PRASAD SINGH. 30 P.L.T. 168.**

——O. 6, R. 17—*Amendment of plaint—Change of cause of action not permissible—Deprivation of right accrued to opposite party by lapse of time—Permissibility.*

Though full powers of amendment must be liberally exercised under O. 6, R. 17, C. P. Code, there is no power to substitute one distinct cause of action for another; further leave to amend will ordinarily be refused where the effect of the proposed amendment would be to take away from the opposite party a legal right which has accrued to him by lapse of time, (*Varma and Beevor, JJ.*) NARENDRA NATH SEN *v.* MAHASOY GANESH PRASAD RAY. 227 I.C. 172=13 B.R. 20=12 Cut.L.T. 10=A.I.R. 1946 Pat. 408.

——O. 6, R. 17—*Amendment of plaint—Fresh and independent cause of action arising after filing of suit—Amendment to introduce—Permissibility.*

A plaintiff bringing a suit on a certain cause of action cannot be permitted by means of an amendment to introduce a new and independent cause of action, arising subsequent to the institution of the suit. If a fresh cause of action arises subsequent to the filing of the suit, the plaintiff may very well institute another suit on that cause of action; but he cannot be allowed to introduce a fresh and independent cause of action by way of amendment of the plaint in the suit. (*Amarendra Nath Sen, J.*) SASHI BHUSAN BANERJEE *v.* TULSI CHARAN BASU. 4 D.L.R. (Cal.) 81=A.I.R. 1950 Cal. 107.

——O. 6, R. 17—*Amendment of plaint—Limitation suit for declaration—Amendment of plaint adding consequential relief on account of circumstances happening after suit.*

Amendment of the plaint at a later stage on account of certain circumstances happening after the institution of the suit, cannot, by any stretch of imagination, be considered to mean the institution of a new suit, particularly when the parties are the same and the dispute is the same. A suit for a declaration without consequential relief filed within limitation cannot become time-barred by the amendment of plaint adding a consequential relief which can be granted to the plaintiff on account of the changed circumstances. (*Kartar Singh Sandhu, J.*) **GONDA SINGH *v.* ZORA SINGH. 5 D.L.R. (Pepsu) 3=A.I.R. 1950 Pepsu 21.**

——O. 6, R. 17—*Amendment of plaint—New cause of action—Suit by holder of impartible estate for declaration that a promissory note and a lease deed executed by him were not binding as obtained by coercion, fraud and undue influence—Death of plaintiff and bringing on record legal representative—Amendment of plaint raising contention that those documents are not binding on the estate—If can be allowed—Holder of impartible estate if can sue for declaration that alienation by him is not binding on the estate.*

A suit was filed by the holder of an impartible estate for declaration that promissory note, and lease deed executed by him were not binding on him on the ground that the execution of the documents was vitiated by coercion, undue influence and fraud. The plaintiff died *pendente lite* and his younger brother was brought on record as his legal representative and successor to the impartible estate and he sought to amend the plaint by raising a contention that the documents were not binding on the estate as it was not competent to his predecessor, who was only a qualified owner to alienate it beyond his lifetime in the absence of necessity.

Held, that as it was not open to the original plaintiff to have raised the plea now sought to be raised by the amendment, and further, even if it were permissible for the original plaintiff to have raised this plea in the plaint itself, the Court ought not to allow him at a subsequent stage to have the plaint amended by the addition of a new plea based upon a cause of action different from that on which the suit was originally laid, it would not be open to his successor to put forward a claim which was not available to his predecessor. The result of allowing such an amendment would be to introduce a completely new element unconnected with and in essence even inconsistent with the grounds originally alleged in support of the plaintiff's claim and it would not be proper to permit the amendment. (*Rajamannar, J.*) ELAVA PILLAI *v.* RAMASAMI JADAYA GOUNDAN. 59 L.W. 677=A.I.R. 1947 Mad. 165=1946 M.W.N. 745=(1946) 2 M.L.J. 373.

——O. 6, R. 17—*Amendment of plaint—Permissibility—Allegations in amended plaint inconsistent with pleadings in original plaint.*

A Court may permit an amendment of plaint if such amendment is necessary for the purpose of determining the real questions in controversy between the parties, although the allegations in the amended plaint are inconsistent with the pleadings of the plaintiff in the original plaint. (*Harnam Singh, J.*) MAN SINGH *v.* RULIA. A. I.R. 1950 E.P. 363.

——O. 6, R. 17—Amendment of plaint—Permissibility—Amendment of plaint in individual capacity into one in a representative capacity. *See* C. P. CODE, O. 1, R. 8. (1946) 2 M.L.J. 462.

——O. 6, R. 17—*Amendment of plaint—Permissibility—Facts alleged in the proposed amendment available even at the time of filing of plaint—Amendment making out a new case on these facts—If can be allowed.*

Where certain facts are alleged in a proposed amendment of the plaint which facts were available to the plaintiffs and which they had not chosen to mention in the original plaint, it would not be open to the Courts to permit such an amendment where it would result in a new case being made out on facts which were available but were not pleaded. (*Krishnaswami Nayudu, J.*) GOPALAKRISHNAMURTHI *v.* SREEDHARA RAO. A.I.R. 1950 Mad. 32=1949 M.W.N. 651=(1949) 2 M.L.J. 421.

——O. 6, R. 17—*Amendment of plaint—Permissibility—Plea of limitation intended to be got over—Amendment with a view to cure a defect—Statutory notice under S. 80, C. P. Code, not given—Refusal of amendment—If justified.*

The plaintiff whose father and brothers were alive brought a suit against the defendant, a village munsiff for recovery of damages to certain sugarcane crop during the period of its attachment by the village munsiff for non-payment of kist and for damages for personal reputation and mental suffering of the plaintiff caused by the attachment. The suit was filed in 1946 while the attachment which was effected in April 1945 has ceased in May, 1945. The plaintiff filed an amendment petition in July 1947 praying to amend the plaint by describing himself as the manager of the joint family consisting of himself, his father and brothers instead of the suit being brought in his own personal capacity as plaintiff. It was shown that if the amendment were allowed it would amount to allowing a suit by the manager of the joint family which would have become barred by that date. It was also shown that the plaintiff had not sent the requisite notice under S. 80, C. P. Code, as manager.

Held, that the amendment should be refused as the object of the plaintiff was not merely to describe himself more fully and correctly, but to obviate the defendant's plea that the plaintiff, not being the pattadar, was not entitled to maintain the suit.

Held further, that the notice could not be construed as one by the manager of the joint family, and that the omission to give a proper notice could be treated as an additional ground for refusing the amendment prayed for. (*Panchapakesa Ayyar, J.*) RAMACHANDRA NAIDU *v.* KANDASWAMI MUDALIAR. 61 L.W. 807=A.I.R. 1949 Mad. 416=1948 M.W.N. 340=(1948) 2 M.L.J. 577.

——O. 6, R. 17—*Amendment of plaint—Permissibility—Suit for ejectment filed under Calcutta Rents Ordinance,* 1946—*West Bengal Premises Rent Control Act,* 1948, *coming into force pending suit—Addition of new ground for ejectment under S.* 12 (3) *of latter Act.*

The plaintiff landlord instituted a suit in ejectment against the defendant while the Calcutta Rent Ordinance, 1946, was in force. The suit was based on a notice to quit and the *bona fide* requirement of the premises for the use and occupation of the plaintiff. While the suit was pending, the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, came into force. The plaintiff applied to amend his plaint by an averment to the effect that the defendant had failed to pay rent for three consecutive months and that by reason of the provisions of S. 12 (3) of the aforesaid Act the tenancy had terminated *ipso facto.*

Held, that the amendment should be allowed as it did not alter the plaintiff's case at all. The plaintiff had sued in ejectment and the suit still remained a suit in ejectment. The cause of action had also not been altered. The plaintiff's cause of action in the original suit was the termination of the tenancy and the plaintiff was relying on the same cause of action and was only adding an additional ground in support of his case that the tenancy had ceased. (*Sen, J.*) AKHIL RANJAN DAS *v.* BISWAS. 54 C.W.N. 536=A. I.R. 1950 Cal. 472.

——O. 6, R. 17—*Amendment of plaint—Plaint for specific performance of contract—Amendment into claim for damages—Permissibility.*

In a proper case a plaint for specific performance can be converted by amendment into a claim for damages for breach of contract and such an amendment does not amount to altering the cause of action or the nature of the suit. The consideration that in the claim for specific performance the party claiming must be ready and willing and must treat the contract as subsisting although the other party has broken it or the consideration that a party claiming for damages need not treat the contract as subsisting does not alter the nature and character of the cause of action in the suit which remains in either case breach of contract. 55 I.A. 360, rel. on. (*Mukherji, J.*) RAJENDRA NATH SAHA *v.* SREE SARASWATI PRESS, LTD. 86 C.L.J. 186.

——O. 6, R. 17—*Amendment of plaint—Plaint not containing averment of service of notice under S.* 80—*If improper—Amendment including averment—Permissibility—Date of suit.*

Where a notice of suit as required by S. 80, C. P. Code, is in fact served, but the fact of such service is not averred in the plaint which is filed, it is competent to the Court to allow an amendment of the plaint, so as to enable the necessary averment to be made in it; it cannot be said that the original plaint is not validly presented and that the date of the amendment is the date of the institution of the suit. (1935) Pat. 86, Rel. (*Sinha and Ramaswami, JJ.*) GOVERNOR-GENERAL

IN COUNCIL *v.* KASIRAM MARWARI. 29 P.L.T. 477=A.I.R. 1949 Pat. 268=4 D.L.R. (Pat.) 24.

———O. 6, R. 17—*Amendment of plaint—Plaint really within jurisdiction of higher court—Court allowing amendment to bring it within its own jurisdiction—Propriety.*

It is ordinarily not open to a Court, though there may be some exceptional circumstances which may justify the course, to allow an amendment of any plaint which may help to bring within its own pecuniary jurisdiction a doubtful plaint really within the jurisdiction of a higher Court. It is ordinarily its duty to decide its own jurisdiction to try the original plaint filed before it. (*Mack, J.*) MUTYALAMMA *v.* NARAYANASWAMI. 1949 M.W.N. 434=A.I.R. 1949 Mad. 719=(1949) 1 M.L.J. 589.

———O. 6, R. 17—*Amendment of plaint—Principles—Addition of new causes of action arising after suit—Permissibility.*

The most important principle governing amendment of plaint is that amendments should be allowed if by doing so, multiplicity of suits may be avoided. In exceptional circumstances like the occurrence of devolution of interest by death or otherwise, it is open to the Court to allow an amendment of the plaint so as to add to the original cause of action new causes of action which have arisen after the institution of the suit, when all these causes of action are allied to one another on the allegations made by the plaintiff. (*Sinha, J.*) THAKUR MAHTO *v.* JAGO KUER. 12 B. R. 383=223 I.C. 294=1946 Pat. (Rul.) 175=A.I.R. 1946 Pat. 429.

———O. 6, R. 17—*Amendment of plaint—Substituting fresh declaration after deficit court-fee was ordered to be paid—If can be allowed.*

Where after a plaintiff was ordered to pay deficit court-fee the plaintiff applied to grant him leave to amend the plaint by substituting a prayer for declaration that he was entitled only to a leasehold interest in the land title to which was claimed absolutely by him in the original plaint, and the objection was raised that since an order had been already made on the original plaint for payment of deficit court-fee the present application for amendment should not be allowed.

Held, under O. 6, R. 17, C. P. Code; the Court has sufficient power in appropriate cases to permit amendment of pleading and this power can naturally be exercised till the plaint is actually rejected. The circumstance that the amendment of the plaint was sought only after the demand for the deficit court-fee had been made cannot stand in the way of amendment being allowed if it would be otherwise proper.

Decision in C.M.P. No. 6269 of 1945 of Kuppuswami Aiyar, J., and 44 Cal. 352, distinguished. (*Balakrishna Ayyar, J.*) GOVINDARAJA MUDALIAR *v.* SARAVANA MUDALIAR. 62 L.W. 206=A.I.R. 1949 Mad. 640=1949 M.W.N. 293=(1949) 1 M.L.J. 331.

———O. 6, R. 17—*Amendment of plaint prayed for by one of several plaintiffs—If may be allowed.*

Under O. 6, R. 17, C. P. Code the Court has jurisdiction to allow in suitable cases an amendment of plaint which is prayed for only by one or some of the plaintiffs and not by all of them. (*Henderson, J.*) SARADINDU SEKHAR *v.* AMIYA PAL. 50 C.W.N. 518.

———O. 6, R. 17—*Amendment of plaint required by death of defendant—Suit for partition and possession of his share by adopted son against adoptive father—Death of latter before service of summons—His widow and daughter added as legal representatives—Denial by them of adoption and setting up of will in their favour—Amendment asking for possession of the whole property after ejecting the defendants—Only a just development of original case—No variation or alteration of the fundamental character of the suit.*

In a suit by an adopted son against his adoptive father for partition and possession of his half share, the father died before the service of summons and thereupon his widow and daughter were brought on record. They denied the adoption and set up a will in their favour by the deceased. As a consequence of this the plaintiff feeling obliged to ask for reliefs appropriate to the altered situation applied for an amendment of the plaint. By the amendment he sought to plead that by reason of the death of his adoptive father, the whole of the suit property passed to him according to Hindu Law and that he had therefore absolute right to obtain possession thereof and that the widow and daughter had no rights at all as the will set up by them was not genuine. He asked for the delivery of possession of the property ejecting the defendants therefrom. On a contention that the amendment altered the nature of the suit therefore ought not to be allowed,

Held, negativing such contention, that having regard to the nature of the original and amended pleadings it cannot be said that there is such variation thereof in the amendment asked for that in giving effect to the spirit of O. 6, R. 17, C. P. Code, the amendment ought to be refused. The necessity for amendment arose out of circumstances which happened after the filing of the suit. The real basis or foundation of the claim in either situation is the alleged adoption. It was a necessary and just development of the plaintiff's original case that he should ask for physical possession of the property on the strength of his alleged right of adoption and in doing so it cannot be said that there is an alteration or variation of the fundamental character of the suit or that it is a case where one cause of action has been substituted for another. There is no new cause of action as the title remains the same and in any case there is no prejudice caused to the defendants. (*Yahya Ali, J.*) BHIMUDU *v.* PITCHAYYA. 227 I.C. 266=1946 M.W.N. 336=59 L.W. 624=A.I.R. 1946 Mad. 497=(1946) 1 M.L.J. 462.

———O. 6, R. 17—*Amendment of plaint—Suit for possession of temple property transferred without authority—Amendment asking for cancellation of sale—If changes cause of action.*

A trustee of a temple filed a suit for recovery of possession of certain properties which he claimed to belong to the temple against the defendants to whom another trustee had purported to mortgage them without auhority. He also asked for the cancellation of the mortgage. There was a decree, but it was set aside on appeal and the case remanded for trial with liberty to the defendants to file additional statements and permission to the plaintiff to amend his plaint by adding new parties, if any plea of non-joinder was raised by the defendants. The plaintiff added as defendants a subsequent vendee of the same properties from the same trustee who originally mortgaged them without authority and also his lessee. At the hearing, the plaintiff applied to amend his plaint by inserting a claim for cancellation of the sale deed in favour of such transferee and for possession against him and his lessee. On a contention that it should not be allowed as it had the effect of changing the cause of action,

Held, that the suit was to be regarded as one for possession of the properties and it was proper that the claim should be fully decided in these proceedings. Under the circumstances, it would be most improper to refuse the amendment asked. (*Clark, J.*) Panchaksharam Pillai *v.* Rangaswami Pillai. 61 L.W. 328=A.I.R. 1948 Mad. 332=1948 M.W.N. 312=(1948) 1 M.L.J. 337.

———**O. 6, R. 17**—*Amendment of plaint—Suit for possession on basis of sale deed—Amendment after limitation to convert suit into one for possession as usufructuary mortgagee—Permissibility.*

Where a valuable right has accrued to a defendant, it is only in very exceptional circumstances that the Court may allow an amendment of the plaint overriding such rights, ordinarily such an amendment should not be allowed.

Where, after the lapse of twelve years and after a suit on the cause of action had become barred, a party seeks to amend his plaint so as to convert his suit for possession on the basis of a sale deed into one for possession as an usufructuary mortgagee, the amendment ought to be refused both on the ground that a new cause of action is sought to be substituted and that the defendant had already acquired a valuable right by limitation. (*Sen, J.*) Chunilal Bhogilal *v.* Abdul Dawood. 49 Bom.L.R. 748=A.I.R. 1948 Bom. 140.

———**O. 6, R. 17**—*Amendment of plaint—Suit under O. 21, R. 103—Addition of new parties—Inclusion of claim not contemplated by R. 103.*

Ordinarily, when a suit is brought against certain persons, *A, B* and *C,* for obtaining possession of certain lands said to be in possession of such persons and it is later found that another person *D* is in possession of some of the properties, it is necessary and proper that *D* should be brought on the record. It will however be unreasonable to grant such a prayer for bringing *D* on the record if at the time the prayer is made, the relief as against *D* is barred by limitation.

It is not correct to say that because a suit has been brought by a party under the provisions of O. 21, R. 103, C. P. Code, nothing else except the relief which is mentioned in R. 103 can be included in such a suit. The mere fact that the relief prayed for against the persons sought to be newly added as defendants is not of the nature contemplated in R. 103 does not justify the conclusion that the nature of the suit will be altered substantially if they are added as parties and relief sought against them, or that the relief against them is barred by limitation on account of the suit not being brought within one year after the order was passed in favour of certain other persons under R. 101 of O. 21, C. P. Code. (*Das Gupta and Guha, JJ.*) Syed Sekandar Ali *v.* Dharam Chand Seraogi. 85 C.L.J. 208=A.I.R. 1950 Cal. 566.

———**O. 6, R. 17**—*Amendment of plaint—When to be allowed.*

The ordinary rule is that no amendment of a plaint should be allowed when it would deprive the defendants of a valuable right which they have obtained by virtue of the law of limitation, though in very exceptional circumstances it may be allowed. (*Amarendra Nath Sen, J.*) Corporation of Calcutta *v.* Radhakrishna Dev. 4 D.L.R. (Cal.) 172.

———**O. 6, R. 17**—*Amendment of pleadings—Change in the nature of the case—Prejudice to the other party.*

Where the amendment sought would alter the nature of the original case and would cause prejudice to the opposite party, the amendment ought not to be allowed. (*Verma and Bind Basni Prasad, JJ.*) Baijnath *v.* Ram Pyari. 1946 A.W.R. (H.C.) 555=1946 A.L.W. 334=A.I.R. 1947 All. 59=231 I.C. 75.

———**O. 6, R. 17 and S. 115**—*Amendment of pleadings—Duty of Court—Revision—Power of High Court.*

If an amendment is necessary to decide the real issues between the parties, the amendment should be granted even though the Court may think that the plaintiff or the defendant who seeks the amendment will not be able to establish the facts necessary to support the amended plea or defence.

If the lower Court wrongly rejects an application to amend the pleadings, the High Court can interfere either under S. 115, C. P. Code, or under its powers of superintendence under the new constitution. (*Harries, C.J. and Sarkar, J.*) Abdul Rahim Naskar *v.* Abdul Jabbar Naskar. 54 C.W.N. 445=A.I.R. 1950 Cal. 379.

———**O. 6, R. 17**—*Amendment of pleadings—Duty of Court, when plaint is found defective—Request for amendment at late stage—Refusal—Propriety.*

If in a suit a trial Court finds that a plaint is defective, then it should either order amendment of the plaint then and there or reject it altogether under R. 11 (*a*) of O. 7, C. P. Code. But if it permits the suit to proceed and tries it after framing issues it cannot refuse amendment but nevertheless dismiss it on the ground that it has not been amended. That would be contrary to the provisions of R. 17 of O. 6, C. P. Code, which specifically provides for amendment at any stage of the proceedings. (*Dible, S. M. and Acton, A.M.*) MOHD. RAZA KHAN v. BIBI SAIDA BEGAM. 1946 R.D. 11=1946 A.W. R. (Rev.) 5.

———O. 6, R. 17—*Amendment of pleadings—When to be allowed.*

Where a plaintiff just seeks to remove a clerical error from the plaint and in no way attempts to set up a new case, there is no reason for disallowing his application for leave to amend his plaint. (*Atma Charan, J.C.*) RAM SWARUP *v.* MT. NASIBI. 5 D.L.R. (A.M.) 28=A.I.R. 1950 Ajmer 32 (1).

———O. 6, R. 17—Amendment sought ousting pecuniary jurisdiction of the Court—Proper procedure. *See* SUITS VALUATION ACT (VII of 1870), S. 8. (1948) 2 M.L.J. 412.

———O. 6, R. 17—*Applicability—Scope—Appeal from compromise decree—Amendment seeking to convert into appeal from order recording compromise—Permissibility—Powers of Court.*

O. 6, R. 17, C. P. Code, does not specifically apply to appeals, but the same principle must apply. The effect of S. 107, C. P. Code, is to apply to the amendment of a memorandum of appeal, ***mutatis mutandis*** **the provisions** of the Code relating to the amendment of a plaint. The Court has no power to allow an amendment so as to convert an appeal against a compromise decree into an appeal against the order recording the compromise giving rise to the compromise decree. (*Bennett and Beevor, JJ.*) IDRISHAIDER *v.* HEMAYAT HUSSAIN. 26 Pat. 83=A.I.R. 1948 Pat. 97.

———O. 6, R. 17—*Application for amendment—Applicant guilty of* suppressio veri—*Application if liable to dismissal.*

Where a defendant is guilty of ***suppressio veri*** in making an application for amendment of his written statement under O. 6, R. 17, C. P. Code, his application is liable to dismissal. (*Harnam Singh, J.*) NATIONAL FIRE & GENERAL INSURANCE CO., LTD. *v.* MOOL SINGH GURDEV SINGH. 52 P.L.R. 374.

———O. 6, R. 17—*Application for amendment of written statement—Laches of defendant—Refusal of amendment—Propriety—Falsity of the case in the amendment—If can be gone into at that stage—Application if belated, when trial has not begun.*

Where the defendant seeking an amendment of the written statement is guilty of gross laches in not setting out the necessary facts earlier and which he ought to have set out even in the original statement, refusal of the amendment on that ground would be too drastic a penalty. For such laches, it is enough to saddle him with costs, which are the supreme panacea for all procedural ills.

When a Court has to decide whether the amendment of a written statement is to be allowed or not, that is not the stage when it can canvass the truth or falsity of the allegation in the proposed amendment and such allegations need not and shoud not be gone into then.

An application for amendment of the written statement cannot be said to be so belated as to deserve a refusal of the prayer where the trial of the case has not yet begun; amendments are allowed even in the course of first appeal and second appeal in deserving cases. (*Panchapakesa Ayyar, J.*) DHARMALINGA CHETTI *v.* KRISHNASWAMI CHETTY. 1949 M.W.N. 71=A.I.R. 1949 Mad. 467=(1948) 2 M.L.J. 644.

———O. 6, R. 17—*Claim based on specific alternative titles—Amendment relying upon a third title—If can be allowed.*

Where the plaintiff's case was originally based on two specific alternative titles, namely, (1) a title as the adopted son of a deceased person to whom the suit properties admittedly belonged and (2) a title as the legatee under the will of the said deceased person, he cannot be allowed to amend his plaint so as to enable him to rely upon a third title, namely, title, under an earlier will if, for any reason, the will propounded by him is found to be not true. (*Rajamannar, J.*) SESHAMMA *v.* SESHADRI AYYANGAR. 60 L.W. 503=1947 M.W.N. 539=A.I.R. 1948 Mad. 179=(1947) 2 M.L.J. 183.

———O. 6, R. 17—*Discretion and duty of Court—Principles governing amendment.*

While under the first part of R. 17 of O. 6, C. P. Code, it is left to the discretion of the Court to amend or not, the second part of the rule makes it imperative on the Court to make all such amendments as may be necessary for determining the real matter in controversy between the parties. As soon as it appears that the way in which a party has framed, his case will not lead to a decision of the real matter in controversy it is as much a matter of right on his part, as it is a duty on the part of the Court, to have it corrected, especially when the amendment does not cause any prejudice to the other party or substitute a totally new case for the original case. 39 I.A. 218; 48 I.A. 214, ref. (*Bannerjee, J.*) JAI KISSEN *v.* MT. RAM RAKHI. A.I.R. 1950 H.P. 12.

———O. 6, R. 17—*Discretion of Court—Amendment not introducing new case but only deleting part of case originally set up and retaining part—No question of limitation—Propriety of amendment.*

Where the effect of an amendment is not to introduce any new cause of action, or any new case, but only amounts to retention of a part of the case as grounded originally and deletion of another part, and there is no question of any bar of limitation, it cannot be said that the order allowing such an amendment is improper or illegal, especially when the defendant has been awarded costs and has accepted the same. (*Pollock and Shevde, JJ.*) KANNALAL DAMRULAL *v.* BHAGWANDAS. I.L.R. (1948) Nag. 913=A.I.R. 1949 Nag. 5=3 D.L.R. (Nag.) 94.

———O. 6, R. 17 and S. 80—*Discretion of Court—Amendment of plaint—Cause of action specified in notice under S. 80 not affected thereby.*

If the amendment of plaint asked for would introduce a new cause of action not specified in the notice under S. 80, C. P. Code, such an amendment could not be allowed without serving a fresh notice embodying the cause of action proposed to be introduced by the amendment. If however the cause of action is not affected by the proposed amendment and there is no reason to suppose that the plaintiff has acted otherwise than *bona fide* throughout, it is eminently a fit case for exercising the discretion in favour of allowing the amendment of the plaint asked for. (*Bose, J.*) Someswar Banerji *v.* Union of India. 85 C.L.J. 364.

———**O. 6, R. 17**—*Discretion of Court—Delay in applying for amendment—Effect of.*

It is a necessary condition for the exercise of the Court's discretion under O. 6, R. 17, C. P. Code, that the applicant should be acting in good faith. Where there is delay in applying for amendment, Courts are justified in inferring want of *bona fides*. (*Ram Labhaya, J.C.*) Beni Prasad *v.* Narayan Glass Works, Makhanpur. A.I.R. 1949 Ajmer 19=4 D.L.R. (A. & M.) 81.

———**O. 6, R. 17**—*Form of relief—Amendment relating to—Permissibility.*

Under O. 6, R. 17, C. P. Code, the Court may allow at any stage of the proceedings an amendment relating solely to the form of granting the relief to which a party is entitled upon the facts and circumstances previously discolsed and discussed. (*Gentle and Das, JJ.*) Commissioner of the Calcutta Police *v.* Rolla Ram Chopra. I.L.R. (1946) 2 Cal. 399=51 C.W.N. 833.

———**O. 6, R. 17 and O. 30, R. 1**—Joint Hindu family firm registered under Partnership Act—Suit by—Plaint signed and verified by one of members as karta of family—Amendment of plaint in second appeal—Permissibility. *See* Civil Procedure Code, O. 30, R. 1 and O. 6, R. 17. A.I.R. 1949 Assam 71.

———**O. 6, R. 17**—*Limitation—Power of Court—Claim barred on date of application to amend—Amendment—If can be allowed.*

Although the power of a Court to amend the plaint in a suit should not as a rule be exercised where the effect is to take away from the defendant a legal right which accrued to him by lapse of time yet there are cases in which that consideration is out-weighed by the special circumstances of the case. 47 I.A. 255, referred to. (*Mukherji, J.*) Rajendra Nath Saha *v.* Sree Saraswati Press, Ltd. 86 C.L.J. 196.

———**O. 6, R. 17**—*Nature of suit changed—Suit to set aside compromise decree on ground of fraud—Amendment into one to set it aside on ground of mistake—Permissibility.*

Where the plaintiff sues to set aside a compromise decree on the ground of fraud, he cannot be permitted to amend his plaint by turning it into a suit for setting aside the decree on the ground that the compromise was one which contained a vital condition about which the parties were honestly mistaken, as the amendment would have the effect of transforming the entire nature of the suit. (*Hindley, J.*) Shibram Kairi *v.* Md. Masadar Ali. 228 I.C. 256=1947 Cal. (Rul.) 62=A.I.R. 1947 Cal. 17.

———**O. 6, R. 17**—Order allowing amendment of plaint—Revision—Competency. *See* C. P. Code (V of 1908), **S. 115 and O. 6, R. 17. 1948 A.L.J. 136.**

———**O. 6, R. 17**—Order refusing amendment of plaint for the addition of a defendant and consequential amendment in the relief—Revision, if lies. *See* C. P. Code, S. 115 and O. 6, R. 17. 1947 A.L.J. 666.

———**O. 6, R. 17**—Order refusing amendment of pleadings—If revisable. *See* C. P. Code (V of 1908), S. 115 and O. 6, R. 17. A.I.R. 1950 Ajmer 32 (1).

———**O. 6, R. 17 and O. 7, R. 11**—*Plaint disclosing no cause of action—Amendment of plaint—Power of Court.*

O. 7, R. 11, C. P. Code, does not take away the Court's power to amend a plaint when it discloses no cause of action. 44 C. 352 and 50 C.W.N. 540, diss. from; 40 C.W.N. 749 and A.I.R. 1937 Cal. 562, rel. on. (*Sarkar, J.*) Ahmed Hossain *v.* Mst. Chembelli. 85 C.L.J. 213.

———**O. 6, R. 17 and O. 7, R. 11**—*Plaint disclosing no cause of action—Amendment to make plaint disclose cause of action—Permissibility.*

O. 6, R. 17, C. P. Code, is very wide in its terms and it gives power to the Court to allow an amendment of the plaint in order that the real questions in controversy between the parties should be adjudicated upon. The rule is not controlled by O. 7, R. 11, C. P. Code. The power of the Court under O. 6, R. 17 to allow amendment is not in any way restricted or controlled by O. 7, R. 11; while it is, no doubt, incumbent upon the Court to reject a plaint that does not disclose a cause of action, it does not follow that it is not open to the Court to allow a plaint to be amended so that it should disclose a cause of action. The Court may prevent the operation of O. 7, R. 11 and may save the plaint being rejected by exercising its power under O. 6, R. 17, and allowing the plaint to be amended. 50 C.W.N. 540, diss.; 44 Cal. 352, dist.; 48 I.A. 214, expl.; 48 Bom.L.R. 252, foll. (*Chagla, C.J. and Coyajee, J.*) Shiavax Cambata *v.* Sunderdas Ebji. 52 Bom.L.R. 381=5 D.L.R. (Bom.) 165=A.I.R. 1950 Bom. 343.

———**O. 6, R. 17**—*Power of Court—Amendment of plaint altering form of relief in view of subsequent decision of Privy Council—Grant of.*

The Court has power to grant an amendment of the plaint seeking alteration in the form of the relief to be granted, which has become necessary in view of a subsequent judgment of the Judicial Committee, when the facts constituting the cause of action as stated in the body of the plaint remain unaffected. (*Bose, J.*) Someswar Banerji *v.* Union of India. 85 C.L.J. 364.

———**O. 6, R. 17**—*Powers of Court to allow amendment of written statement in appeal—Circumstances.*

A written statement or plaint could be amended at any stage, if there are sufficient grounds shown for that purpose.

During the pendency of an appeal against a decree obtained by a widow for maintenance from out of the properties of her father in the hands of his heir, the latter applied for amendment of the written statement filed in the suit, raising a defence to the effect that the widow having become unchaste forfeited her rights to maintenance decreed in her favour. On the appellate Court refusing to allow the amendment, in revision,

Held: Since the question raised in the application for amendment is an important legal question and can be agitated in separate proceedings notwithstanding the result of the appeal, it will meet the ends of justice and also avoid multiplicity of proceedings if the petition for amendment of the written statement is granted. (*Basheer Ahmed Sayeed, J.*) Rajammal *v.* Kannammal. 63 L.W. 302=A.I.R. 1950 Mad. 695=(1950) 1 M.L.J. 805.

———O. 6, R. 17—*"Questions in controversy between the parties"—Meaning of.*

The questions in controversy between the parties within the meaning of O. 6, R. 17, C. P. Code, are such questions which are in controversy between the parties at the time when they join issue, that is, when the defendant puts in his written statement. They do not include any questions which the parties neither wish nor intend to dispute till that stage, but which at a later stage in the proceedings parties may wish to raise because they have changed their mind or because something has happened after the filing of the written statement which makes it profitable or necessary for them to put forward. 16 Luck. 65, foll. (*Ram Labhaya, J. C.*) Beni Pershad *v.* Narayan Glass Works, Makhanpur. 4 D.L.R. (A. & M.) 81=A.I.R. 1949 Ajmer 19.

———O. 6, R. 17—*Scope—Discretion and duty of Court—Principles governing amendment.*

While under the part of R. 17 of O. 6, C. P. Code, it is left to the discretion of the Court to amend or not, the second part of the rule makes it imperative on the Court to make all such amendments as may be necessary for determining the real matter in controversy between the parties. As soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy it is as much a matter of right on his part, as it is a duty on the part of the Court, to have it corrected, especially when the amendment does not cause any prejudice to the other party or substitute a totally new case for the original case. 39 I.A. 218; 48 I.A. 214, ref. (*Bannerjee, J.*) Jai Kissen *v.* Mt. Ram Rakhi. A.I.R. 1950 H.P. 12.

———O. 6, R. 17—*Scope—Suit for partition based on invalidity of prior partition and for accounts—Amendment in appeal confining claim only to accounts on basis of validity of prior partition—If open.*

A suit for partition after avoiding a prior partition, and for accounts, cannot by amendment be converted into one purely for accounts, based on the recognition of the validity of the prior partition which was challenged on the original plaint. (*Achhru Ram and Khosla, JJ.*) Chiranji Lal *v.* Ram Kanwar. 2 D.L.R. 811=A.I.R. 1948 E. P. 26.

———O. 7, R. 2—*Accounts—Suit for—What is—Form and essentials of.*

A suit for an account is a special form of suit. A suit does not necessarily become a suit for accounts because the plaint asks for an account. The plaint must show that the defendant is an accounting party, *i.e.*, under an obligation to render accounts to the plaintiff. There must be something more than a mere relationship of debtor and creditor. The defendant must stand in some other relation to the plaintiff, such as that of agent, or bailee, or receiver, or trustee or partner or mortgagee. The mere fact that, in ascertaining the sum due to the plaintiff, it would be necessary to investigate accounts, does not alter the nature of the suit. (*Sen and Lokur, JJ.*) Kanhayalal Supdubhai Hirlal Deoram. I.L.R. (1947) Bom. 102=48 Bom. L.R. 795=A.I.R. 1947 Bom. 255.

———O. 7, R. 2—*Applicability—Future mesne profits.*

R. 2 of O. 7, C. P. Code, has no application to future mesne profits; consequently no question of putting a separate valuation upon that relief can arise. (*Kaul and Wolford, JJ.*) Chandrani Mst. *v.* Babu Singh. 1945 A.L.W. (C.C.) 363=1945 O.A. (C.C.) 262=1945 A. W.R. (C.C.) 262=1945 O.W.N. (C.C.) 398 =A.I.R. 1946 Oudh 59.

———O. 7, R. 3 and O. 20, R. 9—Immovable property—Discrepancy between two descriptions—Leading description should prevail. [*See* Q.D. 1941-1945, Vol. I, Col. 1076.] Munderlal Sahu *v.* Jiwan Ram. 18 R.P. 175.

———O. 7, R. 3—*Scope—Suit for declaration of title and possession of lands—Description of lands—Duty of plaintiff—Decree—Description of property in decree—Particulars—Plaint and decree not in conformity with law—Effect.*

It is obvious that in a suit for declaration of title and recovery of possession of immovable property, two things have to be found—namely, title and possession. If the plaintiff proves a subsisting title, he is entitled to a decree for possession to the extent of the area from which he has been dispossessed. Unless the plaintiff indicates the identity of the property claimed by him either by means of boundaries or by means of a map as required by O. 7, R. 3, C. P. Code, it would be difficult for the Court to find whether the plaintiff has title to the property claimed and whether any encroachment or dispossession has been made by the defendants. The decree in such a suit has, as laid down in O. 20, R. 9, C. P. Code, to contain a description of the property sufficient to identify the same. Unless the identity of the property (land), is known, it would be impossible for the Court to pass a decree capable of execution. It would also cause prejudice to the defendant, as it would be difficult for him to show (when they are able to show) that the plaintiff has no title to the land in dispute, unless the identity of the land claimed in the suit is known. (*Das, J.*) Chutahru Bhagat *v.* Hialal Sah. A.I.R. 1950 Pat. 306.

———O. 7, Rr. 6 and 11—*Scope and effect of—Ground of exemption from limitation to be speci-*

ally pleaded or it should be apparent on the face of the record.

Whether but for some ground of exemption from the law of limitation a suit would *prima facie* be barred by limitation it is necessary for the plaintiff to show in the plaint such ground of exemption and in the absence of such showing, the plaint is liable to be rejected under R. 11 of O. 7. Where the exemption is not specially pleaded, it would be enough if the ground of exemption sought is apparent on the face of the record. (*Walford, J.*) Mangli *v.* Gaya Prasad. 22 Luck. 299=231 I.C. 27=1947 O.A. (C.C.) 154=1947 O.W.N. 162=A.I.R. 1947 Oudh 235.

———**O. 7, R. 7**—Applicability—Purchaser **from proprietor of estate technically in possession** and *bona fide* believing to be in possession—Suit by against purchaser at revenue sale for arrears under certificate taken against original proprietor for declaration that his rights were not affected by the sale and for injunction against certificate purchaser—Decree for possession—If can be given. *See* Bengal Public Demands Recovery Act, Ss. 45 and 46. A.I.R. 1950 Pat. 89.

———**O. 7, R. 7**—*Discretion of Court—Relief on basis of claim not made in plaint—Grant of—Suit for ejectment of tenant—Relationship of landlord and tenant not proved—Decree on title—Grant of—Permissibility.*

A plaintiff suing to eject an ex-tenant and failing to establish the relationship of landlord and tenant, cannot ordinarily be given a decree for ejectment on the basis of title. But if the question of title has been raised in the trial of the suit and has been investigated, the parties knowing it and adducing evidence on the point and the Court is in a position to give the relief asked for on the basis of his title, such relief may and ought to be given. There is no reason why in such a case the plaintiff should be driven to file another suit in order to get this relief, provided that he has done nothing to disqualify him from receiving this equitable relief, *e.g.*, by coming to Court with a false story. This is, however, an equitable relief which is entirely within the discretion of the Court. Under O. 7, R. 7, Civil Procedure Code, where the question of title, though raised, has not been fairly tried between the parties and there is no sufficient evidence, the plaintiff is not entitled to ask the Court in its discretion to grant him relief on title.

Per Shearer, J.—A plaintiff, seeking to recover possession of land from the defendant, on the footing that he is his tenant and his tenancy has been determined, cannot ordinarily be entitled to a decree on the footing that the defendant is not a tenant, but a trespasser. If there is evidence to show that the defendant is the latter and not the former, it must have been let in wrongly or by accident, where the Court is unable to say, on the evidence, whether the defendant is a tenant or a licensee but is able to say definitely that if he is not the one he is the other the position is quite different, and there is no difficulty in passing a decree. 25 All. 256 (F.B.); 25 All. 498 (F.B.); (1901) A.W.N. 188; 57 Cal. 349; 7 C.L.J. 44 (P.C.); 32 C.W.N. 1113; A.I.R. 1934 Pat. 184; A.I.R. 1936 Pat. 147; A.I.R. 1942 Pat. 379; A.I.R. 1946 Pat. 103; 2 P.L.J. 69; 21 I.C. 560, considered and examined. (*Shearer and Reuben, JJ.*) Mahomed Mian *v.* Jugeshwar. 27 Pat. 554.

———**O. 7, R. 7**—Powers of Court under. *See* U. P. Tenancy Act, S. 192 (1) (*a*) and (*b*). 1946 R.D. 11.

———**O. 7, R. 7**—*Suit for possession—Prayer for other reliefs—How may be construed.*

In a suit for possession, a prayer for other reliefs can only be construed to mean reliefs ancillary to the main claim for possession. A suit for possession on behalf of *A* in whom alone the title is said to reside cannot be turned into a suit for other reliefs which are to benefit *B*, *C* & *D* in a totally different capacity. (*Bose, J.*) Kisan Bhagwan *v.* Shree Maroti Saunsthan. I.L.R. (1947) Nag. 819=1947 N.L.J. 527=A.I.R. 1947 Nag. 233.

———**O. 7, R. 10**—*Applicability—Election petition—C. P. and Berar Municipalities Act, S. 20-A (2).*

Though O. 7, R. 10, C. P. Code, does not in terms apply to an election petition, that rule has to be read with S. 141, C. P. Code. Where a Court finds that it has no jurisdiction to deal with an election petition presented under S. 20-A (2) of the C. P. and Berar Municipalities Act, the order should be not one of dismissal but of returning the petition for presentation to the Judge having jurisdiction to deal with the matter. 44 A. 686 and 6 P. 358, referred to. (*Kaushalendra Rao, J.*) Purshottam Vithal *v.* G. V. Pandit. 1950 N.L.J. 520=A.I.R. 1950 Nag. 212.

———**O. 7, R. 10**—Costs—Order returning plaint—Order providing for costs—Jurisdiction to make. *See* C. P. Code, S. 35. 1946 M.W.N. 74 (2).

———**O. 7, R. 10**—*Powers under—If can be exercised by appellate Court directly without sending file to trial Court.*

R. 10 of O. 7, C.P.Code, does not restrict the powers of the appellate Court to pass orders which the trial Court is competent to pass, namely, the actual return of the plaint to the plaintiff or his counsel for presentation to the proper Court after the decision of the appeal and without his having to wait for the return of the file to the trial Court. (*Ghulam Hasan, J.*) Ram Adhin *v.* Gulzari Singh. 21 Luck. 350=222 I.C. 355=1946 Oudh (Rul.) 67=1946 A.L.W. 24=1946 O.W.N. 24=1946 A.W.R. (C.C.) 10=1946 O.A. (C.C.) 10=A.I.R. 1946 Oudh 116.

———**O. 7, R. 10**—*Return of plaint for presentation to proper Court—Cancellation of stamp—Presentation to proper Court—Duty of that Court to give credit for fee levied.*

Where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court, under O. 7, R. 10 of the Code, the latter Court to which the plaint is presented is bound to give credit for the fee already levied by the former Court. But it is necessary that the plaint returned for presentation and the plaint as presented to the proper Court must be substantially, if not *verbatim et literatim*, the same. (*Raghava Rao, J.*) Sarabhamma *v.* Veeranna. 1949 M.W.N. 703=4 D.L.R. (Mad.) 253=A.I.R. 1950 Mad. 57=(1949) 2 M.L.J. 159.

———O. 7, R. 10—Scope—Suit, when instituted—Return of plaint for presentation to proper Court—Presentation in proper Court—Date of institution—Suit instituted in second Court, if continuation of suit in Court which returned plaint. *See* C. P. Code, S. 15, O. 7, R. 10 and O. 23, R. 3. A.I.R. 1950 Pat. 473.

———O. 7, R. 11—*Applicability—Appeals.*

Quaere: Whether O. 7, R. 11, C. P. Code, applies to suits only or applies to appeals also. (*Nagarkar, J.C.*) Dharam Chand *v.* Bahadur Mal. 4 D.L.R. (A. & M.) 21=A.I.R. 1949 Ajmer 46.

———O. 7, R. 11—*Applicability—Appeals.*

The provisions of O. 7, R. 11, C.P. Code, do not apply to memoranda of appeals. (*Abdul Rashid, A.C.J. and Khosla, J.*) Balwant Singh *v.* Jagjit Singh. 227 I.C. 95=48 P.L.R. 393=A.I.R. 1947 Lah. 210=1946 Lah. (Rul.) 521.

———O. 7, R. 11—Dismissal of entire suit for non-payment of deficit court-fee when plaintiff abandons part of his claim—Legality. *See* C.P. Code, O. 23, R. 1 and O. 7, R. 11. (1945) 2 M.L.J. 473.

———O. 7, R. 11—Scope—If controls or restricts O. 6, R. 17. *See* C. P. Code, O. 6, R. 17. 52 Bom.L.R. 381.

———O. 7, R. 11—Scope—If overridden by S. 149. *See* C. P. Code, S. 149 and O. 7, R. 11. 1949 D.L.R. (Nag.) 15.

———O. 7, R. 11—Scope—Non-payment of deficit court-fee—Order rejecting plaint—Remedy of party—Application for restoration—Competency—Inherent power of Court to restore—S. 151. *See* C. P. Code, S. 151. 29 P.L.T. 354.

———O. 7, R. 11—*Scope—Plaint found to be under-valued—Procedure to be followed—Rejection of plaint straightaway—If justified.*

Where a Judge finds that a plaint has not been properly valued, he should, in accordance with the provisions of R. 11 of O. 7, C. P. Code, direct the plaintiff to value it properly and only after his failure to do so, reject the plaint. Where the suit is dismissed because the plaint is under-valued, the procedure is not justified and cannot be sustained. (*Govinda Menon and Basheer Ahmed Sayeed, JJ.*) Sriramulu Chettiar *v.* Raja Chettiar. 1950 M.W.N. 120 (1)=63 L.W. 161=(1950) 1 M.L.J. 180.

———O. 7, R. 11 (a)—*Cause of action—Date of accrual wrongly stated in plaint—Effect of.*

The cause of action consists of the whole bundle of facts which the plaint sets out as supporting the plaintiff's right of suit. It does not consist of a sentence in the plaint or a pleading setting out the date on which it arises. The date which the plaintiff gives of the accrual of the cause of action is an inference which the plaintiff draws from the facts set out in the plaint. It is an inference of law, and a wrong inference is not sufficient to non-suit the plaintiff when all the

facts on which the relief is grounded have been fully and accurately set out. (*Bose, J.*) Sitaram Bindraban *v.* G. I. P. Ry. I.L.R. (1947) Nag. 726=1947 N.L.J. 540=A.I.R. 1947 Nag. 224.

———O. 7, R. 11 (a)—*Plaint disclosing no cause of action against some defendants—Procedure.*

Under O. 7, R. 11 (*a*), C. P. Code, a plaint which discloses a cause of action against certain defendants and none against the rest cannot be rejected. The only feasible course in such a case is to discharge the defendants against whom no cause of action is disclosed, and have their names struck off from the plaint. (*Bose and Sen, JJ.*) Shankarrao *v.* Shambihari. I.L.R. (1949) Nag. 560=5 D.L.R. (Nag.) 6.

———O. 7, R. 11 (a)—*Plaint not disclosing cause of action—Amendment—Power of Court to allow.*

Under O. 7, R. 11, C.P. Code, the Court has no option but to reject a plaint which does not disclose a cause of action, and it has no jurisdiction to allow an amendment. (*Gentle, J.*) Sailesh Nath *v.* J. Chaudhuri. I.L.R. (1947) 1 Cal. 478=50 C.W.N. 540.

———O. 7, R. 11 (c) and S. 2 (2)—*Order dismissing suit for non-payment of required court-fee—Appeal—Revision.*

Under O. 7, R. 11 (*c*), C. P. Code, the power to reject a plaint may be exercised at any stage of a pending suit when the Court applies its mind to the question of proper valuation. An order dismissing a suit for non-payment of required court-fee after the suit has been tried to completion, amounts to a rejection of the plaint as provided in O. 7, R. 11 (*c*) and is a decree within the definition of S. 2 (2), C. P. Code, from which an appeal would lie. As such an order is appealable, an application for revision is not tenable. 1935 Cal. 157 and 58 M. 1051, referred to. I.L.R. (1941) M. 954 (F.B.) and 36 A. 350, Dist. (*Sarwate, J.*) Shamrao *v.* Amolak Chimniram. I.L.R. (1949) Nag. 391=A.I.R. 1949 Nag. 373=4 D.L.R. (Nag.) 110=1949 N.L.J. 229.

———O. 7, R. 12—*Deficit court-fee—Failure to pay within time allowed—Plaint, if automatically rejected—Setting aside order rejecting application for extension of time for paying court-fee—Consequential order rejecting plaint if also automatically set aside—Separate appeal—If essential.*

The respondent filed a suit on the last day of limitation with a nominal court-fee, with an application for time to pay additional court-fee which was granted. On the day before the extended period elapsed the respondent filed another application for further time which was dismissed on the following day, the 25th January, 1945. The plaint, however, remained on the until the 30th January, 1945, when the judge passed an order: "*application for extension of time was rejected on 25th January,* 1945. *Hence plaint is deemed rejected as on 25th January,* 1945." Before this order was passed two applications, one for reviewing the order of 25th January, 1945, and the other, to extend time were filed. The judge considered that there was sufficient cause for review and passed an order enlarging the time for payment of court-fee. On appeal,

Held, O. 7, R. 12, C. P. Code, requires the Court to pass an order when it rejects the plaint giving reasons for doing so. That order was not passed until the 30th January, 1945, so that when money was tendered and application made on the 29th, the plaint was still in Court with regard to which an application for extension of time could be made. The plaint did not become automatically rejected on 25th January, 1945, on the failure to pay the court-fee within time. Since an order had been passed on the review application setting aside the order of 25th January, 1945, rejecting the application to extend the time, it would follow that the consequential order of 30th January, 1945, rejecting the plaint would be automatically set aside and it is not incumbent on the plaintiff to file an appeal against the order rejecting his plaint. (*Horwill and Shahabuddin, JJ.*) KUMARAWAMIAH *v.* KRISHNA REDDI. I.L.R. (1947) Mad. 220=230 I.C. 15=1947 Mad. (Rul.) 170=A.I.R. 1947 Mad. 84=59 L.W. 460=1946 M.W.N. 575=(1946) 2 M.L.J. 190.

——O. 8—*Additional written statement—Plea inconsistent with pleas in the original written statement—If can be allowed.*

The plea in a proposed additional written statement was that the defendant's father was a partner with the plaintiff, whereas in the original written statement it was that the defendant himself was the partner of the plaintiff. On a question whether the amendment should be allowed,

Held, such a plea can be allowed even if it is inconsistent with the original plea as if both the pleas had been put forward in the original written statement that would have been legally permissible and the Court would have been called upon to investigate them. All that the Court has to consider is whether it is expedient to permit the raising of the plea at the particular stage. (*Rajagopalan, J.*) MAHOMED IBRAHIM MARICAR *v.* AHMED MARICAR. 1948 M.W.N. 830 (3)=A.I.R. 1949 Mad. 541=61 L.W. 836=(1948) 2 M.L.J. 576.

——O. 8—*Written statement—Amendment—Discussion and finding against the allegations in the amendment sought before it is allowed—Refusal on the basis of such finding—Propriety.*

An intended amendment of a written statement should not be discussed and found against even before it is allowed to be incorporated, and issues framed thereon and evidence and arguments adduced on it. A refusal to allow an amendment straightaway on a finding against the allegations in the amendment sought for on merits is not proper. If there are laches on the part of the defendant, it is a case for allowing amendment on terms, for costs are the supreme panacea for all procedural ills. (*Panchapakesa Ayyar, J.*) KRISHNA RAO *v.* SRI GANGADARESWARAR TEMPLE. 62 L.W. 119=A.I.R. 1949 Mad. 433=1949 M.W.N. 70=(1949) 1 M.L.J. 64.

——O. 8, R. 1—*Substitution* in toto *of one written statement for mother already filed—Power of Court.*

There is no provision in the C. P. Code to enable the Court to permit the substitution *in toto* of one written statement for another already filed. A Court has no jurisdiction to pass an order directing such substitution. (*Krishnaswami Nayudu, J.*) NARAYANAPPA *v.* SURYANARAYANA. 62 L.W. 647=1949 M.W.N. 653=A.I.R. 1950 Mad. 46=(1949) 2 M.L.J. 422.

——O. 8, R. 3—*Compliance with.*

A mere statement that a particular para. of the plaint is not admitted is not a proper compliance with the rules of pleading contained in R. 3 of O. 8, C. P. Code. The allegations of fact must be specifically dealt with. (*Seth, J.*) GANGA PRASAD *v.* PREM KUMAR. 1948 A.L.W. 274=A.I.R. 1949 All. 173=1948 O.W.N. 279.

——O. 8, Rr. 3 and 5—*Plaint alleging series of facts in one sentence—Duty of defendant to deal separately with each.*

Though it would be correct to use the word "and" in the plaint when setting out a series of facts, the defendant must if he intends to deny each of these facts, either break the sentence up into a series of sentences and deal separately with each or use the word "or" instead of "and". (*Bose and Hidayatullah, JJ.*) GOVINDRAM *v.* GULABRAO. I.L.R. (1949) Nag. 478=A.I.R. 1949 Nag. 394=4 D.L.R. (Nag.) 94=1949 N.L.J. 189.

——O. 8, Rr. 3 and 5—*Scope and effect of—Allegation in plaint of payment of interest on debt—Absence of specific denial in written statement—Effect—Admission of payment.*

Where a specific allegation in the plaint that a certain amount was paid towards the interest on the suit debt, and the defendant does not specifically deny that allegation, and further pleads that certain amounts were paid to the plaintiff, it must be taken that the defendant has admitted the allegation of payment of interest. A mere general denial of the allegations in the plaint and a bare statement that the claim is barred by limitation cannot be taken to be a specific denial of the payment of interest alleged in the plaint. (*Meredith and Ray, JJ.*) BICHITRANANDA SAHU *v.* MIR MAHEBUB ALI. 12 Cut.L.T. 80=228 I.C. 231=A.I.R. 1947 Pat. 275=13 B.R. 161=1947 Pat. (Rul.) 90.

——O. 8, Rr. 3 and 5—*Suit on hatchithas—Plaint alleging that certain sum was paid by defendant towards interest—Allegation in written statement that statement of account attached to plaint is untrue—Whether amounts to specific denial—Limitation Act, S. 20.*

Where in a suit for a sum of money payable by the defendant to the plaintiff on two hatchithas the plaintiff attaches a statement of accounts to the plaint and alleges that for the purpose of limitation time would run from a certain date on which a certain payment was made by the defendant towards interest, the allegation in the plaint that the sum was paid towards interest is sufficiently specific to call for a special denial if the defendant wishes to raise any issue of fact thereon. A mere allegation in the written statement of the defendant that the statement of account attached to the plaint is untrue, while it may operate as a denial of the alleged payment, cannot possibly operate as an alternative plea that, if the payment was made, it was not made towards interest as alleged in the plaint. Nor does the allegation that "the application of S. 20, Limitation Act, is incorrect" operate as any such denial. That allegation merely means that even if the facts alleged in the plaint are true, the suggested application thereto of the Limitation Act is incorrect. (*Bennett and Beevor, JJ.*) Shyamlal Marwari *v.* Mirtunjay Mandal. A.I.R. 1947 Pat. 446.

———**O. 8, R. 5**—*Scope and applicability—Case in which no written statement is filed—If covered by R. 5.*

R. 5 of O. 8, C. P. Code, relates only to cases in which a written statement is filed but certain allegations made in the plaint are not denied specifically or by necessary implication. That rule does not cover a case in which no written statement has been filed at all. (*Lal, J. M. I.*) Mathuri *v.* Chhangoo. 1948 A.W.R. (Rev.) 200=1948 R.D. 347 (1).

———**O. 8, R. 5, Proviso**—*Scope—Use of to support plea of limitation—If justified.*

The proviso to O. 8, R. 5, C. P. Code, should not generally be used to support the plea of limitation; such a plea is one which the Court never regards with favour, though they may have to give effect to it under the law of limitation. There are no equities in favour of a party who pleads limitation. (*Meredith and Ray, JJ.*) Bichitrananda Sahu *v.* Mir Mahebub Ali. 12 Cut.L.T. 80=228 I.C. 231=A.I.R. 1947 Pat. 275=13 B.R. 161=1947 Pat. (Rul.) 90.

———**O. 8, R. 6**—*Counter-claim—Nature and essence of.*

The essence of a counter-claim is that the defendant should have a cause of action against the plaintiff and the counter-claim is in the nature of a cross action; and not merely a defence to the plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action. 1909 A.C. 597; 1914 A.C. 510; 22 Q.B.D. 543, Rel. on. (*Malik, C.J. and Desai, J.*) Abdul Majid *v.* Abdul Rashid. 1949 A.L.J. 510=A.I.R. 1950 All. 201=1949 A.W.R. 547.

———**O. 8, R. 6 (2)**—*Counter-claim—Separate suit number—Propriety.*

Though counter-claims and set-offs can be made in many forms of suits that does not mean that they should be given separate suit numbers. (*Davies.*) Madan Lal *v.* Pabudan Hira Lal. 1946 A.M.L.J. 24.

———**O. 8, R. 6**—*Joint and separate debts—Whether can be set off.*

One of the requisites of a set-off given in O. 8, R. 6, C. P. Code, is that the parties must fill the same character in both cases. Therefore, joint and separate debts cannot be set-off against each other. (*Base, J.*) Kapilnath Baldeo *v.* Ramnihalsao. I.L.R. (1948) Nag. 780=A.I.R. 1949 Nag. 193=1948 N.L.J. 360.

———**O. 8, R. 6**—Set off—Claims arising out of the same transaction—Counter-claim made after limitation period—Sustainability in case between vendor and vendee. *See* Provincial Insolvency Act (V of 1920), Ss. 54 and 37. (1948) 1 M.L.J. 290.

———**O. 8, R. 6**—*Suit for arrears of cess—Plea by defendant of over-payment of large sum—Framing of such plea—Proper mode.*

If in a suit for arrears of cess in respect of a putni tenure for a certain period, the defendant pleads over-payment of a large sum as cess, the plea cannot be framed as a plea of payment in the written statement. A plea of such character is not a plea of payment, truly so-called, because no payment was made towards cess for the period in suit. The amounts had by the plaintiff from the defendant constitute an antecedent debt which could only be pleaded as a set-off. A written statement pleading set-off must be framed in an appropriate manner and must bear the necessary court-fees. Otherwise no credit can be given to the defendant in the suit for the over-payment made by him nor can it be held that the cess for the period in suit was not in arrear. (*Chakravartti and Ellis, JJ.*) Dharendra Krishna Mukherjee *v.* Banwarilal Roy. 83 C.L.J. 229.

———**O. 8, R. 6**—*Suit for pre-emption—Defendants pleading having spent monies on improvements and praying that suit should be decreed only on plaintiff paying these amounts—Claim if a counter-claim.*

Where in a suit for pre-emption the defendants plead that they had spent monies on improvements and pray that the plaintiff should be directed to pay such sums before obtaining a decree, the claim cannot be said to be a counter-claim. It can only be put forward as a defence to the suit and a separate action could not be maintained on the basis of such a claim. (*Malik, C.J. and Desai, J.*) Abdul Majid *v.* Abbul Rashed. 1949 A.L.J. 510=A.I.R. 1950 All. 201=1949 A.W.R. 547.

———**O. 8, R. 9**—*Amendment of plaint—Duty of Court to permit defendant to file additional written statement.*

O. 8, R. 9, Civil Procedure Code, enables the Court to require a written statement from any of the parties at any time. After the plaint has been amended and new pleadings have been brought on the record, it is the duty of the Court to give the defendant an opportunity to file an additional written statement. (*Panigrahi and Narasimhan, JJ.*) Chandra Kishore Das *v.* Babulal Agarwala. I.L.R. (1949) Cut. 105=A.I.R. 1949 Orissa 77.

———**O. 8, R. 9**—*Effect of—Some defendants declared* ex parte—*Written statements filed by contesting defendants and issues framed—Application by* ex parte *defendants to set aside* ex parte *order—Dismissal—*Ex parte *defendants if entitled thereafter to file written statements as of right.*

After some of the defendants had been declared *ex parte* the contesting defendants filed their statements and issues were framed. Thereafter the *ex parte* defendants applied to set aside the order declaring them *ex parte* but it was dismissed. Then they sought to file a written statement. On a question whether they could claim to file the written statement as of right,

Held, that since the stage for the filing of written statements and the framing of issues had been passed, no fresh written statement could be filed as of right according to the provisions of O. 8, R. 9. The Court may grant them permission by way of indulgence; otherwise they have no such right. 49 M.L.J. 273; (1939) 1 M.L.J. 64, considered and applied. (*Herwill and Govinda Menon, JJ.*) Makku Naicker *v.* Agathiappa Goundar. I.L.R. (1949) Mad. 804=4 D.L.R. (Mad.) 177=A.I.R. 1949 Mad. 622=1949 M.W.N. 67 (2)=62 L.W. 118=(1949) 1 M.L.J. 147.

———**O. 8, R. 10**—Applicability—Failure to the writted statement as required by R. 1—Order under R. 10—Legality. [*See* Q.D. 1941-1945, Vol. I, Col. 1086.] Nagaratnam Pillai *v.* Kamalathamma. I.L.R. (1945) Mad. 866.

———**O. 9, R. 2**—*Failure of plaintiff to serve summonses on some of defendants—Dismissal of entire suit—Jurisdiction of Court.*

Under O. 9, R. 2, C. P. Code, a Court has no jurisdiction to dismiss a suit in its entirety, that is, as against all the defendants, because of the failure of the plaintiff to take appropriate steps to have one or some of the defendants served with the summonses of the suit. A.I.R. 1920 Pat. 820; A.I.R. 1921 Pat. 422; A.I.R. 1937 Oudh 502 and 2 A. 318, foll.; 5 Bom.H.C.R. 118, not foll. (*Mudholkar, J.*) Krishnarao Bapurao *v.* Wamanrao. 1950 N.L.J. 431=A.I.R. 1950 Nag. 188=5 D.L.R. (Nag.) 193.

———**O. 9, Rr. 3, 4, 8 and 9**—*Applicability—Suit dismissed for default—Plaintiff's application for time rejected—Both plaintiff and defendant absent—Order rejecting application for restoration—Appeal—"Appearance"—Meaning of—Filing of pleading—If constitutes.*

Where the plaintiff's petition for time was rejected, there being no one on his behalf to move it before Court, and the defendant was also absent on call, an order dismissing the suit for default falls within O. 9, R. 3 and not within O. 9, R. 8, C. P. Code. An application made by the plaintiff in such a case for setting aside the dismissal must be treated as one under O. 9, R. 4 and not under O. 9, R. 9, C. P. Code, and the mere fact that the Court thought fit to make an order for service of notice on the defendant cannot convert the application into one under O. 9, R. 9, C. P. Code. An order rejecting that application is therefore not appealable.

What R. 3 or R. 8 of O. 9, C. P. Code, requires is appearance of the party when the suit is called on for hearing, not appearance in the suit itself. A party may be said to have appeared in the suit if he has filed a plaint or written statement, but that does not mean that he will be deemed to have been present when the suit is called on for hearing, if he is not actually present in Court or by a pleader instructed to answer all material questions about the case. (*Biswas and Blank, JJ.*) Abinash Chandra Ray *v.* Surjya Narayan Shaha. I.L.R. (1948) 1 Cal. 141.

———**O. 9, R. 3**—*"Hearing"—Meaning of—Date fixed for awaiting return of file from High Court.*

By the expression "hearing" in O. 9, R. 3, C. P. Code, is meant a hearing at which the Judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication about it, and interlocutory matters which involve decisions merely as to the future conduct of the suit are not included within the term. A date fixed for awaiting the return of the file of the case from the High Court is not a hearing within the meaning of O. 9, R. 3, C. P. Code and an order dismissing the suit for default of appearance on that date is, therefore, without jurisdiction. (*Cornelius, J.*) Mt. Barkat Bibi *v.* Fateh Ali. Pak.L.R. (1948) Lah. 89=A.I.R. 1949 Lah. 63.

———**O. 9, Rr. 3 and 8**—*Suit dismissed for default after satisfaction of claim—Dismissal, if under R. 3 or R. 8—Onus.*

If a suit is dismissed for default after the claim has been satisfied, the dismissal is under O. 9, R. 8, C. P. Code, as the form of the order is not sufficient in the absence of other evidence to establish that the defendant was not present at any rate through an instructed pleader, to see that the case was dismissed after he has paid up the amount claimed therein. The onus to establish that the dismissal was under O. 9, R. 3, C. P. Code, is on the plaintiff. (*Roxburgh and Blank, JJ.*) Jiban Krishna Ghose *v.* Santimoyee Devi. A.I.R. 1948 Cal. 366.

———**O. 9, R. 5**—*Provisions of section—When not complied with.*

On 19th July, 1946, the Court directed the plaintiffs to take fresh steps for service on the defendant as the summons, though served, was not proper. On 3rd August, 1946, the plaintiffs applied for time to take necessary steps, and on the 5th, the plaintiffs made an application that substituted service be effected against the defendant. On 7th August, 1946, the Court passed orders allowing the plaintiff's application for substituted service, but gave them only three days' time, that is, till 10th August, 1946, to take the necessary steps. This order did not indicate that unless steps were taken by that date, the name of the defendant would be expunged from the record. On 6th September, 1946, the plaintiffs applied for time to take the necessary steps for substituted service against the defendant. The Court ordered that the name of the defendant should be expunged as requisite steps had not been taken.

Held, that the Court had acted against the provisions of O. 9, R. 5, C. P. Code. (*Sinha, J.*) Babu Lal Sahu *v.* Tamizuddin. A.I.R. 1948 Pat. 238.

———**O. 9, R. 5**—*Summons issued to defendant not according to law—Jurisdiction of Court to dismiss suit.*

Before the penalty provided in O. 9, R. 5, C. P. Code, can be enforced, it must be shown that the conditions precedent to it have been fulfilled according to the letter of the law and not according to its spirit. If, therefore, the summons issued to the defendant was not one which according to law has to issue, the Court has no jurisdiction to dismiss the plaintiff's suit against him under the penal provisions of O. 9, R. 5 (*Mehrchand Mahajan, J.*) KURARYA *v.* DATA RAM. 50 P.L.R. 192=A.I.R. 1949 E P. 49.

———O. 9, Rr. 6 and 7—*Decision of Court to proceed with suit* ex parte *as against certain defendants—Filing of written statement by those defendants a day prior to the date fixed for hearing—No explanation of delay—Court if bound to accept written statement.*

Where after the Court had decided to proceed with a suit *ex parte* as against certain defendants and fixed a date for the hearing, a written statement is filed by those defendants one day prior to that fixed for final hearing and no explanation is given as to the reasons for the delay in filing it, the Court is not in the circumstances bound to accept the written statement. (*Malik, C.J. and Agarwala, J.*) BIDRESH BEHARI *v.* BASANT LAL. 1950 A.L.J. 124=1950 A.W.R. 386.

———O. 9, R. 6—Ex parte *order—Defendant, if can participate in subsequent proceedings.*

An order to proceed *ex parte* under O. 9, R. 6 (1) (*a*), C. P. Code, unless set aside, precludes a defendant from subsequently appearing and participating in the proceedings from the time of his appearance. The passing of an *ex parte* order is a sort of penalty, and it cannot be allowed to be transformed at the will of the defendant to a privilege enabling him to participate at such stages of the suit only as may suit his convenience. 1925 Mad. 1274, 1938 Mad. 385 and 27 N.L.R. 50, Diss. from. 26 O.C. 10, 1929 S. 46 and I.L.R. (1945) Kar. 1, foll. (*Misra, Walford and Kidwai, JJ.*) TULSHA DEVI *v.* SRI KRISHNA. I.L.R. (1950) A. 6=4 D.L.R. (All.) 167=A.I.R. 1949 Oudh 59 (F.B.).

———O. 9, R. 6 (1) (a)—Ex parte *order under—Impliedly setting aside—Permitting defendant to cross-examine plaintiff's witnesses.*

Where after declaring the defendant *ex parte*, the Court allows him to participate in the proceedings by cross-examining the plaintiff's witnesses, it must be taken as if the Court has impliedly set aside the *ex parte* order. (*Misra and Chandiramani, JJ.*) DILDAR HUSSAIN *v.* PAHALWAN. 1950 A.W.R. 158.

———O. 9, R. 7—*Defendants's right to be heard.*

If a party appears before the case is actually heard, he has a right to be heard. The provisions of O. 9, C. P. Code, are never meant to be penal provisions, and it is only in clear cases of gross negligence and misconduct that a party should be deprived of the opportunity of having a satisfactory disposal of the case which evidently can only be done when both parties have full opportunity of placing their case and their evidence before the Court. (*Padhye, J.*) KASHIRAO *v.* RAMCHANDRA. I.L.R. (1948) Nag. 252=A.I.R. 1948 Nag. 362=1949 N.L.J. 83.

———O. 9, R. 7—*Order setting aside* ex parte *order on terms—Direction that if terms not fulfilled defence would be struck off—Validity.*

The provisions of O. 9, R. 7, C. P. Code, do not permit the passing of an order striking off the defence in default of fulfilment of the terms subject to which the *ex parte* order is set aside. Striking off the defence is not a condition for setting aside the *ex parte* order. It is a punishment for non-payment of costs and it cannot be covered by the word "otherwise" contained in R. 7. 45 A. 624, I.L.R. (1942) Nag. 20 and 53 M. 645, Dist. (*Misra, Walford and Kidwai, JJ.*) TULSHA DEVI *v.* SRI KRISHNA. I.L.R. (1950) A. 6=4 D.L.R. (All.) 167=A.I.R. 1949 Oudh 59 (F.B.).

———O. 9, Rr. 8 and 9 and S. 151—*Absence of plaintiff on date to which case had been adjourned for passing some orders and not for hearing of the suit—Dismissal of suit for non-prosecution—Proper remedy—Relative applicability of O. 9, R. 9 and S. 151, C. P. Code.*

Where a case has been adjourned to a certain date for passing certain orders and not for the hearing of the case and the plaintiff is absent on that date and the case is dismissed for non-prosecution, an application for its restoration under O. 9, R. 9, C. P. Code, cannot lie, because the case was not posted for hearing. The proper remedy of the plaintiff is to apply under S. 151, C.P. Code. (*Iqbal Ahmad, C.J. and Bind Basni Prasad, J.*) SHEIKH MAHOMED *v.* RUKMINA KUNWAR. 1946 A.L.J. 285=1946 A.L.W. 329 (2)=1946 A.W.R. (H.C.) 520 (2)=A.I.R. 1946 All. 506.

———O. 9, Rr. 8 and 3—*"Appearance"—Meaning of—Application for adjournment by defendant through pleader—Dismissal of suit for plaintiff's default—If under R. 3 or R. 8.*

Whether a party appears in a suit or not will depend upon various circumstances and its meaning may accordingly vary. Substantially it means that when a party is ready to do something or other in relation to the progress of the suit, he shall be taken to have appeared. Appearance in certain circumstances may mean readiness to proceed with the hearing of the suit but not always. It will all depend upon the stage of the suit and steps that are appropriate at that stage, and what is appropriate for one party may also be ascertained with reference to what the other party has done or is going to do in relation to the progress of the suit. Therefore a party may not fail to appear though he fails to proceed with the evidence. So long as a party performs any act necessary for the progress of the suit, he does appear in the suit. To move for an adjournment is none-the-less necessary for the progress of the suit in the sense that not to do anything amounts to non-appearance.

Where the defendant applies through his pleader for adjournment of the suit on the ground of his illness but the suit is dismissed for default on the failure of the plaintiff or his pleader to appear on call, the dismissal of the suit is under O. 9, R. 8, C. P. Code, and not under O. 9, R. 3 for default of both parties; and a fresh suit on the same cause of action is barred under O. 9, R. 9, C. P. Code. Whether the defendant's pleader was willing to proceed with the suit so far as it was required of him in case the hearing of the suit was taken up could not at all be ascertained until he was told that the Court was not willing to grant his petition for adjournment. It might be, after rejection of his petition, he could have given still sufficient instructions to his pleader to proceed as best as he could to protect his interest in the suit. It would be nothing but mere speculation to say that the defendant was not ready to go on with the suit so far as required by his defence had the petition for adjournment been decided against him. 7 P. 333, foll. 3 P.L.J. 355 and 4 P.L.J. 712, Dist. (*Ray, C.J. and Panigrahi, J.*) KULAMONI BARIK *v.* LOKENATH MOHAPATRA. I.L.R. (1949) Cut. 446=A.I.R. 1949 Orissa 35.

———**O. 9, Rr. 8 and 9**—*Applicability—Original Side of Calcutta High Court.*

O. 9, R. 8 and O. 9, R. 9, C. P. Code, are applicable to the Original Side of the Calcutta High Court. The words "appear" in O. 9, R. 8 and "his non-appearance" in O. 9, R. 9 are not such as would indicate that these rules in terms do not apply to the Original Side. The words "appear" and "non-appearance" must be read and construed so as to mean and include not merely appearance by the party himself but also appearance through recognised agents and solicitors on the Original Side who hold power of attorney. These words in R. 8 and R. 9 of O. 9, C. P. Code, should be read and interpreted in accordance with the meaning of the word "appearance" as provided by R. 1 and R. 2 of O. 3, C. P. Code. I.L.R. (1943) 2 Cal. 927, foll.; 55 C. 473, Dist. (*P. B. Mukharji, J.*) DEBENDRA NATH DUTT *v.* SATYABALA DASSI. 54 C.W.N. 110=A.I.R. 1950 Cal. 217.

———**O. 9, Rr. 8 and 9**—*Applicability—Preliminary decree in suit for accounts—Application for final decree—Dismissal for default of appearance—Propriety—Application for restoration—Rejection of—Legality.*

The provisions of Rr. 8 and 9 of O. 9, C. P. Code, are not applicable to proceedings subsequent to the passing of a preliminary decree in a suit, *e.g.*, in a suit for accounts and an application for a final decree cannot be dismissed for default on the ground of the plaintiff's absence. The preparation of the final decree is an enforcement of the preliminary decree and the proceedings cannot be closed because the plaintiff absents himself from Court. A Court is therefore not justified in dismissing the application for final decree for default or in refusing to revive the same when the plaintiff applies for the restoration of his application. 51 I.A. 321, rel. on. (*Misra and Kaul, JJ.*) JAMALUDDIN *v.* ABDUL ALI. I.L.R. (1950) All. 65=4 D.L.R. (All.) 277.

———**O. 9, R. 8**—*Case adjourned by Sheristadar of Court—Order of dismissal for default on adjourned date—Legality—Review—Permissibility.*

It cannot be held as a general rule that an order purporting to have been passed under O. 9, R. 8, C. P. Code, is not at all subject to review. The Sheristadar of a Court has no authority to adjourn a case to a future date in the absence of the presiding Judge of the Court. An order of dismissal for default on the adjourned date is therefore illegal. Such an order may be reviewed if valid grounds for review exist. The illegality of the order may well be regarded as a mistake or error apparent on the face of the record. 49 Bom. 839, dist. A.I.R. 1934 Lah. 984 and 1936 Lah. 1000, rel. on. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) BHAIRABENDRA NARAYAN DEB *v.* PUNYENDRA NARAYAN DEB. A.I.R. 1950 Assam 47.

———**O. 9, Rr. 8 and 9 and O. 17, Rr. 2 and 3 (All.)**—*Dismissal purporting to be under O. 17, R. 3 on adjourned day when only 3 out of 20 witnesses had been examined—If can be set aside under R. 9 of O. 9.*

Where though a dismissal of a suit on an adjourned day purports to be under R. 3 of O. 17, C. P. Code, by which time only 3 out of 20 witnesses had been examined, it is really a dismissal under R. 2 of O. 17 read with R. 8 of O. 9 and could not be one on the merits. Hence an application under O. 9, R. 9 could be filed to set aside the dismissal. Case-law discussed. (*Wanchoo and Bhargava, JJ.*) RAFIQ AHMAD *v.* MD. SHAFI. I.L.R. (1949) A. 759=1948 O.W.N. 416=A.I.R. 1949 A. 423=1948 A.L.W. 414.

———**O. 9, R. 9 and O. 17, R. 3**—*Applicability—Adjourned hearing—Party appearing in person—Application for adjournment and issue of commission refused—Dismissal of suit on refusal of party to proceed with case—Restoration—Applicability of O. 9, R. 9.*

On the date fixed for hearing of a suit the plaintiff's vakil asked for an adjournment on the ground that the witnesses for whom batta had been paid had not been served and also as attempts at a settlement were in progress. The Court however directed that the document should be marked and the plaintiff examined. Thereupon the plaintiff's vakil reported "no instructions." Thereafter, the plaintiff in person asked for an adjournment and the same having been refused requested the Court to take up the case the next day so that he might engage a vakil and be ready to proceed with the trial, and the Court acceded to his request. The next day, however, the plaintiff appeared in person and filed two applications one for the examination of a witness on commission and the other for adjournment of the suit. The Court thereupon directed the plaintiff to examine himself, mark his documents and deposit the amount necessary for having the witness examined on commission. The plaintiff, however, did not agree and then the Court refused the application for adjournment and dismissed the suit and the application for the issue of a commission. The plaintiff having applied to set aside the order of dismissal under O. 9, R. 9, C. P. Code,

Held, that in the circumstances the dismissal of the suit was under O. 17, R. 3, C. P. Code, and hence no application lay under O. 9, R. 9 of the Code. (*Gentle, C. J. and Tyagarajan, J.*) DAKSHINAMOORTHI KANDAR *v.* PONNUSWAMI. 1948 M.W.N. 38=61 L.W. 63=A.I.R. 1949 Mad. 78=(1948) 1 M.L.J. 65.

———O. 9, R. 9—*Applicability—Application to set aside* ex parte *decree—Applicant absent as he was in jail on the date to which the petition was adjourned—Dismissal of application on his vakil reporting no instructions—Application to set aside such order of dismissal—If lies—Limitation—Limitation Act (IX of 1908), Art. 163—Applicability—Time if can be extended.* ..

O. 9, R. 9 applies to voluntary as well as involuntary absences.

Pending a defendant's application to set aside an *ex parte* decree he was arrested and did not appear on the adjourned date. His vakil reported no instructions and his application was dismissed on 8th February, 1946. He was released from jail on 17th October, 1946, and he filed an application on 28th October, 1946, to set aside the order of dismissal.

Held:—As the application was not filed within 30 days of the order of dismissal as prescribed by Art. 163 of the Limitation Act, the Court has no jurisdiction to set aside the dismissal for default. The Court has no inherent jurisdiction to extend the time and S. 5 of the Limitation Act has no application. (*Horwill, J.*) CHINNAPPA NAIDU *v.* DEENADAYALU NAIDU. 61 L.W. 395 (2) =A.I.R. 1948 Mad. 480=1948 M.W.N. 400= (1948) 1 M.L.J. 411.

———O. 9, R. 9—Applicability—Court proceeding wrongly under R. 3 of O. 17. *See* C. P. CODE, O. 17, RR. 2 AND 3. (1947) 1 M.L.J. 271.

———O. 9, R. 9—*Applicability—Dismissal for non-payment of deficiency in Court-fee under proviso to sub-S. (3) of S. 6 of Court-Fees Act—Right to apply under R. 9 of O. 9.*

A plaintiff whose suit is dismissed on his failure to pay the deficiency in court-fee (for which he was allowed to furnish security) cannot apply under R. 9 of O. 9, C. P. Code, for the simple reason that the dismissal is not a dismissal under R. 8 of O. 9. (*Verma and Bind Basni Prasad, JJ.*) MOHAMMAD ANWARUL AHSAN *v.* NAZNIN BEGAM. I.L.R. (1946) All. 725=230 I.C. 385= 1947 All. (Rul.) 198=A.I.R. 1947 All. 34=1947 A.L.J. 21=1946 A.L.W. 343=1946 A.W.R. (H.C.) 448.

———O. 9, R. 9—*Applicability—Second suit instituted during pendency of first suit—If maintainable.*

Although the operation of the bar created by O. 9, R. 9, C. P. Code, is confined to a suit instituted in respect of the same cause of action after the dismissal under O. 9, R. 8 of the first suit, and does not extend to a suit instituted during the pendency and before the dismissal of the first suit the latter suit is liable to be dismissed as offending against the well-known maxim that no one shall be twice vexed with one and the same cause, and on the ground of its institution and trial amounting to an abuse of the process of the Court. (*Abdul Rashid, Ag. C.J. and Achhru Ram, J.*) AMIR DIN *v.* SHIV DEV SINGH. 228 I.C. 599=1947 Lah. (Rul.) 133=A.I.R. 1947 Lah. 102=48 P. L.R. 471.

———O. 9, R. 9—*Applicability—Suit on behalf of minor dismissed for default by the gross negligence of the guardian—No application to set aside order of dismissal—Subsequent suit by minor on attaining majority—Maintainability—Limitation Act (IX of 1908), S. 5 and Art. 163—Applicability of S. 5 to application to set aside order of dismissal for default.*

It is a well-settled rule of law so far as the Madras High Court is concerned that a minor is not bound by a decree which has been passed against him as the result of the gross negligence of his guardian in the conduct of the suit. The same principle must apply to a case where a mother sues on behalf of her minor son and by her gross negligence allows the suit to be dismissed for default. It cannot be said that when subsequently the son becomes a major and sues for the same relief, such a suit was not maintainable because he had failed to apply for an order setting aside the dismissal of the prior suit. As S. 5 of the Limitation Act does not apply to an application to set aside the order of dismissal for default, it would be monstrous to hold that the plaintiff was affected by the order of dismissal and therefore it must be held that he was entitled to ignore it. (*Leach, C.J. and Lakshmana Rao, J.*) SAMANKATHA NADAR *v.* JAMES. 59 L.W. 683=1947 M.W.N. 21=A.I.R. 1947 Mad. 153=(1946) 2 M.L.J. 382.

———O. 9, R. 9—*Bar of suit—Suit for declaration of co-tenancy after dismissal for default of a similar prior suit—If barred.*

Where a suit for declaration of co-tenancy is dismissed for default though the zamindar denied the plaintiff's claim and a fresh suit is brought for the same relief but the zamindar admits the claim of the plaintiff, there is no question of the second suit being barred by O. 9, R. 9, C. P. Code. (*Bates, A.M.*) SUKHI *v.* PARTAP. 1947 A.W.R. (Rev.) 37 (2)=1947 R.D. 90.

———O. 9, R. 9—*Bar under—If applies to applications made in execution of a decree.*

The bar applicable to suits under O. 9, R. 9, C. P. Code, does not apply to applications made in execution of a decree. A decree-holder whose execution application has been dismissed for default is entitled with immunity to make any number of applications so long as they are in time.

It is a point for consideration by the rule committee whether it will be proper to add to the rules regarding execution, a provision analogous to the one contained in O. 9, R. 9, C. P. Code. (*Satyanarayana Rao, J.*) AYYALUREDDI *v.* MALLAREDDI. 1948 M.W.N. 324=A.I.R. 1948 Mad. 337=61 L.W. 380=(1948) 1 M.L.J. 381.

———O. 9, R. 9 and O. 33, R. 5 (d-1)—*Bar under O. 9, R. 9—Next friend of minor suing to set aside alienation by father—Previous suit by another next friend of the same minor for the same relief dismissed for default.*

In a suit by a next friend under O. 32, R. 1, C. P. Code, to set aside an alienation originally made by the minor's own father, the lower Court rejected the application under O. 33, R.

5 (*d*-1) on the ground that it was barred by O. 9, R. 9, C. P. Code, in view of a previous suit filed on behalf of the same minor by another next friend for the same relief having been dismissed for default. In revision,

Held, that the lower Court was right in rejecting the present suit under O. 33, R. 5 (*d*-1) as being barred under O. 9, R. 9. 22 Cal. 8, dist. (*Mack, J.*) VEDACHALA REDDY *v.* NARAYANASWAMY REDDY. 4 D.L.R. (Mad.) 189=A.I.R. 1949 Mad. 646=(1949) 1 M.L.J. 293.

———**O. 9, R. 9**—*Dismissal for default of suit against trespassers and alleged sub-tenants—Fresh suit against trespassers only—Maintainability.*

The dismissal for default of a suit for ejectment against trespassers and certain alleged sub-tenants would bar a fresh suit for ejectment even though it is brought against trespassers only. The cause of action is the same in both the suits. (*Lal, J. M. I.*) SHAM LAL *v.* RAMCHAND. 1948 R.D. 276.

———**O. 9, R. 9**—*Next friend of minor plaintiff negligent or deliberately obstructive—Dismissal of suit for non-appearance—If ground for restoration—Next friend's conduct likely to jeopardise minor's interest—Duty of Court.*

If the non-appearance of the next friend of a minor plaintiff is *bona fide* or in other words for reasons which would be held to constitute sufficient cause if he were conducting his own suit, O. 9, R. 9 of the C.P. Code can be invoked on behalf of the minor plaintiff. Again if the non-appearance of the next friend is the result of collusion between him and the defendants or if the next friend assumes, for whatever reason, an attitude of hostility against the minor plaintiff and consequently refrains from appearing there may be "sufficient cause" for the restoration of the suit. But where a next friend is negligent or deliberately obstructive and the suit is dismissed for his non-appearance there is no sufficient cause for such non-appearance within the meaning of O. 9, R. 9 and therefore no ground for restoration.

Where the Court finds the next friend's conduct of the suit such as is likely to jeopardise the minor's interests it can remove the next friend and appoint another where that is feasible; but where it is not and the Court is unable to proceed with the suit because the next friend is persistently negligent or wilfully obstructive, it should, while dismissing the suit and mulcting the next friend in costs place on record its impressions as to the circumstances preceding the dismissal so that in a future suit by the minor through another next friend or after attaining majority, the Court which tries it may know whether and how far the previous dismissal should stand in the way of the plaintiff getting his rights adjudicated upon. (*Bell and Govindarajachari, JJ.*) VAITHILINGA NAIDU *v.* DEVANAIAMMAL. I.L.R. (1948) Mad. 719=A.I.R. 1949 Mad. 46=1948 M.W.N. 116=61 L.W. 201=(1947) 2 M.L.J. 566.

———**O. 9, R. 9**—*Next friend of minor plaintiff not grossly negligent in not appearing on day of hearing—Duty of Court.*

Though no difference is made in the Code between a minor plaintiff and any other plaintiff in so far as O. 9, C. P. Code, is concerned, still in practical operation it is to be remembered that a minor is unable to protect his interests except through agent, and unless it can be shown that the agent was either grossly negligent or that there was a manoeuvring on his part to gain some advantage in the case, the case of the minor must be looked at somewhat indulgently. On an application for restoration of a suit dismissed for failure of the next friend of the minor to appear when the suit was called on the day of hearing, the Court should consider whether it was not a proper case in which to visit the plaintiff with some other punishment than the dismissal of his whole claim. The failure of the Court to consider this in its appropriate setting is a failure to exercise the discretion on judicial lines, and the High Court may in revision restore the suit to the file subject to payment of costs to the defendant. (*Hidayatullah, J.*) RAMBABU SHRINARAYAN *v.* GULAB SINGH. I.L.R. (1947) Nag. 474=A.I.R. 1948 Nag. 55=1947 N.L.J. 270.

———**O. 9, R. 9**—*Restoration—Latitude by Courts—Absence of information as to date of hearing—Sufficiency of ground for restoration.*

In the matter of restoration sufficient latitude is usually given by Courts. Where a party to an appeal swears to an affidavit that he did not know the date of hearing and on the strength of it the appeal which had been dismissed for default is restored, the restoration is neither illegal nor unjustified. (*Sultan Ahmad, M.*) NET RAM *v.* NARAIN DAS. 1948 R.D. 137 (1)=1948 A.W.R. (Rev.) 91 (1).

———**O. 9, R. 9**—*Restoration of appeal dismissed for default—Notice of appeal served on Mukhtar who did not inform client.*

Where it is shown that the notice of appeal was served on the Mukhtar who did not inform his client, and the appeal is dismissed for default, it is a case where restoration may be ordered. (*Sultan Ahmad, M.*) NET RAM *v.* NARAIN DAS. 1948 A.W.R. (Rev.) 91 (1)=1948 R.D. 137 (1).

———**O. 9, R. 9**—*Restoration—Refusal—Propriety—Applicant habitually making defaults.*

Where an applicant for restoration of a suit dismissed for default, allows that application to be dismissed for default and later on applies again for restoration and it is dismisssed, that order will not be interfered with in revision where the Board is satisfied that the applicant has made a habit of making defaults. (*Nehru, M.*) KHAMAN *v.* DAUDAYAL. 1947 A.W.R. (Rev.) 116.

———**O. 9, Rr. 9 and 13**—*Restoration of suit—Scope of Courts' powers—Inherent jurisdiction.*

Though it may be true that O. 9 is not exhaustive of the jurisdiction or the power of the Court to restore suits or set aside *ex parte* decrees, yet unless the necessary circumstances exist there is no scope for the exercise of or extension of the doctrine of *inherent jurisdiction* of Courts. (*Sinha and Mathur, JJ.*) SWADESHI BIMA CO. *v.* SHIV CHARAN DAS. 1948 O.A. (H.C.) 48=1948 A.

W.R. (H.C.) 48=A.I.R. 1948 A. 315=1948 A.L.J. 197=1948 A.L.W. 215.

———O. 9, R. 9 (2)—*Scope—Non-compliance—Failure to serve notice of application for restoration on all defendants who have appeared and contested—Order restoring suit—Validity.*

An order for restoration of a suit which had been dismissed for default under O. 9, R. 8, C. P. Code, passed in contravention of O. 9, R. 9 (2), without serving notice of the application on all the defendants who have entered appearance and filed written statements in the suit, is void and cannot be maintained. A.I.R. 1926 All. 169; A.I.R. 1920 Bom. 54, dist. and doubt. (*Ray, C.J. and Panigrahi, J.*) RATNAKAR RAY *v.* KULAMONI RAY. I.L.R. (1949) Cut. 572.

———O. 9, R. 9—*Scope and applicability—Plaintiff in subsequent suit impleaded as defendant in prior suit on identical cause of action—Prayer in prior suit for decree in favour of plaintiffs and the particular defendant—Dismissal of prior suit for default—Subsequent suit by that defendant—If barred.*

On 18th March, 1929, the co-owners of an extent of 8 acres of land agreed to sell the lands to *V* for a sum of Rs. 3,700 and paid an advance of Rs. 450. *A* who claimed the rights under the contract from *V* paid on 2nd July, 1929, a sum of Rs. 950 to two of the co-owners obtained a receipt and was ever since in possession of the land through her lessees *B* and *C*. On 2nd March, 1934, one of the co-sharers *X* sold an extent of one acre out of one of the items to *Y*. The co-sharers instituted on 9th March, 1936, a suit in the District Munsiff's Court of Tenali which was the subject-matter of the sale from *V* and *Y* was impleaded as a defendant in that suit. *A* and his lessees were also impleaded as defendants. That suit was based on the allegation that *V* committed default and that the plaintiffs were entitled to recover possession of the property. Reference was made in that plaint to the sale in favour of *Y* of one acre of land and it was prayed that as one of the plaintiffs *X* was bound to secure possession and deliver the same to *Y*, he should be put in possession of the said extent of one acre. *Y* also filed a written statement pleading that he was entitled to possession of one acre of land sold to him under the sale-deed of 1934, together with the profits of that land and an issue on that was raised. On 20th September, 1937, the suit was dismissed as the plaintiffs did not appear and the vakils were absent. That order became final.

Y then instituted on 15th March, 1941, a suit to recover possession of the one acre on the strength of the sale-deed of 1934 in his favour. The main contesting defendant was *A* who claimed to be entitled to continue in possession of the property and that the sale-deed in favour of *Y* was brought into existence fraudulently and was of no legal effect. A plea that the suit was also barred under O. 9, R. 9 of the C. P. Code was raised.

Held: For R. 9 of O. 9 to operate as a bar two things are essential: (1) The plaintiff must be the same and (2) the cause of action must be identical. As in the present case the plaintiff was only a defendant in the prior suit the rule does not operate as a bar though the cause of action was identical.

Quaere: Whether the disability under R. 9 applies to persons deriving title through the plaintiff either as assignees from him or as legal representatives. *Satyanarayana Rao, J.*) GOPALAKRISHNAMURTHI *v.* MADIREDDI. 1949 M.W.N. 158=4 D.L.R. (Mad.) 121=A.I.R. 1949 Mad. 882=62 L.W. 151=(1949) 1 M.L.J. 240.

———O. 9, R. 9—*Sufficient cause—Plaintiff's absence not intentional—His pleader not allowed to appear as his power not on record.*

Where the plaintiff's absence was not intentional and he was late only by a few minutes in arriving on the date of hearing, and the pleader engaged by him was not allowed to appear when the case was called as his power was not on the record, it is a fit case where the suit should be restored on payment of costs. 3 A.M.L.J. 69, referred to. (*Ramabhadran, J.C.*) LADU RAM *v.* GODA. 1949 A.M L.J. 78=A.I.R. 1949 Ajmer 42=4 D.L.R. (A. & M.) 80.

———O. 9, R. 9—*Vakalat of petitioner irregular—Corrected vakalat filed later—Date of presentation of petition.*

The vakalat on behalf of a petitioner under R. 9 of O. 9, C. P. Code, was defective as the body of the vakalat contained the name of another vakil though the petitioner's vakil had endorsed his acceptance thereon. The Court returned the vakalat and petition for correction and it was re-presented within the time allowed. On a question whether the presentation was a proper presentation even on the day when the petition was filed,

Held, the first presentation was a proper filing within time and the fact that the vakil's name was not entered in the body of the vakalat was only a clerical error. (*Koman, J.*) KUNHIKRISHNA REMA *v.* RAMARAJU 227 I.C. 93=59 L.W. 279=1946 M.W.N. 343=A.I.R. 1946 Mad. 482=(1946) 1 M.L.J. 274.

———O. 9, R. 11—*Power of Court—Major and minor defendants—Minor's guardian* ad litem *absent at hearing—Power to pass decree against minor as against other defendants*

Where in a suit there are several defendants one of whom is a minor, represented by a guardian *ad litem*, if the guardian fails to appear at the time of the hearing of the suit, the Court has full power under O. 9, R. 11, C. P. Code, to pass the same decree against the minor defendant as against the other defendants in the suit, especially when the same counsel represented all the defendants. (*Wali Ullah and Bennett, JJ.*) HAKIM BAHAUDDIN *v.* GOVIND SINGH. I.L.R. (1947) All. 301=A.I.R. 1948 All. 117=228 I.C. 363=1947 A. (Rul.) 66=1947 A.L.W. 300.

———O. 9, R. 13—*Appeal—Order setting aside* ex parte *order—Appealability.*

There is no provision in O. 43, R. 1, C. P. Code for an appeal against an order setting aside an *ex parte* order under O. 9, R. 13, C. P. Code. (*O'Sullivan and Thadani, JJ.*) GOKALDAS MAHADEV *v.* BEHARILAL JAGGAMAL. I.L.R. (1946) Kar. 307=A.I.R. 1947 Sind 116.

———**O. 9, R. 13**—*Applicability—Claim petition dismissed* ex parte—*Restoration—Jurisdiction of executing Court—Revision—Interference by High Court—C. P. Code, S. 115.*

An executing Court has no jurisdiction to restore to file a claim petition under O. 21, R. 58, C. P. Code, which has been dismissed *ex parte*, there being an express remedy by way of suit provided under O. 21, R. 63, C. P. Code. An order restoring the claim petition to file being one without jurisdiction, a revision application will lie in the High Court against such an order. (*Davis, C.J.*) RADHOMAL POHUMAL *v.* ABDUL RAHIM. I.L.R. (1947) Kar. 73=A.I.R. 1948 Sind 33.

———**O. 9, R. 13**—*Applicability*—Ex parte *final decree for foreclosure.*

S. 141, C. P. Code, does not apply to a proceeding for making a preliminary foreclosure decree final though it is a proceeding in a suit. Therefore, a final decree passed *ex parte* cannot be set aside under O. 9, R. 13, C. P. Code. (*Ray, J.*) SURENDRA KUMAR *v.* MUKUND LAL SAHU. A.I.R. 1949 Pat. 68.

———**O. 9, R. 13**—*Applicability*—Ex parte *final mortgage decree.*

A final decree for sale or for foreclosure in a mortgage suit may be an *ex parte* decree, and O. 9, R. 13, C. P. Code, is applicable to such a decree. 51 A. 634 and 14 Luck. 435, referred to. (*Mukherjea and Sharpe, JJ.*) BRAJA KISHORE DE *v.* GOUR CHANDRA RAY. I.L.R. (1946) 1 Cal. 333.

———**O. 9, R. 13**—Applicability—*Ex parte* order disposing of reference on respondent's vakil reporting no instructions—Application to set aside—Maintainability. *See* LAND ACQUISITION ACT (I OF 1894), S. 30. (1948) 1 M.L.J. 119.

———**O. 9, R. 13**—*Applicability*—Ex parte *order in guardianship case.*

The net effect of O. 9, R. 13 and S. 141, C. P. Code, is that an *ex parte* order made by a Court in a guardianship case cannot be set aside on grounds other than those specified in O. 9, R. 13. (*Bhandari, J.*) SHARAF JAHAN BEGAM *v.* YAQUB ALI. A.I.R. 1947 Lah. 409.

———**O. 9, R. 13**—*Applicability—Order under O. 21, R. 46-B.*

Quaere: Whether O. 9, R. 13, C. P. Code, applies in terms or by analogy to an order made under the provisions of O. 21, R. 46-B. (*O'Sullivan and Thadani, JJ.*) GOKALDAS MAHADEV *v.* BEHARILAL JAGGAMAL. I.L.R. (1946) Kar. 307 =A.I.R. 1947 Sind 116.

———**O. 9, R. 13 and O. 17, Rr. 2 and 3 (U. P.)**—*Applicability of R. 13 of O. 9 to a case where the Court purports to decide the suit upon merits when not justified by circumstances.*

Though the question whether a case falls under R. (1) or R. 2 (2) or R. 3 of O. 17, C. P. Code, is one which depends upon the facts of each case, the mere fact that the Court purported to decide the matter on the merits will not make the provisions of O. 9, R. 13, inapplicable to the case when the circumstances are such as do not justify the Court in proceeding under the wrong provision of law. (*Ghulam Hasan, C.J.*) KEWAL SINGH *v.* TULSHI RAM. 21 Luck. 581 =A.I.R. 1947 Oudh 84=226 I.C. 543=1946 Oudh (Rul.) 257=1946 A.W.R. (C.C.) 217=1946 O.A. (C.C.) 217=1946 O.W.N. 343.

———**O. 9, R. 13**—*Applicability—Setting aside consent decree—Non-representation of minor party to suit.*

An application under O. 9, R. 13, C. P. Code, is not an appropriate remedy for setting aside a consent decree on the ground of non-representation of an infant party to the suit. (*Das, J.*) HEERALAL DHANDHANIA *v.* CHOTEYLAL DHANDHANIA. I.L.R. (1947) 2 Cal. 73.

———**O. 9, R. 13 and S. 24**—*Application to set aside* ex parte *decree—Power of District Court to transfer.*

While it is necessitated by the wording of O. 9, R. 13, C. P. Code, that any application to set aside an *ex parte* decree must be made in the first instance to the Court which passed the decree, there is no reason arising either from the wording of the rule or from general considerations of justice or on a general reading of the Code of Civil Procedure to hold that this in itself prevents the exercise by the District Court of its power to transfer a case allowed to it under S. 24, C. P. Code. (*Ormond, J.*) DISTRICT BOARD OF TIPPERAH *v.* SARAFAT ALI. 2 D.R. 242.

———**O. 9, R. 13 and S. 115**—*Application under filing of—If bars right to have* ex parte *decree set aside in revision.*

The filing of an application under O. 9, R. 13, C. P. Code, does not take away the right of a defendant to have an *ex parte* decree against him set aside in revision especially when he had filed a revision petition against the order dismissing his petition under O. 9, R. 13. (*Rajagopalan, J.*) MANICKA GOUNDAN *v.* KRISHNA GOUNDAN. 61 L.W. 853=1949 M.W.N. 54= A.I.R. 1949 Mad. 396=(1948) 2 M.L.J. 574.

———**O. 9, R. 13**—*Application under—Maintainability—Appeal against* ex parte *decree dismissed summarily.*

The Court which passed the *ex parte* decree is not competent to entertain an application made for setting it aside under O. 9, R. 13, C. P. Code, when an appeal against the *ex parte* decree has been dismissed summarily. (*Davies, C.J. and Thadani, J.*) VATOOMAL THANWARDAS *v.* GODHUMAL MULCHAND. I.L.R. (1947) Kar. 94 =A.I.R. 1948 Sind 10.

———**O. 9, R. 13**—Application under—Maintainability—Decision to which R. 3 of O. 17 applies. *See* C. P. CODE, O. 17, R. 3 AND O. 9, R. 13. 1946 A.L.W. 219.

———**O. 9, R. 13**—*Application under—Opportunity to substantiate allegations—Necessity.*

Where an application is made under R. 13 of O. 9, C. P. Code, the applicant must be given an opportunity to substantiate the allegations made by him and the Court would not be justified in giving a finding that the applicant's absence was deliberate without giving him an opportunity to show that it was not so. (*Lal, J.M. I and Haider, J.M. II.*) SHED PAL *v.* AYODHYA PRASAD. 1948 R.D. 399=1948 A.W.R. (Rev.) 304.

———O. 9, R. 13—*Decree* ex parte *against one of several defendants—Application to set aside—Proper course—Order setting aside decree against that defendant only—Effect—Fresh decree against all at re-hearing—Legality of.*

Where a decree which has been passed *ex parte* against one of several defendants, is sought to be set aside by that defendant, it is open to the Court to set aside the whole decree, when only a part cannot be set aside without affecting the whole. Where the Court, however, does not take that course, but simply makes an order setting aside the decree as against that particular defendant and directing a re-hearing of that much of the suit only the re-hearing is of a limited scope and the Court at such hearing cannot make a fresh decree against all the defendants in substitution of the former decree in the same suit without setting aside the entire decree passed in the first hearing. No Court can legally do that, there being already a decree as against the other defendants, which still stands and is in full force. If the Court, without setting aside that decree, makes a fresh decree against the other defendants, who were not *ex parte*, at the fresh hearing, that second decree cannot be executed as against them. It is only the first decree that can be executed against such defendants. (*Trivedi, J.C.*) KHIMJI CHAMPSI *v.* DEVJI VIJPAR. A.I.R. 1950 Kuj. 18.

———O. 9, R. 13—*Defendant aware of suit—If entitled to have* ex parte *decree set aside.*

Under O. 9, R. 13, C. P. Code, a defendant is entitled to have an *ex parte* decree set aside if the summons in the suit was not duly served on him, although he had otherwise knowledge of the institution of the suit (*Gentle and Ormond, JJ.*) JHABARMULL DUDHWALLA *v.* BHAGATRAM. I.L.R. (1946) 2 Cal. 495=51 C.W.N. 189.

———O. 9, R. 13—Ex parte *decree set aside but restored in revision—Appeal against* ex parte *decree—Comtepency.*

When an *ex parte* decree which has been set aside by the lower Court is restored in revision on the only ground that the defendants had been duly served, an appeal to District Court against the decree is entirely competent as except for the decision on the question as to the adequacy of service of summons, the matter is still *res integra* so far as the District Court is concerned. (*Davies.*) FATEH MOHAMMAD *v.* MST. AISHA. 1946 A.M.L.J. 29.

———O. 9, R. 13—Ex parte *decree—Setting aside without giving any reasons—Legality.*

Where an *ex parte* decree is set aside without giving any reasons, the order is an arbitrary one and cannot be described as judicial and as such would be set aside in revision. (*Sultan Ahmad, S.J.M. and Lal, J. M. II.*) SALAR *v.* MOHD. RAZA. 1948 R.D. 128=1948 A.W.R. (Rev.) 127.

———O. 9, R. 13—Ex parte *proceeding resulting in* ex parte *decree—Re-opening from intermediary stage—Permissibility—Transfer of* ex parte *proceeding to another Court—Transferee Court passing* ex parte *decree without issuing notice to defendant—Proceeding taken since transfer—If liable to be set aside—Lahore High Court Rules and Orders, Vol. I, Chap. 13, para. 6.*

There is nothing in the C. P. Code to prohibit a defendant against whom a case is proceeding *ex parte*, to join at any hearing of the case and start from that stage. This is, however, quite different from saying that after the case is finished and has resulted in a decree, a defendant can insist on the re-opening of the proceedings from the intermediary stage for which he had established "sufficient cause" for his absence. This would lead to useless complication and a case may never end. Where *ex parte* proceedings have commenced in a proper manner and culminated in an *ex parte* decree, the defendant must show "sufficient cause" for his non-appearance on the date when the *ex parte* proceedings were first taken.

But where a case is transferred to another Court after *ex parte* proceedings have commenced and the transferee Court passes an *ex parte* decree without issuing notice to the defendant, the proceedings taken against him since transfer are liable to be set aside. Under the Lahore High Court Rules and Orders, Vol. I, Chap. 13, para. 6, the defendant is entitled to a notice after the transfer of the case to another Court. The Rule directs notice to the "parties" and the defendant does not cease to be a party after the *ex parte* proceedings. He was aware of the Court which sent him summons and where a change has occurred, he should be apprised of this change; for it is his undoubted right to return to his case at any time before it was over. (*Mahomed Sharif, J.*) KRISHAN LAL *v.* MADAN LAL. A.I.R. 1950 Lah. 43=Pak.L.R. (1949) Lah. 797.

———O. 9, R. 13—*Jurisdiction—Decree confirmed on appeal or revision—Application to set aside* ex parte *decree—Forum—Trial Court or appellate or revisional Court.*

Where a decree is confirmed on appeal or revision, "the Court by which the decree was passed," for purposes of O. 9, R. 13, C. P. Code, is the trial Court and not the appellate or revisional Court. Therefore an application to set aside the decree under O. 9, R. 13, C. P. Code, has to be made to the original Court. (*Almond, J.C. and Mahomed Ibrahim, J.*) MT. GHULAM FATIMA *v.* BILKIS JAN. 228 I.C. 121=A.I.R. 1947 Pesh. 7=1947 Pesh. (Rul.) 6.

———O. 9, R. 13—*Jurisdiction*—Ex parte *decree for redemption of mortgage—Setting aside—Grounds—Defendant claiming value of improvements—If sufficient cause.*

An *ex parte* decree can be set aside only if the defendant proves that he had reasonable cause for his non-appearance and on no other ground. An order setting aside an *ex parte* decree for redemption of a mortgage decree merely on the ground that the defendant wished to claim compensation for the value of improvements, no attempt being made to prove any sufficient cause for his non-appearance, is illegal and without jurisdiction. (*Trivedi, J.C.*) RANBAI *v.* JETHA BHANJI. A.I.R. 1950 Kut. 19.

———**O. 9, R. 13**—*Jurisdiction to set aside* ex parte *decree—Refusal by Court to hear defendant under R. 7.*

The Court has jurisdiction under O. 9, R. 13, C. P. Code, to set aside an *ex parte* decree notwithstanding the fact that under O. 9, R. 7, the Court had refused to set aside the *ex parte* order and hear the defendant. (*Padhye, J.*) KASHIRAO *v.* RAMCHANDRA. I.L.R. (1948) Nag. 252=A.I.R. 1948 Nag. 362=1949 N.L.J. 83.

———**O. 9, R. 13**—*Order for restoration on payment of costs—Date for payment not fixed—Refusal to restore on ground of non-payment on the date of hearing—Legality.*

Where restoration is ordered on condition of the payment of costs to the other side, but no time is fixed within which the payment is to be made, the Court would not be justified in refusing to take up the restored suit on the ground of failure to deposit the costs on the date fixed for hearing. (*Pedley and Bates, J.M.*) RAI LACHMI NARAYAN *v.* BINDESHWARI SINGH. 1947 R.D. 126=1947 A.W.R. (Rev.) 58.

———**O. 9, R. 13**—*Petition for setting aside* ex parte *decree—Order allowing petition on payment of costs of suit and day costs before a certain date and providing that in default of compliance with any of the conditions the petition should stand dismissed automatically—Default—Rejection of request to furnish security—'Final order' for purposes of appealing.*

On a petition to set aside an *ex parte* decree an order passed on 3rd July, 1946, setting aside the *ex parte* decree on condition that the petitioner deposited the costs of the suit and the day costs before 2nd August, 1946, concluded with these words "in default of the one or other of the two conditions, the petition stands dismissed automatically." By 2nd August, 1946, the petitioner had paid only the day costs and the costs of the suit were not deposited. On his application for permission to furnish security for the costs of the suit being rejected, he filed an appeal on 24th August, 1946, to the District Judge. On a question as to the "final order" in the case for purposes of appealing,

Held: The order of the 3rd July, 1946, was an all-comprehensive one and was the "final order" for the purposes of appeal and should have been appealed against within 30 days. It cannot be said that the order of 3rd July was only a conditional order and became a final order rejecting the petition only on 2nd August when the condition was not fulfilled. (*Panchapakesa Ayyar, J.*) K. KOTIAH *v.* NARASIMHAM. 61 L.W. 834 =A.I.R. 1949 Mad. 469=1948 M.W.N. 826=(1948) 2 M.L.J. 596.

———**O. 9, R. 13**—*Restoration—Justification—No evidence to rebut allegations in affidavit explaining absence of applicant for restoration.*

Where there is no denial by the opposite party of the allegations in the affidavit of the applicant for restoration explaining his absence on the date of hearing and no evidence is let in to rebut those allegations, the Court would be justified in ordering restoration. (*Pedley, S.M. and Bates, J.M.*) PINAKI DUTT *v.* HAR KARAN. 1947 R.D. 208 (2).

———**O. 9, R. 13**—*Right to apply under—Decreeing of suit on failure of defendant to appear on date to which case was adjourned at his instance.*

Where on the date to which a case has been adjourned at the request of the defendant, the defendant and his witnesses do not appear and the Court decrees the suit, the order of the Court falls under R. 3 of **O. 17, C. P. Code**, and the defendant has no right to apply under R. 13 of O. 9, for the restoration of the suit. (*Pedley, J.M.*) RAM AUTAR *v.* ABDUL GAFFAR. 1947 A.W.R. (Rev.) 10 (1)=1947 R.D. 10.

———**O. 9, R. 13 and O. 17, Rr. 2 and 3 (All.)**—*Right to apply under O. 9, R. 13—Party failing to appear and Court disposing of suit.*

As a result of the amendment of Rr. 2 and 3 of O. 17 by the Allahabad High Court, a suit must be deemed to have been decided *ex parte* when a party fails to appear on the date fixed and the Explanation to O. 17, R. 2, makes it clear that no party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purposes of making an application. In all other cases where the party has failed to appear the Court, if it decides to proceed to dispose of the suit, must be deemed to have decided *ex parte*. In such a case an application under O. 9, R. 13 would be competent. (*Malik, C.J. and Mushtaq Ahmad, J.*) QUDRUTULLAH *v.* MOHD KASIM KHAN. I.L.R. (1950) All. 240.

———**O. 9, R. 13**—*Scope—If exhaustive.*

A Court has no power, apart from O. 9, R. 13 C. P. Code, to set aside an *ex parte* decree. (*Sen, J.*) PRAGILAL *v.* KHILAWANSING DANGI. I.L.R. (1946) Nag. 586=224 I.C. 526=1946 Nag. (Rul.) 155=1946 N.L.J. 349=A.I.R. 1946 Nag. 393.

———**. 9, R. 13**—*Scope of inquiry—Merits of the case—Consideration of—Relevancy.*

The merits of the matter are not a relevant consideration in the matter of setting aside an *ex parte* decree or order under O. 9, R. 13, C. P. Code. (*O' Sullivan and Thadani, JJ.*) GOKALDAS MAHADEV *v.* BEHARILAL JAGGAMAL. I.L.R. (1946) Kar. 307=A.I.R. 1947 Sind. 116.

———**O. 9, R. 13**—*Scope—Small cause suit—Summons not duly served—If ground for setting aside decree in separate suit—Decree setting aside original decree—Interference in revision—'Contrary to law'.*

A decree passed in a small cause suit cannot be set aside in a separate suit merely on a finding that the summonses were not properly served, when there is no finding of fraud. A separate suit on the ground of non-service of summons properly is barred by O. 9, R. 13, C. P. Code. If such a separate suit is allowed and the decree in the small cause Court is set aside, it will be a ground for interference by the High Court under S. 27 of the Provincial Small Cause Courts Act, and the decree setting aside the former decree will not be allowed to stand. (*Reuben and Das, JJ.*) RAJA RAM SINGH *v.* KANHAYA RAI. 5 D.L.R. (Pat.) 177=A.I.R. 1950 Pat. 284.

———**O. 9, R. 13**—*Scope of enquiry—Suit to set aside* ex parte *decree—Decision in proceedings under Rule—How far* res judicata*—C. P. Code, S. 11.*

Under O. 9, R. 13, C. P. Code, the only two grounds on which an *ex parte* decree could be set aside are that the defendant had not been actually served with the summons of the suit, or, in spite of the service, the defendant had not been able to attend the Court for some sufficient cause on the day the suit was called on for hearing. If anything has been decided in the proceedings under O. 9, R. 13, on any one of these points, it cannot be reconsidered in a subsequent suit to set aside the *ex parte* decree. The scope of the enquiry under this rule being limited to the two circumstances mentioned above, it is not necessary for a Court dealing with an application under that rule to step beyond those circumstances and travel into such extraneous matters as those of fraud or the like that might have vitiated the decree. Accordingly, a suit to set aside an *ex parte* decree based on the allegation that the defendant's claim in the earlier suit was itself a fraud on the plaintiff of the later suit and that the contrivance adopted in procuring a false endorsement of service on the summons was only a part of the same fraud, is not barred by *res judicata* on any point that may have been decided about that service in the miscellaneous proceedings. I.L.R. (1940) 2 Cal. 477, 28 C. 475 (P.C.), 29 Cal. 395 (P.C.) and 17 Luck. 341, relied on. 29 A. 212, 29 A. 608, 1937 Lah. 614 and 2 P. 833, Dist. (*Mushtaq Ahmad, J.*) ASHRAF *v.* KARIM BUX. I.L.R. (1949) A. 320=4 D.L.R. (A.) 43=A.I.R. 1949 All. 198.

———**O. 9, R. 13**—*Setting aside* ex parte *decree—Absence of finding as to sufficiency of ground.*

In the absence of a finding as to sufficiency of the ground for setting aside an *ex parte* decree, the order setting aside the *ex parte* decree is without jurisdiction. (*Sultan Ahmad, J.M. I. and Lal, J.M. II.*) RAM JANAM PANDE *v.* REKHA PANDE. 1948 A.W.R. (Rev.) 135=1948 R.D. 208.

———**O. 9, R. 13 and U. P. Tenancy Act (XVII of 1939), S. 275**—*Setting aside of* ex parte *decree "for ends of justice", though no "sufficient cause" shown—Liability to be set aside in revision.*

Where a trial Court sets aside an *ex parte* decree "for the ends of justice" even though it is satisfied that there was no sufficient cause for the non-attendance of the party, it is a material irregularity and is liable to be set aside in revision under S. 275 of the U. P. Tenancy Act. (*Lal, J.M. I and Haider, J.M. II.*) RUSTAM *v.* JAGJIWAN LAL. 1949 R.D. 82.

———**O. 9, R. 13**—*Setting aside of* ex parte *decree—Imposition of conditions as to deposit of costs and mesne profits decreed—Jurisdiction of Court.*

The intendment of O. 9, R. 13 of the C. P. Code, is to confer power upon a Court to impose conditions for setting aside an *ex parte* decree as to costs, as to payment of the decretal amount in whole or in part or as to such other conditions as the Court thinks fit. Under the provisions of law, the Court has ample jurisdiction to impose any of the above-mentioned three conditions.

Where the petitioner applied to have an *ex parte* order against him set aside and the Court granted the application and imposed certain conditions, as to the deposit of costs of the suit and mesne profits decreed,

Held, that the conditions imposed having been under special circumstances, it could not be said the Court had no jurisdiction at all to impose such terms. (1898) I.L.R. 26 Cal. 222, A.I.R. 1920 Pat. 660 and A.I.R. 1926 Sind 50, relied. (*Chandra Reddi, J.*) SURAYYA *v.* PUSHPAVALLI THAYARAMMA. 63 L.W. 162=1950 M.W.N. 133=A.I.R. 1950 Mad. 618=(1950 1 M.L.J. 190.

———**O. 9, R. 13 and S. 151**—*Setting aside of* ex parte *decree under inherent powers of Court—Legality.*

A Court cannot set aside an *ex parte* decree in exercise of its inherent jurisdiction. S. 151, C. P. Code, is not intended to override the plain and express enactments of law even on the ground of hardship. (*Atmacharan, J.C.*) PRITHVI RAJ *v.* SHIV NARAYAN. 5 D.L.R. (A. M.) 23 (1).

———**O. 9, R. 13**—*"Sufficient cause"—Absence of motive for non-appearance.*

In the absence of any clear motive for the defendant to have deliberately absented himself from the Court on the date fixed for hearing of the case, the Court should hold that the defendant made out sufficient cause for his non-appearance on the date fixed for hearing. The rules of procedure should not be so strictly applied as to deny justice to the party unless the Court is satisfied that the party had a clear motive for his non-appearance and he deliberately remained absent to achieve that motive. (*Padhye, J.*) KASHIRAO *v.* RAMCHANDRA. I.L.R. (1948) Nag. 252=A.I.R. 1948 Nag. 362=1949 N.L.J. 83.

———**O. 9, R. 13**—*Sufficient cause—Application for restoration within an hour of* ex parte *decree—Circumstances not proving* mala fide *or negligence or misconduct of defendant—Fit case for setting aside* ex parte *decree.*

Where a defendant in a suit wanted an adjournment of the case owing to personal inconvenience and the lower Court did not feel there was justification for the adjournment application and proceeded with the trial and finding neither the defendant nor his witnesses in Court passed an *ex parte* decree against him, but within an hour or so an application was made by him for setting aside the *ex parte* decree and for restoration of the suit,

Held, that the words 'sufficient cause' in O. 9, R. 13 are sufficiently elastic to cover a case of such kind. In the absence of any kind of *mala fides* or negligence or misconduct on the part of the defendant who had come to Court with his application for restoration within an hour of the passing of the *ex parte* decree it would be wrong to deny him justice. (1922) 43 M.L.J. 632: I. L.R. 46 Mad. 60, ref. (*Govinda Menon and Basheer Ahmed Sayeed, JJ.*) SUBBAYYA *v.* BAPAYYA. A.I.R. 1950 Mad. 294=(1949) 2 M.L. J. 813.

———**O. 9, R. 13**—*Sufficient Cause—Mother and guardian* ad litem *of minor defendant in advanced state of pregnancy—If sufficient cause—Application stating different ground—Effect.*

Where it is found that the guardian *ad litem* (mother) of a minor defendant was in an advanced state of pregnancy, and actually gave birth to a child the day after the date fixed for the hearing of the suit, would afford sufficient cause within the meaning of O. 9, R. 13, C. P. Code, for her absence at the hearing, justifying the setting aside of the *ex parte* decree against the minor, although this is not slated as a ground in the application to set aside the *ex parte* decree. (*Sen, J.*) PRAGILAL *v.* KHILAWANSING DANGI. I.L.R. (1946) Nag. 586=224 I.C. 526=1946 Nag. (Rul.) 155=1946 N.L.J. 349=A.I.R. 1946 Nag. 393.

———**O. 9, R. 13**—*"Sufficient cause"—Service of summons—What amounts to—Mere knowledge of institution of a suit—Sufficiency—Post card without signature of Judge or officer nor bearing seal of Courts, though with date stamp—Sufficiency for service.*

A party's knowledge of the institution of a suit is not sufficient so long as he is not effectively served with summons of the suit. He may otherwise come to know that a suit has been filed against him, but he is entitled to expect service of summons from Court. Till that is done he cannot be fixed with the liability of an *ex parte* decree, and his application to set aside the *ex parte* decree cannot be refused on the ground that there is good reason to believe that he knew of the suit and that therefore no sufficient cause (or non-service of summons in due manner) existed.

O. 1, R. 20, Civil Procedure Code, no doubt, permits the Court to have the service effected through registered post. But service by post may be adopted only as a supplementary mode and shall not, by itself, take the place of service of summons, especially in a case where there has been no attempt to serve the summons on the defendant personally or proof of such service by the process-server to the satisfaction of the Court.

A post card, addressed to the defendant, containing some particulars about the date fixed for the suit, the nature of the suit, and the parties thereto, but containing nothing to show that it was signed by the Judge or under his authority, nor bearing the seal of the Court issuing the same though bearing a date stamp cannot be held to amount to a summons; and the tender of such a post card can never be held to be due service of summons in accordance with law. In such a case it cannot be held that there is due service of summons and an *ex parte* decree passed on the basis of such service must be set aside on an application under O. 9, R. 13, C. P. Code. (*Ray, C.J. and Panigrahi, J.*) NARENDRA KISHORE DAS *v.* BANAMALI SAHU. I.L.R. (1949) Cut. 511.

———**O. 9, R. 13**—*"Sufficient cause"—Summary suit under O. 37—*Ex parte *decree—Application to set aside—Plea that defendant was prevented by false promise of plaintiff not made out—Effect—Remedy of defendant—Separate suit—O. 37, R. 4.*

O. 9, R. 13, C. P. Code, comes into operation only if the defendant satisfies the Court that he was prevented by sufficient cause from appearing when the suit was called on for hearing. Where a defendant applies to set aside an *ex parte* decree passed against him in a summary suit on a promissory note under O. 37, C. P. Code, on the ground that he was assured by the plaintiff by a false promise made to him by the plaintiff and on that assurance did not appear or take any steps, but the Court does not believe it, the Court will not set aside the *ex parte* decree under O. 9, R. 13, or under O. 37, R. 4, C. P. Code. The proper remedy is to file a regular suit to set aside the decree on the ground of fraud or for damages for breach of contract on the ground of misstatement of a future event, if it be held that there was no misrepresentation of present fact. (*Blagden, J.*) HIMATLAL JASRAJ *v.* RUSTOMJI. 48 Bom.L.R. 635=230 I.C. 65=A.I.R. 1947 Bom. 87=1947 Bom. (Rul.) 227.

———**O. 9, R. 13**—Sufficient cause for setting aside *ex parte* decree—Innterference in revision. *See* C. P. CODE, S. 115 AND O. 9, R. 13. 1946 O.A. (C.C.) 217.

———**O. 9, R. 14 and U. P. Tenancy Act (XVII of 1939), S. 59**—*"Opposite party" for purposes of serving a notice of application for setting aside on* ex parte *decree in a suit under S. 59 of the U. P. Tenancy Act—Zamindar, if one.*

Where in a suit under S. 59 of the U. P. Tenancy Act, the Zamindar has been merely added as a *pro forma* defendant and the suit is decreed *ex parte*, in an application to set it aside it is not necessary that the Zamindar should be made a party to that application for the words "opposite party" in R. 14 of O. 9, C. P. Code, only means the plaintiff who has obtained the *ex parte* decree (*Lal, J.M. I and Haider, J.M. II.*) RAM KRIPAL RAI *v.* GAYA RAI. 1949 R.D. 105.

———**O. 10**—*Clarification of pleadings under—Desirability of.*

In the trial of civil suits it is very necessary that proper use is made of the provisions of the Code to clarify the pleadings under O. 10, C. P. Code and to ascertain the exact point of difference and to find out how far the parties are prepared to admit each other's case. This would not only cut down the evidence and shut out the irrelevant but also help the Judges to proceed with the trial more intelligently. (*Malik, C.J. and Bind Basni Prasad, J.*) RAM KISHNA *v.* SHRI THAKURJI RAMJANKI. 1950 A.W.R. 350=5 D.L.R. (A.) 199=1950 A.L.J. 239.

———**O. 10, R. 1**—*Plaintiff not amending plaint in regard to particulars—Dismissal of suit—Propriety—Proper procedure.*

Where a plaintiff who was asked to amend the plaint in the light of the particulars contained in an affidavit filed by him, it is not proper for the Court to dismiss the suit because the Court can avail itself of O. 10, R. 1, C.P.Code, and examine the plaintiff and by such examination bring on record the necessary particulars. (*Haider, J.M. II and Lal, J.M. I.*) Damma Mal *v.* Shimbhu. 1949 R.D. 171.

———O. 10, R. 2—*Scope and object of—Summoning of first defendant as Court witness and examination and cross-examination of him before conclusion of evidence of first witness for plaintiff—Propriety.*

Before the evidence of the first witness for the plaintiffs was concluded, the trial Judge summoned the first defendant as a Court witness and examined him on certain matters. He was again examined on a subsequent day on which date P. W. 1 was also further examined. Again on a later date the first defendant was called and further examined by Court and the plaintiffs' advocate was also permitted to put questions to him. Finally after the plaintiffs had closed their evidence the first defendant examined himself as the first witness for the defence.

Held: The Judge was not justified in following this course and O. 10, R. 2 of the C.P. Code does not contemplate such a procedure. The rule does not provide for an examination on oath. That provision was intended to be used to elucidate the matters in controversy in suit before the trial began and it is not a provision intended to be used to supersede the usual procedure to be followed at the trial. 35 C.W.N. 925 (P.C.) relied on. (*Rajamannar, C.J and Viswanatha Sastri, J.*) Arunagiri Goundan *v.* Vasantharoya Goundan. 62 L.W. 223=1949 M.W.N. 192=A.I.R. 1949 Mad. 707=4 D.L.R. (Mad.) 234=(1949) 1 M.L.J. 373.

———O. 11, Rr. 1 and 2—Person neither plaintiff nor defendant—If can be ordered to answer interrogatories *See* U. P. Encumbered Estates Act (XXV of 1934), S. 11. 1946 A.L.W. 232.

———O. 11, R. 6—*Leave granted to deliver interrogatories overruling objections by party sought to be interrogated—Latter, if can object to answer them on same grounds.*

It is open to a party sought to be interrogated to object to answer any of the interrogatories on the grounds set forth in O. 11, R. 6, C. P. Code, although he had previously objected to the delivery of those interrogatories on the same grounds on which he is now refusing to answer them and the Court after overruling his objections had granted leave to the interrogator to deliver the interrogatories. The present practice under which an application for leave to administer interrogatories is not made *ex parte* but on summons to all parties sought to be interrogated according to Chap. XI of the Rules of the Calcutta High Court, has made non substantial change in this respect. (*Das, J.*) Nanda Kumar Burdhan *v.* Governor-General in Council. I.L.R. (1947) 1 Cal. 590=51 C.W.N. 250.

———O. 11, Rr. 12, 14, 18 and 19—*Applicability—Crown—Liability of to produce documents—Privilege—Grounds of objection—If to be stated—Time for raising objection—Duty of Court to treat objection conclusive.*

It cannot be held that, in matters of procedure to which the C. P. Code relates, the Crown is on the same footing as any other litigant and that therefore the Crown is bound to make discovery under O. 11, R. 12, C. P. Code. The correct view is that the subject as against the Crown in India is not entitled to discovery, and no special ground of objection need be stated except public interest.

The question of the Crown's prerogative may arise either before the trial begins, out of an application for inspection of documents or at the trial itself when a *subpoena* has been served calling for the prooduction of documents and there is a refusal to comply on the ground that production would be contrary to the public interest; and the same considerations incidentally arise at either stage.

The second stage is covered by the provisions contained in Ss. 123, 124 and 162, Evidence Act; and with regard to the claim of privilege at the first stage (O. 11, C. P. Code), it must be held that documents otherwise relevant and liable to production need not be produced if, owing to their actual contents, or the class of documents to which they belong, the public interest requires that they should be withheld, and an objection to the production of documents duly taken by the head of a department should be treated by the Court as conclusive. (*O' Sullivan J.*) Sunder Das Vishindas *v.* Governor-General in Council. I.L.R. (1946) Kar. 416=A.I.R. 1947 Sind 154.

———O. 11, R. 12—*Order for discovery against Crown—If may be made.*

Per Full Bench.—In the matter of the procedure relating to discovery the law applicable to the Crown, when a party to a suit in India, is the same as that applicable to any other party, and the Crown in India does not retain the prerogative, which it has in England by virtue of which no order can be made against it compelling it to make discovery. I.L.R. (1946) Kar. 516, overruled.

Per *Thadani, J.*—The prerogative right of the Crown in India, in the matter of discovery, procedure in regard to which is regulated by O. 11, C. P. Code, has been taken away by reason of S. 276, Government of India Act, 1935, in suits instituted under the provisions of S. 79, C. P. Code, provided the subject-matter of the suit is one in respect of which the East India Company could have been sued as a body corporate. If, however, the subject-matter of the suit is not one in respect of which the East India Company could have been sued, the Crown in India, at any rate up to 15th August, 1947, could claim the prerogative right in the matter of discovery. (*Tyabji, C. J., Thadani and Constantine, JJ.*) Mahomed Mehdi *v.* Governor-General in Council. A.I.R. 1948 Sind 100 (F.B.).

———O. 11, R. 13—*Party directed to make discovery of his account books not having may—Affidavit, if necessary.*

A party who is directed by Court to make discovery of his account books is required by the Code to file an affidavit even if he has no books. O. 11, R. 13, C. P. Code, requires an affidavit and Appendix C, No. 5 shows that the affidavit must disclose that the party has no document if in fact he has none. (*Bose, J.*) Krishnakumar *v.* Jawand Singh. I.L.R. (1947) Nag. 790=231 I.C. 24=1947 N.L.J. 221=A.I.R. 1947 Nag. 236.

———O. 11, R. 14—*Discretion of Court.*

Under O. 11, R. 14, C. P. Code, the Court has a discretion in the matter of making an order for production of documents in the possession of another party and is not bound to do so, although they relate to the matter in question. The words "it shall be lawful" used in the rule are merely enabling, and confer a power on the Court which it could exercise in its discretion. (*Majumdar, J.*) Ram Hari De *v.* Niranjan Krishna Das & Co. 50 C.W.N. 845.

———O. 11, Rr. 14 and 12—*Order for production of documents—If may be made prior to order for discovery.*

An order to be made under O. 11, R. 14, C. P. Code, is not dependent upon any prior order being made under R. 12. The order for production of documents under R. 14 is an altogether different matter and distinct from an order for discovery and can be made by the Court *at any time* either on the application of a party or *suo motu*, provided the requisite conditions under the rule are satisfied. The use of the words "at any time" in the rule indicates that the Legislature intended that there should be no limitation with regard to the point of time when the order could be made. Consequently the Court has power to make the order under O. 11, R. 14, even before the written statement is filed or the order for discovery is made. (*Majumdar, J.*) Ram Hari De *v.* Niranjan Krishna Das & Co. 50 C.W.N. 845.

———O. 11, Rr. 14 and 21—*Order for production of documents not made under R. 14—Striking out of defence or dismissal of suit on non-compliance—If justified.*

Where the order for production of certain documents does not purport to be made under R. 14, of O. 11, C. P. Code, a failure to comply with it would not warrant a striking out of the defence or dismissal of a suit. (*Seth, J.*) Taffazul *v.* Shah Mohamed. I.L.R. (1949) A. 391=1948 A.W.R. (H.C.) 320=A.I.R. 1949 A. 261.

———O. 11, R. 21—*Applicability—No interrogatories filed.*

R. 21, of O. 11, C. P. Code, can only come into operation when there has been interrogatories which a party has been required to answer and which he has not answewred. Hence, it cannot apply to a case where there has been no application for leave to file interrogatories at all. (*Lal, J.M. I and Haider, J.M. II.*) Jogender

Singh *v.* Khushial Chamar. 1948 A.W.R. (Rev.) 274=1948 R.D. 413.

———O. 11, R. 21—*Applicability—Time limit fixed for payment—Disobeying of Court orders—Power of Court to strike off defence.*

The plaintiff (first respondent) filed a suit to recover possession of suit properties from first defendant, who was alleged to have been in possession as agent or lessee of plaintiff. The plaintiff's contention was that he had purchased the property under Ex. P-1 and that the first defendant was unlawfully setting up adverse title. The first defendant denied he plaintiff's right and alleged that the sale in favour of plaintiff was benami for himself. As the sale to plaintiff was subject to a mortgage only the balance of money was paid to the vendor, the rest of the sale price having been retained by the vendee to be paid to the mortgagee on ascertainment of actual dues after the decision in certain scaling down proceedings under the Agriculturists' Relief Act. During the suit for recovery of possession from defendants 1 and 4 to 6 who were all in possession of the properties for cultivation purposes, a Receiver was appointed and the Court directed the defendants to pay certain sums to the Receiver. Since the amounts were not paid in full and even the time limit fixed by Court for such payments was exceeded, the defence was struck off by order of Court. Thereafter evidence was let in for plaintiff and a decree passed in his favour. On the question whether the Court had power to strike off defence in the circumstances end to pass a decree in plaintiff's favour directing him, in turn, to pay the sale amount into Court.

Held, that this case did not fall within the specific provisions of the C. P. Code giving power to Courts to strike off defence (O. 11, R. 21). The proper procedure would have been to direct the Receiver to take possession forthwith and to take other proceedings for recovery of the amount due from the defendant. But that would not justify the drastic order of striking out the defence on the ground that the amount ordered to be paid was not paid within time given. (*Somayya and Rajamannar, JJ.*) Ramayya Servai *v.* Sama Ayyar. I.L.R. (1947) Mad. 397=1947 Mad. (Rul.) 183=A.I.R. 1947 Mad. 92=230 I.C. 256=59 L.W. 508=1946 M.W.N. 589=(1946) 2 M.L.J. 210.

———O. 11, Rr. 21 and 13—*Order for discovery of account books on plaintiff—Latter failing to swear affidavit on counsel's advice—Suit, if liable to be dismissed.*

Under O. 11, R. 21, C. P. Code, a suit cannot be lightly thrown out or defence struck off without adequate reason; unless the default by the party is wilful, no order can be passed under that rule. A party in default must either be inn a position to know what the consequence of his default would be or someone should have explained the true legal position to him, before he can be penalised for his default. Where a plaintiff on whom an order for discovery of his account books is made under O. 11, R. 12 fails to file an affidavit under O. 11, R. 13 acting on the advice of his counsel that it is not necessary to do so and that a statement by him in the witness-box that he has no account books would meet the requirements of law, the default by the plaintiff cannot be regarded as a wilful default. A party ought not to suffer for a counsel's error, provided, of course, the error is *bona fide*. Here, as R. 13 of O. 11 does not say that filing an affidavit is the only way of answering an order under R. 12, there is room for counsel to say that denial in the witness-box would be as efficacious. (*Mudholkar, J.*) JAWAN SINGH *v.* KRISHNA KUMAR. 1949 N.L.J. 511=A.I.R. 1950 Nag. 8=5 D.L.R. (Nag.) 49.

———**O. 11, R. 21**—*Order under—When could be passed.*

An order under R. 21 of O. 11, C. P. Code can be passed only when a prior order has been passed under R. 11 of the same order requiring a party to answer interrogatories. It cannot be said that an order under R. 1 of O. 11 would amount to an order to answer interrogatories, so as justify a Court in dismissing a suit for failure to answer interrogatories. An order under R. 1 merely grants leave to deliver interrogatories. (*Mootham, J.*) CHANDRA BHAN SINGH *v.* LALLU SINGH. I.L.R. (1947) All. 389=229 I. C. 26=1947 A. (Rul.) 112=1947 A.L.W. 238 =A.I.R. 1947 A. 343.

———**O. 12, R. 6**—*Admission in pleadings subject to condition—Whether can be split up.*

If an admission in a pleading is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. It cannot be split up. If in a suit for recovery of money tent and advanced against three defendants one of the defendants alleges in the written statement that the loan was made by the plaintiff only to him personally and that he has made a part payment, the admission of this defendant in so far as it is an admission of the plaintiff's claim in the suit is a strictly conditional one. He says that the plaintiff is entitled to receive the admitted amount but subject to this, *viz.*, that he is enitled to receive it from this defendant and not from any of the others. The plaintiff cannot, therefore, split up the admission so as to take advantage of it in so far as it enables him to obtain realisation of the admitted amount from the defendant making the admission and at the same time proceed with the suit for the recovery not only of the balance not admitted from him but of the entire amount of his claim in the suit from the other defendants. (*Khundhar, J.*) BIRENDRA NATH MALLICK *v.* BRAHMA BRATA ROY. I.L.R. (1946) 1 Cal. 652 =50 C.W.N. 439.

———**O. 12, R. 6**—*Applicability—Judgment on admission under O. 9, R. 8.*

O. 12, R. 6, C. P. Code, contemplates an application by the plaintiff for judgment on admission. So, there can be no scope for a judgment on admission under O. 9, R. 8, which contemplates a case where both the plaintiff and the defendant are absent at the hearing. (*Biswas and Blank, JJ.*) ABINASH CHANDRA RAY *v.* SURJYA NARAYAN SHAHA. I.L.R. (1948) 1 Cal. 141.

———**O. 12, R. 8**—Decree on admission under Finality of—Decree allotting properties in partition suit—Reservation as to re-allotment at final decree stage if considered necessary or desirable—Subsequent amendment of written statement to embody contentions contrary to statements made originally—Permissibility. [*See* Q.D. (1941-1945), Vol. I, Col. 1103.] SIVALINGA PATHAR *v.* NARAYANI AMMAL. A.I.R. 1946 Mad. 151.

———**O. 12, R. 6**—*Discretion of Court—Judgments upon admission.*

It is well settled that judgmennts upon admission under O. 12, R. 6, C. P. Code, are matters of discretion and not of right. Where the case involves questions which cannot be conveniently disposed of on a motion under this rule, the Court should in the exercise of its discretion refuse the motion. (*Khundkar, J.*) BIRENDRA NATH MALLICK *v.* BRAHMA BRATA ROY. I.L.R. (1946) 1 Cal. 652=50 C.W.N. 439.

———**O. 13, Rr. 1 and 2**—*Admission of public records at late stage—Discretion of trial Court.*

The trial Court has a discretion in the matter of admitting public records at a late stage. While generally speaking it will be a wise exercise of the discretion to admit such evidence, the question must be decided in each case in the light of the particular circumstances. (*Sir Lionel Leach.*) KANDA *v.* WAGHU. 77 I.A. 15=1950 A.L.J. 326 =1950 A.W.R. 292=1950 R.L.W. 31=52 Bom.L.R. 498=85 C.L.J. 352=53 L.W. 232= A.I.R. 1950 P.C. 68=1950 M.W.N. 168= (1950) 1 M.L.J. 417 (P.C.).

———**O. 13, R. 1 and Civil Rules of Practice (Madras), R. 62**—*Refusal to excuse delay in filing some of the documents and excusing delay as to documents regarding which there was no opposition by the other party—Arbitrary exercise of discretion—Revision.*

Where an application is made to excuse delay in filing a number of documents, the Judge cannot arbitrarily condone the delay as to documents for which there was no opposition and refuse to excuse the delay as to the other documents where there is no ground for any real discrimination between the items admitted and the items excluded. In such a case it cannot be said that the discrimination was made in the exercise of judicial discretion and is liable to be interfered with in revision, though ordinarily, an order refusing to condone the delay in filing a document is not one which interfered with in revision.

It is usual to apply R. 62 of the Civil Rules of Practice (Madras)) with reasonable laxity and give parties time to get certified copies of official documents in view of the possibility of delay. (*Mack, J.*) THAYYAL *v.* BAGGYATHAMMAL. A.I.R. 1949 Mad. 759=(1949) 1 M.L.J. 484.

———**O. 13, R. 2**—*Official records produced at late stage—Rejection—Propriety.*

The fact that documents were produced at a late state is not in itself a sufficient ground for rejecting them, when the documents are official records of undoubted authenticity which may assist the Court to decide rightly the issue before it. (*Pollock and Sen, JJ.*) Buchibai *v.* Nagpur University. I.L.R. (1946) Nag. 433=1946 N.L.J. 406=A.I.R. 1946 Nag. 377=1947 I.T.R. 150.

——— **O. 13, R. 2**—*Public documents necessary for determination of question in issue—Failure to file in proper time—Duty of Court.*

Where copies of public documents and official records, which would be of help to the Court in deciding the question at issue before it, have not been filed in time, the Court should not for that reason refuse leave to have them filed later. (*Bates, J.M. and Nehru, A.M.*) Sukhdei *v.* Har Narain. 1947 A.W.R. (Rev.) 114.

——— **O. 13, R. 4**—*Certified copy of public record not exhibited—Probative value.*

It is no doubt necessary for the Court to exhibit every document which is produced by the parties and is proved, where proof is necessary. But the fact that this has not been done does not take away from the probative value of the document, particularly when the document is a certified copy of a public record and no formal proof of it was necessary. (*Teja Singh, C. J. and Chopra, J.*) Mana *v.* Mt. Diali. A.I.R. 1950 Pepsu 55.

——— **O. 14, R. 1**—*Framing of issues—Duty of Court.*

In deciding suits issues should be framed when from the pleas of the parties it is clear that they are at issue on any point. 1944 R.D. 127.

Where though a plea of limitation is raised in the written statement, no issue is raised on it, the case has to be remanded for trial after framing proper issues. (*Faiyaz Ali, J.M. II and Lal, J.M. I.*) Bansh Bahadur Lal *v.* Balraj. 1949 R.D. 250 (1).

——— **O. 14, R. 1 (5)**—*Framing of issues—Duty of Court.*

The issues are the back-bone of a suit. It is the duty of a Court under sub-R. (5) of R. 1 of O. 14, C. P. Code, to ascertain at the first hearing of the suit, the material propositions of fact or law on which the parties are at variance and thereafter to frame and record the issues on which the decision of the case depends. (*Lal, J.M. I.*) Bansi *v.* Munshi. 1949 R.D. 381.

——— **O. 14, R. 2**—*Exercise of discretion under—Interference in revision.*

The discretion that a trial Court is called upon to exercise under O. 14, R. 2, C. P. Code, is a nice one to be determined by the facts of each case, in other words, whether the preliminary issue of law raised would be sufficient and is so clear out that it will decide the suit finally once and for all.

Where a Court declined to decide first an issue of jurisdiction as a preliminary issue which was one of mixed law and fact namely whether the suit filed under S. 92, C. P. Code, with the consent of the Advocate-General did not also come within the scope of S. 73 of the Madras Hindu Religious Endowments Act requiring sanction of the Board,

***Held*:** That in the circumstances, the lower Court had acted with no material irregularity in

the exercise of its discretion under O. 14, R. 2, C. P. Code. (*Mack, J.*) Ganapathi Pillai *v.* Somasundaram Pillai. 62 L.W. 794=A.I.R. 1950 Mad. 213=(1949) 2 M.L.J. 602.

——— **O. 14, R. 2 and S. 92**—*Trial of preliminary issue—Rules as to—Sanction of Advocate-General to institute suit—Not bad on the face of the record—Refusal of trial Judge to try issue regarding the validity of the sanction as preliminary issue—Not a material irregularity.*

Under O. 14, R. 2 of the Code, where issues of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of issues of fact until after the issues of law have been determined. The Court therefore has a discretion as to the order in which it shall try the issues arising in the case and the power to dispose of the issues in the way in which it considers to be most conducive to the rendering of justice. But, in appealable cases, Subordinate Courts should, as far as possible, receive the evidence adduced and decide all the issues in order to avoid a piecemeal trial and a protracted litigation in the shape of an appeal and remand in case the decision of the subordinate Court on the preliminary issues is not upheld by the appellate Court. So, in a case where the Advocate-General sanctioned the institution of a suit, under S. 92 of the Code, and the validity of the sanction is questioned and sought to be tried as a preliminary issue, the Court may refuse to do so, when there is nothing bad with the sanction on the face of the record and the suit itself, both on the issues of fact and law, is ripe for trial. (*Viswanatha Sastri, J.*) Shibathullahi Sahib *v.* Mohammad Labbai. 63 L.W. 369=A.I.R. 1950 Mad. 596=5 D.L.R. (Mad.) 249=(1950) 1 M.L.J. 657.

——— **O. 14, R. 5 and S. 115**—*Order refusing to frame issues—Revision.*

The provisions of O. 14, R. 5, C. P. Code, make it obligatory upon a Court to frame such issues as are necessary for determining the controversy between the parties, and if it refuses to do so, it fails to exercise the jurisdiction which is vested in it. It is a well-established principle that if the determination of any particular question of fact or law results in affecting the Court's jurisdiction to decide a matter, an erroneous decision of that question of fact or law is also a question of jurisdiction. If the Court has decided wrongly that a particular issue is not necessary for determining the controversy while it is, in fact, necessary, it is this wrong decision which leads it to the position of failing to exercise its jurisdiction of framing necessary issues. A revision, therefore, lies from an order refusing to frame issues. (*Ray, J.*) Shiba Prasad Singh *v.* Nilalji Bali. 12 B.R. 389=223 I.C. 303=1946 Pat. (Rul.) 180=A.I.R. 1947 Pat. 45.

——— **O. 14, R. 5 (2)**—Order under striking off certain issues—Revision under S. 115—Competency. *See* C. P. Code (V of 1908), S. 115 and O. 14, R. 5 (2). 1948 A.L.J. 105.

———**O. 15, Rr. 1 and 3**—*Procedure—Admission of facts in statement by pleader—Judgment on—If justified.*

Where a statement made by a party's pleader contains an admission of facts sufficient to dispose of the case, the Court may at once proceed to pronounce judgment on such admission, under Rr. 1 and 3 of O. 15, C. P. Code. (*O'Sullivan and Constantine, JJ.*) KUNDIBAI *v.* VISHINJI. 228 I.C. 75=1947 Sind (Rul.) 32=A.I.R. 1947 Sind 105.

———**O. 16**—If governs issue of summons under S. 36 of the Presidency Towns Insolvency Act. *See* PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 36. (1948) 1 M. L. J. 241.

———**O. 16, R. 1**—*Summons to witness at late stage—Right of party.*

Under O. 16, R. 1, C. P. Code, a party is entitled as of right to a summons so long as the application is made after the institution of the suit and before it is decided. It does not matter that the application is made at a late stage of the proceedings. The Court must grant the application though it need not adjourn the hearing for the attendance of the witness summoned. 7 C. 560 and 16 A. 218, foll. (*Harries, C.J. and Sarkar, J.*) ASWINI KUMAR BHANDARI *v.* ANUKUL CHANDRA BHANDARI. A.I.R. 1950 Cal. 326.

———**O. 16, Rr. 7 and 10**—*Witness of plaintiff asked by Court to produce a document—Document containing accounts of his own family—Non-production—Summary punishment of fine—If can be inflicted—Evidence Act (I of 1872), S. 168 not availed of.*

Where the petitioner, a witness of the plaintiff in the District Munsiff's Court, was referred to a note made by him in a private diary, and later he was questioned whether he had maintained accounts of his own family income and expenditure, and he replied in the affirmative, whereupon the Court directed him to produce such accounts the next day, but the petitioner neither appeared again in Court nor produced the accounts and the District Munsiff imposed a fine of Rs. 50 on the witness for contempt of Court in disobeying the order to produce accounts.

Held, that there is no provision in the C. P. Code or elsewhere entitling the District Munsiff to make the order against which complaint was made. The order should be set aside and the fine remitted. 1929 All. 99, not followed.

If neither party needs the assistance of the Court in procuring evidence, the Court may make orders in accordance with rules. (*See* O. XIII and O. XVI of the Code). In proper cases the Court may inflict penalties on those who disobey orders made in accordance with the rules.

The Court had of course power to require persons present in Court to give evidence or to produce documents which they have in their possession or power, then and there. (O. XVI, R. 7.) But the Court cannot of its own accord issue summons under O. XVI, R. 10.

When the District Munsiff was also not acting under S. 165, Evidence Act, under which a Court has wide powers to order production of any document there is no authority to summarily inflict a fine for non-production of witness's private and family accounts. (*Bell, J.*) CHINNASAMI THANJIROYAR *v.* PICHAI MARICAR. I.L.R. (1947) Mad. 360=A.I.R. 1947 Mad. 58=1946 M.W.N. 566=59 L.W. 453=(1946) 2 M.L.J. 141.

———**O. 16, R. 19 (b)**—*"Established public conveyance"—If includes disconnected buses belonging to different companies running in different routes—Important witness—If can ask to be examined on commission.*

The "established public conveyance" mentioned in R. 19 (*b*) of O. 16, C. P. Code, does not mean disconnected buses belonging to different companies and with no certainty of continuous travel. Where a witness is living at a place which is about 300 miles by train from the place where the Court is situate, a prayer to examine such a witness cannot be refused on the ground that the place where the witness lives is less than 200 miles from the Court house, if a person is to travel by buses, where there is no *"through"* or connected bus service, ensuring continuous travel.

Any witness however important, is entitled to ask to be examined on commission if he lives in a place more than 200 miles from the Court house and the Court sees no fraud or *mala fides* in the application. (*Panchapakesa Ayyar, J.*) BORRAYYA *v.* RAMAKOTI SASTRI. 1949 M.W.N. 42 =A.I.R. 1949 Mad. 468=62 L.W. 99=4 D.L.R. (Mad.) 97=(1948) 2 M.L.J. 641.

———**O. 16, R. 19 (b)**—*Expert witness—Right of party to examine on commission—Principles governing.*

A party to a suit has a right to ask for the issue of a commission to examine a witness beyond the prescribed distance. The same principle applies even in the case of an expert witness. A party can ask for a commission to examine a handwriting expert of his choice as a matter of right.

Accordingly where in a suit on a promissory note the defendant who contends that the endorsement was a forgery applies for the issue of a commission to examine Mr. Dixit, Government Examiner of questioned documents, Central Provinces and Bear, it is not open to the Court to dismiss the application on the ground that it was desirable that the suit document should be examined by the Government Examiner of the Central Government.

When a petitioner is entitled to select his own witnesses and he selects one of the two witnesses that are available, it cannot be said that he is guilty of an abuse of the process of Court. (*Subba Rao, J.*) SUBBARAYA PADAYACHI *v.* KOZHANDAIVEL UDAIYAR. 61 L.W. 828=A.I.R. 1949 Mad. 496=4 D.L.R. (Mad.) 50=1948 M.W.N. 831=(1948) 2 M.L.J. 567.

———**O. 16, R. 20**—*Scope and applicability—Plaintiff refusing to give statement to Commissioner appointed to examine her at the instance of the defendant.*

The penalty provided by R. 20 of O. 16, C. P. Code, applies when the party required by the Court to give evidence is present before the Court and refuses to give evidence. A penalty under R. 20 of O. 16 is imposed on the party as such and not as a witness. Hence, where the plaintiff refuses to give a statement to a Commissioner appointed to examine her at the instance of the defendant, R. 20 of O. 16 has no application, because the party was not before the Court and it was not the Court that required the plaintiff to give evidence. (*Chandiramani, J.*) Janki Kuar *v.* Babni. 1948 O.W.N. 100=A.I.R. 1948 Oudh 225=1948 A.W.R. (C.C.) 76.

———**O. 17, R. 1 (2)**—*Costs "occasioned by the adjournment"— Interpretation of—If restricted to taxable costs of the day.*

The expression "occasioned by the adjournment" is deliberately used in O. 17, R. 1 (2), C. P. Code, in order that the discretion of the Court should not be restricted to the taxable costs of the day. The principle underlying the rule is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be "occasioned by the adjournment", and as might reasonably compensate him for the expense incurred by reason of the adjournment. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment, and hence the costs awarded should in no case exceed a sum commensurate with the expense which, in the opinion of the Court, the party ready to proceed with the suit reasonably incurs as a result of the adjournment. (*Lokur and Gajendragadkar, JJ.*) Jadavbai Narayandas *v.* Shrikisan. 224 I.C. 547=1946 Bom. (Rul.) 262=47 Bom.L.R. 978=A. I.R. 1946 Bom. 113.

———**O. 17, R. 12**—*Applicability—Decision on merits on the absence of the plaintiff at the first hearing—Legality—Proper procedure.*

As O. 17 R. 2, C. P. Code, applies only to an adjourned hearing **and not to the first hearing**, a Court is not justified in giving a decision on the merits of a suit on the absence of the plaintiff or his pleader at the first hearing of the suit. The Court could only pass an order under R. 8 of O. 9, C. P. Code. (*Pathak, J.*) Idris Ahmad Khan *v.* Zahir Ahmad Khan. 1946 O.W.N. (H.C.) 193=1946 A.L.W. 201.

———**O. 17, Rr. 2 and 3 and O. 9, R. 13**—*Defendant absent on date to which suit had been adjourned by the Court* suo motu—Ex parte *decree—Decision if one under R. 2 or R. 3 of O. 17.*

Where the defendant is absent on the date to which the suit had been adjourned by the Court *suo motu* and the Court proceeds to decide the case *ex parte*, the decision is one under R. 2 and not R. 3 of O. 17 inasmuch as the adjournment was not at the request of the party. Such a suit could be restored under R. 13 of O. 9, C. P. Code, if other conditions are satisfied. (*Pedley, S.M. and Bates, J.M.*) Rikhiram *v.* Ghaffar. 1947 R.D. 107=1947 A.W.R. (Rev.) 53.

———**O. 17, R. 2 and O. 9, Rr. 3 and 4**—*Dismissal of suit on adjourned hearing—Both plaintiff and defendant not appearing—Application for restoration also dismissed—Order of dismissal —If appealable.*

The provisions of O. 9, C. P. Code, by themselves do not apply to adjourned hearings, but the

effect of O. 17, R. 2, C. P. Code, is to assimilate the procedure contemplated in O. 9 to adjourned hearings. If both the plaintiff and the defendant fail to appear on an adjourned hearing and the Court dismisses the suit, the order of dismissal of the suit must be deemed to be made under O. 17, R. 2 read with O. 9, R. 3, C.P. Code. No appeal lies from the order dismissing the suit under O. 9 R. 3 or from the order dismissing the application for restoration of the suit under O. 9, R. 4, C. P. Code. (*O'Sullivan and Thadani, JJ.*) Hassomal Tillumal *v.* Ghulam Nabishah. A.I.R. 1949 Sind 26.

———**O. 17, R. 2**—*Disposal of* ex parte *case under—Duty of Court to write a judgment.*

When a Court disposes of an *ex parte* case under R. 2 of O. 17, C. P. Code, it is not necessary that a judgment with a finding on each issue should be recorded. (*Lal, J.M. I.*) Raja Ram *v.* Beni Madho. 1949 R.D. 22.

———**O. 17, R. 2 and O. 9**—Ex parte *decision on adjourned date—Decision, if becomes one on merits by giving of reasons so as to take case out of O. 9.*

Where on an adjourned date a case is decided in the absence of the defendant and the order is described as an *ex parte* one, it cannot be said that merely because the Court gave some reasons for its decision, it becomes a decision on merits so as to take the case out of the provisions of O. 9, C. P. Code. (*Lal, J.M. I and Haider, J.M. II.*) Nek Dil *v.* Shakoor. 1948 R.D. 456.

———**O. 17, Rr. 2 and 3 and S. 115**—Ex parte *decree on adjourned date without mentioning whether it was under R. 2 or R. 3 of O. 17 —How to be construed—Dismissal of application to set it aside on the ground that order was under R. 3 of O. 17—Refusal to exercise jurisdiction.*

Where on an adjourned date, a Court passes an order decreeing the suit without stating whether it was passed under R. 2 or R. 3 of O. 17, C. P. Code, it must be taken that the order is one under R. 2 of O. 17. If the Court dismisses an application to set aside such a decree on the ground that it was passed under R. 3 of O. 17, it is a refusal to exercise jurisdiction vested in it by law and as such is open to be revised. 47 All. 140 and 181, foll. (*Seth, J.*) Gulab *v.* Madhusudhan Lal. 1948 O.W.N. 381=A.I. R. 1949 A. 221=1948 A.L.W. 379.

———**O. 17, Rr. 2 and 3**—*Ex parte* order on the vakil for respondent reporting no instructions and the petitioner proving his claim. *See* Land Acquisition Act (I of 1894), S. 30. (1948) 1 M.L.J. 119.

———**O. 17, Rr. 2 and 3**—*Refusal of adjournment and reporting of no instructions by plaintiff's pleader—Decision purporting to be passed on finding on merits dismissing the suit as not maintainable—Dismissal of application by plaintiff to restore suit under O. 9, R. 9—Appeals against dismissal of application under O. 9, R. 9, as well as against decree dismissing suit on merits—Failure of former appeal—If bars latter appeal.*

Where on the refusal of an application for adjournment the plaintiff's pleader reports "no instructions" and the plaintiff though present during the defendant's arguments asks for time to engage another pleader which is refused, the trial Judge should, in such circumstances, pass an order dismissing the suit for default and not purport to pass a decree based on a finding on the merits against the plaintiff. Where in such circumstances a decree purports to be passed on the merits the plaintiff will not be deprived of the remedy of applying under O. 9, R. 9, for the restoration of the suit on the ground that it has really been dismissed for default. But the fact that this remedy has been recognised will not deprive the plaintiff of the remedy which the law allows to a plaintiff against whom a decree has been passed dismissing the suit on the merits. Merely because the decree on merits can for certain purposes be treated as the order which ought to have been passed (namely, dismissal for default) it does not follow that for the purpose of disposal of appeal the Court is not to have regard to the decree which was in fact passed. The failure of an appeal against the dismissal of an application for restoration of the suit dismissed for default is no bar to an appeal against the decree treating it as a decree on the merits. (*Wadsworth and Govindarajacchari, JJ.*) Somasundaramma *v.* Seshagiri Rao. I.L.R. (1948) Mad. 109=1947 M.W.N. 622=60 L.W. 273=A.I.R. 1947 Mad. 378=(1947) 1 M.L.J. 292.

———O. 17, Rr. 2 and 3—*Relative applicability.*

R. 3 of O. 17 applies only to those cases in which time has been granted to a party at his request to produce evidence or to do any one of the acts mentioned in that rule. In all other cases where one of the parties absents himself on the hearing date, the Court should dispose of the suit as provided in R. 2. (*Hoider, J.M. I and Lal, J.M. II.*) Jai Gopal *v.* Rajendra Sahai. 1948 R.D. 203 (2)=1948 A.W.R. (Rev.) 175.

———O. 17, Rr. 2 and 3—*Relative applicability—Test—Court purporting to act under O. 17, R. 3—Real nature of the order—Counsel asking for adjournment and on refusal reporting no instruction—Presence of party—If affects the question.*

A suit was posted for hearing on a particular date after two adjournments and on that date a pleader applied for an adjournment as the pleader appearing for the plaintiff (respondent) was ill. The adjournment was refused and the pleader represented that he had instruction from the pleader appearing for the plaintiff and who was ill to report no instructions. The plaintiff (respondent) was present in Court. Thereupon the Judge dismissed the suit under O. 17, R. 3. The plaintiff (respondent) applied under O. 9, R. 9 to have the order of dismissal set aside. The suit was restored to file on the ground that though the order of dismissal purported to be under O. 17, R. 3, it was really an order under O. 17, R. 2. On revision,

Held, the order of dismissal should be regarded as an order made under O. 17, R. 2 and not under R. 3, for O. 17, R. 3 applies only to cases where the parties are present. The mere physical presence of the plaintiff (respondent) did not affect the question. (Case-law discussed.) (*Happell, J.*) Venkatareddi *v.* Ranga Reddi. 227 I.C. 232=1946 M.W.N. 417=59 L.W. 291=A.I.R. 1946 Mad. 491=(1946) 1 M.L.J. 452.

———O. 17, Rr. 2 and 3—*Scope and applicability—Plaintiff absent on the date of the trial and her counsel reporting "no instructions"—Defendant admitting part of claim—Decree for that part and dismissal of rest of claim on merits after hearing defendant's counsel—Remedy of plaintiff—Application under R. 9 of O. 9—Maintainability.*

The plaintiff in a suit asked for arrears of maintenance and for an enhancement of the previous rate which had been fixed by a registered agreement and the defendant while admitting the arrears as due pleaded that enhancement was neither possible nor lawful. The plaintiff was absent on the date of the trial and on the refusal of an adjournment her advocate reported "no instructions". Thereupon the Court purporting to proceed under R. 3 of O. 17 of the C.P. Code passed a decree for the amount of the arrears of maintenance but dismissed the plaintiff's claim for enhancement after examining the registered document itself and hearing the arguments of the defendant's counsel. An application by the plaintiff under R. 9 of O. 9 of the C. P. Code to set aside the order of dismissal of the second part of her claim was dismissed as not maintainable and it was confirmed in appeal. In revision,

Held, O. 17, R. 3 applies only to cases where the parties are present and as only one of the parties was present, the trial Court should have proceeded with regard to the second part of the plaintiff's case under the provisions of O. 17, R. 2, namely, by dismissing that part in default of her appearance. The plaintiff in the circumstances, had two remedies (1) to appeal against the decree of dismissal on merits and|or (2) to proceed under O. 9, R. 9. Hence the plaintiff was entitled to proceed under O. 9, R. 9, the more convenient and cheaper course and have the order of the dismissal of the second part of the claim set aside. (*Bell, J.*) Venkataratnam *v.* Apparao. 60 L.W. 235=1947 M.W.N. 381=A.I.R. 1948 Mad. 80=(1947) 1 M.L.J. 271.

———O. 17, Rr. 2 and 3 (All.)—Scope and effect of. *See* C. P. Code (V of 1908), O. 9, R. 13 and O. 17, Rr. 2 and 3. I.L.R. (1950) All. 240.

———O. 17, Rr. 2 (1) (2) and 3 (U.P.)—*Adjournment for examining plaintiff as defendant's witness at the instance of the plaintiff—Defendant absent on adjourned day—Provision of law applicable.*

Where the adjournment for examining plaintiff as defendant's witness is at the instance of the plaintiff and the defendant is absent on the adjourned day and the plaintiff is present, R. 3

of O. 17, C. P. Code, has no application and it is only R. 2 (1) of O. 17 that applies. (*Ghulam Hasan, C.J.*) Kewal Singh *v.* Tulshi Ram. 21 Luck. 581=A.I.R. 1947 Oudh 84=226 I.C. 543=1946 Oudh (Rul.) 257=1946 A.W.R. (C. C.) 217=1946 O.A. (C.C.) 217=1946 O.W. N. 343.

———**O. 17, R. 3**—Applicability. *See* C. P. Code, O. 9, R. 9 and O. 17, R. 3. (1948) 1 M.L.J. 65.

———**O. 17, R. 3 and O. 9, R. 13**—*Adjournment for the filing of written statement—Written statement not filed—Defendant* ex parte—*Examination of plaintiff and decree—Nature of decree—Application under R.* 13 *of O.* 9—*Maintainability.*

The granting of time to a defendant for filing his written statement is covered by the provisions of O. 17, R. 3, C. P. Code. Hence when on the adjourned date the defendant does not file his written statement and remains *ex parte* and the Court examines the plaintiff and decrees the suit *ex parte*, the decision is on the merits. In such a case an application by the defendant under R. 13 of O. 9, C. P. Code, would not lie. The conditions mentioned in R. 3 of O. 17 are satisfied and an application under R. 13 of O. 9 is precluded. (*Pathak, J.*) Butau Ram *v.* Madan Lal Marwari. 1946 A.L.W. 219=1946 O.W. N. (H.C.) 211=1946 A.W.R. (H.C.) 415= A.I.R. 1947 All. 40=229 I.C. 268=1947 All. (Rul.) 146.

———**O. 17, R. 3**—*Applicability—Application by plaintiff's counsel for adjournment on ground of plaintiff's absence, refused—Suit dismissed after recording defendant's evidence—Remedy of plaintiff.*

Where the plaintiff's counsel appears on the adjourned date of hearing and applies for an adjournment on the ground of the absence of the plaintiff and his witnesses due to illness, and when his request for adjournment is refused retires from the case on the ground that no instructions were given to him by the plaintiff for that particular date and thereafter the Court records the evidence of the defendant and passes a decree dismissing the plaintiff's suit, the dismissal of the suit is on merits under O. 17, R. 3, C. P. Code, and the proper remedy of the plaintiff is by way of an appeal and not by way of an application for restoration of the suit to file. The Court passing the decree has no jurisdiction to set aside the decree passed by it in a proceeding started on an application for restoration of a suit to file and the High Court cannot also do it in revision against an order refusing to restore the suit to file. (*Padhye, J.*) Sitalprasad *v.* Sukya. I.L.R. (1948) Nag. 462=1948 N.L.J. 443=A.I.R. 1948 Nag. 310=3 D.L.R. (Nag.) 65.

———**O. 17, R. 3 (All.)**—*Applicability—Plaintiff absent on adjourned date and his pleader reporting no instructions on refusal of further adjournment—Dismissal—Appealability.*

Where a plaintiff is absent on an adjourned date and his pleader reports no instruction on the Court refusing further adjournment and the Court thereupon dismisses the suit "for default of the plaintiff," O. 17, R. 3, C. P. Code, applies and an appeal would lie against the decision of the Court. (*Verma, Hamilton and Sinha, JJ.*) Panna Lal Mandwari *v.* Bishan Devi. I.L.R. (1946) All. 833=228 I.C. 547=1947 All. (Rul.) 91=1946 A.L.J. 277=1946 A.W.R. (H.C.) 473=1946 A.L.W. 315=A.I.R. 1946 A. 353.

———**O. 17, R. 3**—*Dismissal under—Application for restoration under O. 9—Maintainability.*

Where the dismissal of a suit is under R. 3 of O. 17, C. P. Code, an application for its restoration under O. 9 cannot lie. (*Lal, J.M. I and Haider, J.M. II.*) Brij Mohan *v.* Bhola. 1949 R.D. 98.

———**O. 17, R. 3**—*Disposal of suit under—Circumstances that can be taken note of.*

When a Court decides to dispose of a case under the provisions of O. 17, R. 3, C. P. Code, the Court is not necessarily bound to take note only of the absence of the defendant on that date. The Court can also take into account the general past conduct of the party in respect of that suit and his prior laches. (*Lal, J.M. I.*) Mathura Prasad *v.* Brij Rani. 1948 R.D. 334 =1948 A.W.R. (Rev.) 202.

———**O. 17, R. 3**—*Scope and applicability—Restoration applications.*

Even if O. 17, C. P. Code, cannot be applied to restoration applications, there is nothing to prevent the principles underlying that order from being applied to miscellaneous proceedings. Where during the progress of an application to set aside an *ex parte* decree a party has been ordered to do something and he fails to do that, the Court may on the adjourned day apply the principles of R. 3 of O. 17, and decide the matter on the merits, as it stands with the materials on the record. (*Bind Basni Prasad and Agarwala, JJ.*) Chandra Mohan *v.* Raghunath Prasad. 1950 A.W.R. 181=A.I.R. 1950 A. 339=5 D.L.R. (A.) 198=1950 A.L.J. 82.

———**O. 17, R. 3 and O. 20, R. 4 (2) (U.P.)**—*Scope and effect of R.* 3 *of O.* 17—*Necessity for judgment as required by O.* 20, *R.* 4 (2) *even when defendant is in default.*

R. 3 of O. 17, C. P. Code, as amended, does not mean that the Court may merely pass a decree if the defendant is in default. What it means is that the Court may further adjourn the hearing or it may without granting any further adjournment proceed to try the suit, take such evidence as may be produced and decide the suit on the merits. There must be a judgment containing the particulars specified in O. 20, R. 4 (2) even in such a case. (*Acton, S.M.*) Mahomed Zia *v.* Girja. 1946 A.W.R. (Rev.) 22.

———**O. 18, R. 4**—*Summary dismissal of suit on admissions of one of plaintiffs—Propriety.*

In a suit brought by eleven plaintiffs for declaration of their right of way over a village path, the Court held on the basis of certain admissions made in his cross-examination by one of the plaintiffs that the disputed path was a public highway and not a village path, and dismissed the suit on the ground that it was not maintainable under S. 91 and O. 1, R. 8 C. P. Code. No specific objection with regard to the ground of non-maintainability was taken in the written statement. The suit was decided without taking the evidence of the witnesses who were in attendance and without considering other materials already on the record, such as the report of the commissioner who held a local investigation.

Held, that the summary dismissal of the suit without complying with the provisions of O. 18, R. 4, C. P. Code, was neither fair nor proper. (*Sharpe, J.*) HANGSA KALITA *v.* PRODIPRAI DEKA. I.L.R. (1946) 1 Cal. 522=A.I.R. 1949 Cal. 209=83 C.L.J. 123=50 C.W.N. 489.

———O. 18, R. 17—*Powers of Court—Conclusion of hearing and reservation of judgment—Power to recall witness and examine further—Right of party to apply to Court.*

The powers given to a Court under O. 18, R. 17, C. P. Code, are very wide and it is desirable that they should be kept wide. The effect of the words "at any stage of a suit" is that if a Court, after the hearing is concluded, while considering its judgment, finds that there is an ambiguity on the face of the record, or an omission which wants clearing up the Court can, in a proper case, recall a witness, who had given evidence, for that purpose. The Court can exercise its power either of its own motion or at the instance of a litigant. But the power, being discretionary should be exercised with the greatest care and only in the most peculiar circumstances. (*Blagden, J.*) MADHUBHAI AMTHALAL *v.* AMTHALAL NANALAL. 48 Bom.L.R. 721=A.I.R. 1947 Bom. 156=231 I.C. 308.

———O. 18, R. 18—*Memorandum of local inspection—If must form part of record.*

There is no provision in O. 18, R. 18, C. P. Code, for the making of any memorandum to form part of the record, such as is provided by S. 539-B, Cr. P. Code, for criminal cases. (*Sharpe, J.*) BHOLANATH GHOSH *v.* MOMENA KHATUN. 223 I.C. 470=1946 Cal. (Rul.) 178=50 C.W.N. 682=A.I.R. 1946 Cal. 444.

———O. 18, R. 18—*Scope—Object of local inspection—Bringing fresh evidence on record—Propriety of.*

It is well-established that the purpose of a local inspection is to enable the Court to understand the evidence on the record, and not to bring fresh evidence on the record. Such local inspection cannot be used for the purpose of bringing fresh evidence on record. (*Shearer and Reuben, JJ.*) MAHOMED MIAN *v.* JUGESWAR. 21 Pat. 554.

———O. 19, Rr. 1 and 2—*Scope—Affidavit—Value of—Oral denial of allegations by opposite party—If makes affidavit not evidence of facts alleged—Duty of deponent to go into witness box when no request is made by opposite party.*

An affidavit does not cease to be evidence of the facts alleged therein merely because the opposite party verbally denies them without any attempt at controversion by a counter-affidavit or without a request for the attendance of the deponent for cross-examination. It is not incumbent on the deponent to go into the witness box voluntarily, though no demand or request therefor is made by the other side. (1942) O.W.N. 242, ref. (*Misra and Kaul, JJ.*) JAMALUDDIN ABDUL WAHAB *v.* ABDUL ALI. I.L.R. (1950) All. 65=4 D.L.R. (All.) 277.

———O. 20, R. 2—Scope—Scheme decree—Subsequent modification—Application for—Maintainability—Power of Court to alter in the absence of clause giving liberty to apply. *See* C. P. CODE, S. 92. 49 Bom.L.R. 757.

———O. 20, R. 3—*Applicability to Chartered High Courts—Power of Judge to alter judgment after its delivery—Practice in derogation of law, if recognizable.*

O. 20, R. 3, C. P. Code, would apply to judgments of Chartered High Courts delivered in the exercise of their appellate or revisional jurisdiction and except within the well-known limits where a Court can exercise its inherent jurisdiction, there is no inherent jurisdiction in the Court to re-hear a case and alter or add to a judgment which has been duly pronounced and deliberately signed in accordance with law.

It follows, that it is not competent to a Judge who has once pronounced and signed a judgment to re-call and alter that judgment at the request of either party.

A practice in derogation of the law as laid down above can neither grow nor be recognized. (*Braund, Malik and Pathak, JJ.*) ALLAH RABBUL ALMIN *v.* GANGA SAHAI. I.L.R. (1947) A. 180=230 I.C. 473=1947 A.W.R. (H.C.) 249=1947 A.L.J. 215=1947 A.L.W. 112=A.I.R. 1947 A. 211 (F.B.).

———O. 20, R. 4—*Contents of judgment—Necessity for giving reasons for the findings of fact.*

O. 20, R. 4 (2) requires a Court not only to state the points for determination and the decision thereon but also to give reasons for such a decision. In the case of findings of fact arrived at by Courts of first appeal this is all the more necessary because those findings are binding on the Court of second appeal and it is necessary that, if such matter comes before a Court of second appeal, that Court should be able to judge whether the first appellate Court has applied its mind to consideration of the evidence or not. (*Kidwai, J.*) SABHARAJ *v.* MAHESH NARAIN. 22 Luck. 363=A.I.R. 1948 Oudh 27=1947 O.W.N. 232=1947 O.A. (C.C.) 76=1947 A.W.R. (C.C.) 76.

———O. 20, R. 4 (1)—*Judgment of Small Cause Court—Court's duty to make it intelligible—Provincial Small Cause Court Act, S 25.*

As under S. 25, Provincial Small Cause Court Act, the High Court is empowered to satisfy itself that a decree or order of the Judge of a Small Cause Court was in accordance with law or not, "a correlative duty is impliedly cast on that Judge to make his judgment sufficiently intelligible to enable the High Court to perform its duty properly". The Judge may, without giving his reasons for the decision, elucidate the points for determination in such detail as to make the decision intelligible. A.I.R. 1943 Bom. 416, foll. (*Kayani, J.*) FAIZ BEGUM *v.* MD. BASHIR.

Pak.L.R. (1950) Lah. 177=A.I.R. 1950 Lah. 128.

———O. 20, R. 4 (2)—*Contents of judgment—Duty to set out material evidence.*

It is not sufficient for the trial Court merely to state in its judgment that on a careful consideration of the evidence it has come to this or that conclusion. The material evidence on a particular issue for and against the parties to the suit must be set out in the judgment, and reasons stated for its acceptance or rejection. (*Thadani, Ag. C.J. and Ram Labhaya, J.*) Ambor Ali *v.* Nichar Ali. A.I.R. 1950 Assam 79.

———O. 20, R. 5—*Issues of fact—Duty of trial Court to decide all issues.*

The Courts of fact must decide all the issues of fact which arise between the parties so that if the appellate Court takes a different view, the parties are saved from further harassment. (*Manohar Lall, Meredith and Shearer, JJ.*) Ram Ranbijaya Prasad Singh *v.* Sukar Ahir. 26 Pat. 181=A.I.R. 1947 Pat. 334=1948 P.W.N. 33 (S.B.).

———O. 20 R. 6—*Decree—Form and contents of—Suit for dissolution and accounts of partnership—Dismissal — Appeal — Judgment allowing appeal—Decree not drawn up but memo. of costs alone prepared and signed by Court—If proper decree—Second appeal with such memo. of costs—If proper or maintainable—O.* 41, *R.* 1 *and O.* 42, *R.* 1.

The decree in an original suit (*e.g.*) in a suit for dissolution of partnership, should be quite distinct from the judgment and should contain a statement of the amount of costs awarded and also by whom and out of what property the same are to be paid, etc. So also in an appeal from the decree dismissing such suit, there must be a judgment as well as a decree. A memo. of costs signed by the Court, but without containing the details specified in O. 20, R. 6, is not a proper decree as to costs within the meaning of O. 20, R. 6 or for purposes of O. 41, R. 1 or O. 42, R. 1. Such a memo. of costs annexed to the memorandum of appeal cannot be treated as a decree. There being no decree, no appeal can lie. 1 Lah. 223, foll. (*Harnam Singh, J.*) Banwari Lal Verma *v.* Amrit Sagar Gupta. 4 D.L.R. (Simla) 200=A.I.R. 1949 E.P. 400 =51 P.L.R. 305.

———O. 20, R. 9—Scope—Decree—Description of property—Particulars—Absence of—Effect. *See* C. P. Code, O. 7, R. 3. A.I.R. 1950 Pat. 306.

———O. 20, R. 11—*Applicability—Mortgage decree.*

O. 20, R. 11, C. P. Code, applies to a money decree and not to a mortgage decree. (*Shearer and Reuben, JJ.*) Basanta Kumar Mitra *v.* Chota Nagpur Banking Association, Ltd. 26 Pat. 231=A.I.R. 1948 Pat. 18=1948 Comp. C. 127.

———O. 20, R. 11—*Prayer for instalments—Duty of Court.*

Where instalments are prayed for by the debtors, the Court should see that the facts relating to means and circumstances of the debtor as also

of the creditor are brought in before the Court. If a debtor simply says that he would not be able to pay money if a certain number of instalments is not granted to him, that is not sufficient. Strictly speaking, it would be his own opinion and would not be admissible in evidence. (*Mitter and Sharpe, JJ.*) Jagadish Chandra Chakraparti *v.* Brojendra Mohan Maitra. I.L.R. (1945) 1 Cal. 474=A.I.R. 1949 Cal. 427.

———O. 20, R. 11 (2)—*Conversion of decree into instalment decree without consent of decree-holder—Jurisdiction of Court.*

Under O. 20, R. 11 (2), C. P. Code, the Court has no jurisdiction to alter a decree into an instalment decree except with the consent of both the decree-holder and the judgment-debtor. (*Harries, C.J.*) Chandra Nath Bhose *v.* Sahadabia Kumarin. 52 C.W.N. 440.

———O. 20, R. 12 (Mad.)—*Applicability—No claim for mesne profits in suit and no decree—Decree-holders' subsequent application for ascertainment of future mesne profits—Maintainability—Madras Debt Conciliation Act (XI of* 1936), *S.* 10 (2)—*Whether liability for future mesne profits can be a "debt".*

In a suit to recover possession and for damages for a particular year, the decree directed the defendants to put the plaintiffs in possession and also awarded damages for the year asked for. There was no claim for future mesne profits for the subsequent years and the decree was silent about it. Some years later the decree-holders applied under O. 20, R. 12, C. P. Code, for the ascertainment of the subsequent mesne profits and for a decree regarding the amount so ascertained. It was resisted on the grounds that (*a*) the liability had become discharged under the Madras Debt Conciliation Act, S. 10 (2) and (*b*) the application under O. 20, R. 12 was not maintainable.

Held, (1) that the liability for future mesne profits not having been adjudicated upon by any decision of Court and the amount itself not having been ascertained it could not be described as a "debt" within the meaning of the Madras Debt Conciliation Act. (2) That the Court had no jurisdiction to allow the application under O. 20, R. 12, since mesne profits have to be ascertained at the stage of the suit itself and there having been no such claim and the decree having been silent, the relief should be deemed to have been refused. (*Chandrasekhara Aiyar, J.*) Atchayya *v.* Appalaraju. 1946 M.W.N. 607=230 I.C. 436=A.I.R. 1947 Mad. 109=59 L.W. 525= (1946) 2 M.L.J. 233.

———O. 20, R. 12—*Application under—Jurisdiction of lower Court to entertain—Appellate decree directing mesne profits to be ascertained in execution.*

Where the appellate Court decreeing a suit for possession on appeal directs that mesne profits should be determined in execution proceedings, the duty of the lower Court is to carry out its direction. It has no jurisdiction to entertain an application under O. 20, R. 12, C. P. Code. (*Tyabji, C.J. and Meher, J.*) Mahomed Hussain

Khan v. Rasoolbux. I.L.R. (1947) Kar. 194 =A.I.R. 1948 Sind 124.

———**O. 20, R. 12**—*Order dismissing application—Appeal.*

An order dismissing an application under O. 20, R. 12, C. P. Code, on the ground that it does not lie as the direction in the decree passed by the Appellate Court, that mesne profits should be determined in execution proceedings has to be followed, is not a decree within the meaning of S. 2 (2), C. P. Code. It is only an interlocutory order from which no appeal lies. (*Tyabji, C.J. and Meher, J.*) Mahomed Hussain Khan v. Rasoolbux. I.L.R. (1947) Kar. 194=A.I.R. 1948 Sind 124.

———**O. 20, Rr. 12 and 18**—*Partition suit—Preliminary decree giving no directions as to profits subsequent to date of suit—Mesne profits if can be awarded at stage of final decree—Mesne profits after date of suit—If to be specifically asked for in the plaint.*

The mere fact that a preliminary decree for partition did not give directions as to profits subsequent to the date of suit does not preclude the parties from applying for or the Court from awarding mesne profits by its final decree.

In a partition suit when a plaintiff asks for the establishment of his right to a share in the lands, what is appurtenant to it, namely, a right to account, need not be separately asked for and the absence of such specific prayer is no bar to the award of mesne profits. (*Somayya, J.*) Raghava Mannadiar v. Theyyunni Mannadiar. 1946 M.W.N. 571=59 L.W. 426=A.I.R. 1947 Mad. 106=231 I.C. 295=(1946) 2 M.L.J. 117.

———**O. 20, R. 12 and Limitation Act (IX of 1908), Art. 181**—*Preliminary decree of 1937 in partition suit directing determination of mesne profits due to plaintiff on his application in execution—Application under O. 20, R. 12 in 1945—If barred.*

A preliminary decree in a partition suit passed on 23rd December, 1937, directed "that the mesne profits due to the plaintiff........be determined on a separate petition by the plaintiff in execution." The plaintiff filed an application under O. 20, R. 12, C. P. Code, on 22nd February, 1945. On a question whether the application was barred as limitation,

Held, that the proper way to deal with the decree would be to treat it as a decree declaring the plaintiff's right to mesne profits coupled with the direction that the mesne profits might be subsequently ascertained in an application to be filed for that purpose and that the proper application could only be under O. 20, R. 12, C. P. Code. In considering the question of limitation the principles of law that must be applied must be those governing an application under O. 20, R. 12. Hence, it cannot be held that the application comes under Art. 181 of the Limitation Act and that it must be filed within three years from the date of the passing of the preliminary decree. (*Govindarajachari, J.*) Chandrakantam v. Chandramowliprasada Rao. 61 L.W. 562 (2)=1948 M.W.N. 617=A.I.R. 1949 Mad. 134=4 D.L.R. (Mad.) 17=(1948) 2 M.L.J. 206.

———**O. 20, R. 12**—*Scope—Preliminary decree in respect of future mesne profits—If essential—Decree for amount of mesne profits without preliminary decree—Legality.*

Though under normal circumstances it is no doubt usual for the Court to pass a preliminary decree regarding mesne profits subsequent to suit, it would be quite within the competence of the Court, to pass a decree for such profits payable subsequently to the suit, if, in the circumstances of the case, an inquiry is unnecessary or is waived by the parties. A preliminary decree becomes necessary only when the exact amount has to be ascertained after examination of fresh evidence. If mesne profits are claimed on the basis of rent which is fixed and agreed upon between the parties, or if the Court decides that mesne profits ought to be allowed on that basis the amount being definitely ascertained, there would be no occasion for passing a preliminary decree so that there may be another ascertainment of the amount due to the plaintiff. The matter is one of procedure and not one of jurisdiction. (*Mukherjea and Sharpe, JJ.*) Ganeshi Lal Sharma v. Snehalata Dassi. I.L.R. (1946) 2 Cal. 599=226 I.C. 426=1946 Cal. (Rul.) 380=51 C.W.N. 136=A.I.R. 1947 Cal. 68.

———**O. 20, R. 12**—Suit for possession of immovable property and mesne profits—Claim for damages for period subsequent to suit—If can be joined. *See* C. P. Code, O. 2, R. 4 (*b*) and (*c*) 50 C.W.N. 229.

———**O. 20, R. 13**—*Essence and scope of administration suit—Question of benami or whether property formed part of estate of deceased—If can be gone into.*

The essence of an administration suit is that the defendant must be a party accountable to the plaintiff in respect of the estate of the deceased which is to be administered. The object of the suit is to have the estate administered under a decree of Court; and in such a suit the whole administration and settlement of the estate are assumed by the Court; the suit in essence is one for an account and for the application of the assets for the satisfaction of dues of all the creditors and for the benefit of all others who are entitled; the Court marshals the assets and makes such a decree.

The question whether a particular item of property formed part of the estate of the deceased can be determined in such suit and any fraudulent transfer made by an executor can be set aside. The rule that where a transaction is made out to be benami effect will be given to the real and not to the nominal title can be applied only subject to the proviso that the result of doing so should not be to violate the provisions of a statute. 39 All. 173 (P.C.); 1928 All. 511; 1933 Bom. 262; 33 Cal. 180 (P.C.); 1918 Cal. 883; 1935 Cal. 39; 1932 Lah. 328; 1936 Lah. 365; 1931 Mad. 683, ref. (*Harnam Singh, J.*) Mahomed Ishaq v. Mt. Ahmad Bi. 4 D.L.R. (Simla) 229.

——**O. 20, R. 14**—*Payment of pre-emption money after time fixed in decree on disposal of appeal against decree—If proper payment.*

Under O. 20, R. 14 the Court at the time of passing a pre-emption decree is bound to specify a date within which the payment is to be made unless in the decree itself any power has been reserved to extend the time for deposit. Where a time has been fixed and no provision is made for extension and an appeal is filed and no stay obtained, payment of the pre-emption money after the disposal of the appeal and the expiry of the time fixed in the decree would not be a valid deposit. (*Chandiramoni, J.*) BADRI PRASAD *v.* MATA PRASAD. A.I.R. 1950 All. 663.

——**O. 20, R. 18 (2)**—Applicability to suits under S. 49, U. P. Tenancy Act. *See* U. P. TENANCY ACT, S. 49. 1949 R.D. 240.

——**O. 21, R. 1**—*Instalment decree not restricting mode of payment—Option of judgment-debtor to pay instalment in Court—Due date for payment falling on holiday—Deposit of instalment in Court on re-opening day—Validity—Limitation Act, S. 4.*

Under O. 21, R. 1, C. P. Code, a judgment-debtor has an option to pay the decretal amount out of Court to the decree-holder or to deposit into the Court whose duty it is to execute the decree. Where an instalment decree does not restrict the mode of payment of the instalments and it does not direct that the money is payable to the decree-holder out of Court and is not to be deposited in Court for payment to him, the judgment-debtor has an option to pay the instalments either to the decree-holder out of Court or to deposit them in Court.

If the due date for payment of an instalment falls on a holiday, the deposit of that instalment in Court on the first reopening day is valid. The general principle is that, although a party cannot by his own act extend a period allowed by law for doing an act in Court, yet, if delay is caused by the fact of the Court being closed on the last day of that period, he is entitled to do the act on the first opening day. (*Bose and Sen, JJ.*) PREMCHAND *v.* RAMDEO. I.L.R. (1948) Nag. 612=A.I.R. 1949 Nag. 141=1949 N.L.J. 303.

——**O. 21, R. 2**—*Adjustment—Agreement after decree—Provision for payment in instalments and for payment of interest not decreed—Power of executing Court to record—Executability of compromise.*

A compromise arrived at between a decree-holder and a judgment-debtor after decree, providing that the decree shall be payable in instalments and that the judgment-debtor shall pay some interest for which the decree has made no provision, is one which can be recorded by the executing Court under O. 21, R. 2, C. P. Code, and executed by it. (*Bose, J.*) MURLIDHAR *v.* BALMUKUND. I.L.R. (1946) Nag. 752=224 I.C. 447=1946 Nag. (Rul.) 151=1946 N.L.J. 469=A.I.R. 1946 Nag. 313.

——**O. 21, R. 2**—*Adjustment—Scheme of Composition approved by Insolvency Court—If adjustment of decree of creditor.*

A scheme of composition approved by the Insolvency Court is not an adjustment of a decree when the creditor's claim is a judgment debt, and as such can be recognised by any Court executing the decree, although it has not been certified or recorded under O. 21, R. 2, C. P. Code. (Clough, *J.*) GANESH DAS *v.* SURYA KUMAR BOSE. 50 C.W.N. 307.

——**O. 21, R. 2**—*Agreement between parties to vary decree—Jurisdiction of Court to execute such agreement.*

Agreements to compromise a claim to execute a decree may be divided into three classes. In the first class of agreement the decree-holder agrees to give up all his rights under the decree on the judgment-debtor's doing something or the other, and there is no adjustment until the judgment-debtor has done whatever he promised. The second class of agreement is where the decree-holder agrees to give up all his rights under the decree in return for a promise by the judgment-debtor to do something or the other; on the recording of such an adjustment, the decree becomes fully satisfied and the decree-holder can enforce the fulfilment of the judgment-debtor's promise only by a separate suit. The third class of agreement is one in which the parties agree that the decree should be modified in some way or other and that decree-holder shall be entitled to execute the decree as modified but not the original decree. The parties to a decree can, by agreement, vary that decree and ask the Court to record such an agreement and the Court will then have jurisdiction to execute that agreement. (*Puranik and Pollock, JJ.*) MEGHRAJ *v.* KESARIMAL. I.L.R. (1947) Nag. 197=231 I.C. 119=A.I.R. 1948 Nag. 35=1947 N.L.J. 225.

——**O. 21, R. 2**—*Applicability—Decree for ejectment.*

O. 21, R. 2, C. P. Code, applies to a decree for ejectment. The words "in the decree" in the rule refer to a decree of any kind. (*Bose, J.*) DEVIDAS *v.* SHRI BALASAHEB DEOSTHAN BASIM. I.L.R. (1948) Nag. 486=1948 N.L.J. 421=A.I.R. 1948 Nag. 374=3 D.L.R. (Nag.) 68.

——**O. 21, R. 2**—*Applicability—Execution of decree by successor of original decree-holder.*

Even when a decree is sought to be executed by the successor of the original decree-holder, the provisions of O. 21, R. 2, C. P. Code, are applicable and no payment can be considered by the Court unless it has either been certified under sub-R. (1) or recorded under sub-R. (2) of that rule. (*Kaul and Kidwai, JJ.*) HIRA DEVI *v.* AJODHIA NATH TANDON. 1948 O.A. (C.C.) 106 =1948 O.W.N. 144=A.I.R. 1948 Oudh 299= 1948 A.W.R. (C.C.) 106.

——**O. 21, R. 2 and O. 23, R. 3**—Applicability and relative scope—Mortgage suit—Application for final decree under O. 34, R. 5—Plea of adjustment of mortgage debt before preliminary decree—Power of Court to inquire into. [*See* Q. D. 1941-1945, Vol. I, Col. 1122.] MADAN THEATERS LTD. *v.* DINSHAW & Co. 72 I.A. 277 =I.L.R. (1945) Kar. (P.C.) 321=26 P.L.T. 283=20 Luck. 461=1946 O.A. (P.C.) 86=50 C.W.N. 102=1946 A.W.R. (P.C.) 86 (P.C.).

———**O. 21, R. 2**—*Bar of execution—Execution petition to realise balance of decree debt allotted in partition by father to son—Plea of satisfaction by payment to father—Alleged payment found against—Memorandum of full satisfaction filed by the father, if a bar to execution* —Locus standi *of father to file it.*

Under a registered deed of partition, dated 28th December, 1944, the balance due under a decree obtained by the father was allotted to his son. When the son filed on 27th March, 1945, an Execution Petition to realise the balance due under the decree the judgment-debtor pleaded satisfaction of the decree by payment to the father on 28th June, 1944 and it was supported by the father filing a memorandum of full satisfaction on 7th August, 1945. But it was found by the Court that no money was really paid by the judgment-debtor to the father. On a question whether nevertheless the Court had no jurisdiction to execute the decree in the face of the decree-holder's memorandum of full satisfaction of the decree.

Held, that as the decree had been found to be really not satisfied by payment and the original decree-holder, the father, ceased to have any interest in it after the date of the partition when that interest passed to his son, the father had thereafter no *locus standi* to file any memorandum of full satisfaction of the decree and it could not help the judgment-debtor to object to the execution of the decree. (*Rajamannar and Shahabuddin, JJ.*) KRISHNAN CHETTIAR *v.* MINOR LAKSHMANAN CHETTIAR. 1947 M.W.N. 317=60 L.W. 247=A.I.R. 1948 Mad. 6=(1947) 1 M.L.J. 270.

———**O. 21, R. 2**—*Decree-holder filing application for adjustment—Whether can withdraw or modify.*

There is nothing in O. 21, R. 2, C. P. Code, to prevent the decree-holder from withdrawing or modifying his application for adjustment before the adjustment is recorded. (*Puranik and Pollock, JJ.*) MEGHRAJ *v.* KESARIMAL. I.L.R. (1947) Nag. 197=231 I.C. 119=A.I.R. 1948 Nag. 35=1947 N.L.J. 225.

———**O. 21, R. 2**—*Effect of not certifying payment.*

Though it is the duty of the decree-holder to certify payment, if he fails to do so, the judgment-debtor can inform the Court of such payment. But if the Court is not informed of such payment, it will not be recognized in the execution Court. (*Haider, J.M. II and Lal J. M.I.*) WAJAHAT ALI *v.* BHAGGOO. 1949 R.D. 173.

———**O. 21, R. 2**—*If applies only to a money decree—Awarding of costs, if makes a decree a money decree.*

It is wrong to say that O. 21, R. 2, C. P. Code applies only to a money decree. A decree does not become a money decree merely because costs have been awarded. (*Davies.*) HEM RAJ *v.* GABRU. 1946 A.M.L.J. 6.

———**O. 21, Rr. 2 and 15**—*Payment outside Court to one of the partners in the case of a decree in favour of a firm—If binds other partners.*

Per Full Bench (*Raghava Rao, J., dissenting* —When a decree is passed in favour of a firm, payment made outside Court to one partner decree-holder can bind the other partners decree-holders, pprovided that the other partners decree-holders would be at liberty to establish special circumstances why such a payment should not bind them. 31 M.L.J. 93 and 66 M.L.J. 656; I.L.R. 57 Mad. 696, overruled. Observations of Bhashyam Ayyangar, J., in 12 M.L.J. 160; I.L.R. 25 Mad. 431 (F.B.), not approved. (*P. V. Rajamannar, C. J., Viswanatha Sastri and Raghava Rao, JJ.*) HANUMANTHAPPA *v.* SEETHAYYA AND CO. I.L.R. (1950) Mad. 285=5 D.L.R. (Mad.) 72=62 L.W. 539=1949 M.W.N. 527=A.I.R. 1949 Mad. 790=(1949) 2 M.L.J. 217 (F.B.).

———**O. 21, R. 2**—*Scope and effect of.*

The payment of the decreed amounts have to be certified to the Court under O. 21, R. 2, C. P. Code and if they are not so certified they cannot be admitted and execution must proceed. (*Nethersole, S.M. and Nehru, A.M.*) GOKUL PRASAD *v.* MOHAN LAL. 1947 A.W.R. (Rev.) 68 (1).

———**O. 21, R. 2**—Scope—Suit for possession by purchaser at sale in execution—Plea of uncertified adjustment of decree in defence—Sustainability. [*See* Q.D. 1941-1945, Vol. I, Col. 1124.] ABDUL SUBHAN SAHIB *v.* RAMANNA. I.L.R. (1945) Mad. 827.

———**O. 21, R. 2 (3)**—*Scope—Court holding enquiry under S. 476, Cr. P. Code—Whether can recognise uncertified payment.*

Under O. 21, R. 2 (3), C. P. Code, a Court cannot consider an uncertified payment in the course of the execution of the decree, but it is not precluded from doing so while subsequently holding an enquiry under S. 476, Cr. P. Code. 9 R. 104, relied on. (*Mangalmurthi, J.*) SHRIRAM *v.* BAJRANGLAL. I.L.R. (1949) Nag. 145=4 D.L.R. (Nag.) 41=3 A.I.Cr.D. 156=A.I.R. 1949 Nag. 276=50 Cr.L.J. 709=1949 N.L.J. 59.

———**O. 21, R. 5 and S. 39**—*Decree transferred direct to subordinate Court in another District—Jurisdiction of transferee Court—Subsequent transfer of decree to that Court by District Court—Effect of.*

S. 39, Civil Procedure Code, no doubt, provides in general terms that on the application of the decree-holder the Court which passed the decree may send it for execution to another Court when the conditions specified in the section are fulfilled, but then O. 21, R. 5, Civil Procedure Code, steps in to fix the District Court as the Court to which the decree shall be sent when it has to be sent to Court situate in another district. The words are mandatory and do not leave any room for the exercise of any discretion in the matter by the Court which passed the decree. On receipt of the decree the District Judge may choose to execute the decree himself and may not send it to any subordinate Court at all. Until the District Judge has passed an order of transfer under R. 8, no subordinate Court has any jurisdiction in the matter. If therefore a decree is sent direct to a subordinate Court in another district in contravention of the provisions of O. 21, R. 5, the transferee Court has no jurisdiction to execute the decree. If subsequently the District Judge transfers the decree to that Court, the execution case must proceed on the footing that the application for execution is presented on the day on which the decree is received on transfer by the District Judge. An order of attachment and the attachment effected thereunder prior to the said transfer are null and void. 22 C. 764, foll. A.I.R. 1943 Lah. 129, Diss. from. (*Das Gupta and Mitra, JJ.*) Sachindra Kumar Bose *v.* Raj Kumari Usha Prova De. A.I.R. 1949 Cal. 690.

——**O. 21, Rr. 5 and 8**—Non-compliance—If fatal and affects jurisdiction of transferee Court to entertain execution application and to execute. *See* Limitation Act, Art. 182 (5). 25 Pat. 50.

——**O. 21, R. 5**—*Non-compliance with requirements—If affects jurisdiction.*

Non-compliance with the requirements of O. 21, R. 5, C. P. Code, would affect jurisdiction. Where a decree passed by the Calcutta High Court on its original side is transferred to a District Judge for execution but his address is incorrectly given, the Subordinate Judge at that address is not justified in receiving the papers which are not meant for him. His receiving the papers meant for the District Judge will not confer any jurisdiction on him to execute the decree. The irregularity is not curable as it affects jurisdiction. (*Thadani, C.J. and Ram Labhaya, J.*) Durgaprasad Agarwalla *v.* Harisankar Killa. A.I.R. 1950 Assam. 163.

——**O. 21, Rr. 6, 7 and 8**—Order transferring decree—When comes into effect—Execution petition to transferee Court without production of the order of transfer—Dismissal—Legality—Proper procedure. [*See* Q.D. 1941-1945 Vol. I, Col. 1127.] Perumal Chettiar *v.* Kotayya. 224 I.C. 296=1946 Mad. (Rul.) 176=A.I.R. 1946 Mad. 169.

——**O. 21, R. 6**—*Scope of enquiry—Duty of Court.*

O. 21, R. 6, C. P. Code, requires the Court which passed the decree to certify certain matters to the Court to which the decree is to be transferred for execution, among them the fact that satisfaction has not been obtained or that it has been obtained in part. This is not a mere ministerial act but a judicial one. It is the duty of the Court which passed the decree to satisfy itself that the decree it is transferring is a live decree which is still capable of execution. If the decree has been fully satisfied or is dead for other reasons, the Court which passed it should, in normal circumstances, determine the matter. It certainly has jurisdiction to do so, though it may be proper in certain cases to leave the matter open. (*Bose, J.*) Prayagdas Shankerlal *v.* Mt. Indirabai. I.L.R. (1947) Nag. 497=A.I.R. 1948 Nag. 189 =1947 N.L.J. 376.

——**O. 21, Rr. 10 and 11**—*Application to transfer decree—If one for execution—Further application in transferee Court—Necessity for.*

An application to transfer a decree to another Court for execution is not an application for execution. It is only a step-in-aid of execution. It only asks that the decree be transferred to another Court to enable it to be executed. It does not in itself ask for execution. A further application would be necessary in the transferee, Court. (*Bose, J.*) Prayagdas Shankarlal *v.* Mt. Indirabai. I.L.R. (1947) Nag. 497=A.I.R. 1948 Nag. 189=1947 N.L.J. 376.

——**O. 21, R. 10**—*Execution with regard to part of claim—Permissibility.*

There is nothing in law to prevent a decree-holder from giving up part of his claim and executing his decree only for a portion. He certainly cannot split up his claim and ask for separate execution proceedings to be started in regard to each particular portion of the claim, but there is nothing to prevent him from starting execution proceedings with regard to part of the claim provided he does not proceed with the other part. Subsequently, he is not allowed in law to proceed with the part which was not proceeded with before. (*Blank and K.C. Chunder, JJ.*) Ramdas Mukhopadhyay *v.* Uday Chand Mahatab. A.I.R. 1949 Cal. 228.

——**O. 21, R. 11**—*Application for re-execution of decree—Duty of decree-holder to exhibit result of previous execution case.*

In an application for re-execution of a decree, the decree-holder has to show the balance due on the decree by exhibiting the result of the previous execution case. Otherwise, the application is liable to be dismissed. (*Trivedi, J.C.*) Sundraji Kanji *v.* Shah Jeram Chela. A.I.R. 1949 Kut. 2.

——**O. 21, R. 11 (2) (i) (v)**—*Omission of statement under—Irregularity.*

Sub-cl. (*v*) of cl. (*j*) of O. 21, R. 11 (2), C. P. Code is a general one. The main mode in which the assistance of the Court is required is given in sub-cl. (*i*) to (*iv*). If what is required by sub-cl. (*v*) is not expressly stated, it will amount only to an irregularity. It is not an illegality affecting the merits of the application. (*Grille, C.J. and Puranik,* Kanmal Meghraj *v.* Govind Prasad. I.L.R. (1946) Nag. 563= 1946 N.L.J. 354=1946 Nag. (Rul.) 186=A.I. R. 1946 Nag. 365.

——**O. 21, R. 12**—*"Judgment-debtor"—Legal representative of judgment-debtor.*

A legal representative of a judgment-debtor is not a judgment-debtor as defined in S. 2 (10), C. P. Code, as it cannot be said that a decree has been passed against him; and for purposes of O. 21, R. 12, C. P. Code, the term "judgment-debtor" does not include a legal representative of the judgment-debtor. (*Desai, J.*) Mahomed Liaq *v.* Ramji. 4 D.L.R. (All.) 208.

——**O. 21, R. 12**—*Scope—Non-compliance—*Effect—Application for attachment not accompanied by inventory—If in accordance with law. *See* Limitation Act, Art. 182 (5). 4 D.L.R. (All.) 208.

———**O. 21, Rr. 13 and 17**—*Failure to give particulars required by R. 13—Court not observing provisions of R. 17—Death of judgment-debtor in the interval—Decree-holder, if can be permitted to amend the execution application.*

Where an execution application fails to give the particulars required by R. 13 of O. 21, C. P. Code and the Court fails to observe the provisions of R. 17 of O. 21, the decree-holder cannot be prejudiced by the defects in the application nor deprived of the right of amendment. Where after the filing of such a defective application the judgment-debtor dies and the decree-holder applies to have the legal representative of the judgment-debtor brought on record, any second application for execution must be treated as a continuation of the first. (*Padley, S. M. and Bates, J.M* Baldewa *v.* Hamid Alikhan. 1946 R.D. 212=1946 A.W.R. (Rev.) 33.

———**O. 21, R. 15**—*Applicability—One of two joint decree-holders applying for execution of whole decree—Mention of rule in the application—If essential.*

Where one of the two *joint* decree-holders applies for the execution of the whole decree, the application would be one under O. 21, R. 15 though the rule is not mentioned. Where the application is substantially in compliance with R. 15 of O. 21, it is not necessary that the rule should be mentioned in the application. (*Kidwai, J.*) Rameshwar *v.* Gajodhar Prasad. 23 Luck. 179=1947 A.W.R. (C.C.) 289=3 D.L.R (Oudh) 71=1947 O.A. (C.C.) 289=A.I.R. 1948 Oudh 156=1947 O.W.N. 515.

———**O. 21, R. 15**—*Application by some decree-holders to execute whole decree—Maintainability.*

An application by some only of the decree-holders to execute, not a part but of the whole decree for the benefit of all the decree-holders between each of whom there is no conflict of interests, would be quite in order and would not conflict with any provision of R. 15 of O. 21, C. P. Code. (*Kaul and Kidwai, JJ.*) Hira Devi *v.* Ajodhia Nath Tandon. 1948 O.A. (C.C.) 106=1948 O.W.N. 144=A.I.R. 1948 Oudh 299=1948 A.W.R. (C.C.) 106.

———**O. 21, R. 15**—*Decree in favour of firm through one co-proprietor—Execution by another co-proprietor—Permissibility.*

An application for the execution of a decree passed in favour of a firm through a co-proprietor, can be put in by another co-proprietor of the firm under O. 21, R. 15, C. P. Code. (*Atma Charan, J.C.*) Bhura Lal *v.* Sultan Singh. 4 D. L.R. (A. & M.) 86=A.I.R. 1950 Ajmer 3.

———**O. 21, R. 15**—*Decree in favour of more than one—Execution application by one only—Non-mention that it was on behalf of all.*

According to R. 15 of O. 21, C. P. Code, it is not obligatory on a decree-holder who applies to execute a decree in favour of himself and others to say explicitly that the application is on behalf of all the creditors. Failure to mention this is not fatal. (*Nagarkar.*) Mohan Lal *v.* Anandi Prasad. 1948 A.M.L.J. 54.

———**O. 21, R. 15**—*Execution at instance of one of decree-holders—Competency.*

Execution at the instance of one of several decree-holders will not lie, unless made for the benefit of all the decree-holders. The fact that the application was made on behalf of the decree-holders can be substantiated or the defect, if any, can be made good by the other decree-holders coming into execution case and either giving their express or implied assent to the proceeding. (*Ray, C.J. and Panigrahi, J.*) Muralidhar Bhattar *v.* Mahendranath Das. I.L.R. (1949) Cut. 269=A.I.R. 1949 Orissa 73.

———**O. 21, Rr. 15 and 16**—Scope—Hindu coparcener—Right to apply for execution of decree not made in his favour—Procedure. [*See* Q.D. 1941-1945, Vol. I, Col. 1132.] Kirtilal Jivabhai *v.* Chunilal Manilal. I.L.R. (1946) Bom. 234=A.I.R. 1946 Bom. 27.

———**O. 21, R. 16**—*Applicability—Benamidar—Execution by—If enures to benefit of real owner—Declaration of title in favour of real owner—Effect of—If real owner constituted transferee—Right to execute without obtaining actual transfer.*

It is no doubt true that where two persons claim to execute a decree by virtue of rights which are entirely independent of each other an application for execution by one of them in his own right will not and cannot operate as an assertion of the independent right of the other and so will not enure to the benefit of the other. Where, however, the whole *locus standi* of the one to claim to execute the decree derives solely from the lending of his name to the other, their respective rights to enforce the decree are not independent of each other and therefore the execution by the one will enure to the benefit of the other. A person in the position of a benamidar cannot in law act in relation to the benami property in a manner hostile to the real owner, and if he attempts to do so, the law will restrain him from so doing, and the real owner is entitled to the benefit of a wrong act done by the benamidar in relation to the benami property.

Where the real owner gets a declaration from a competent Court of his status as the real owner, the latter is constituted a transferee of the decree within the meaning of O. 21, R. 16, C. P. Code, and he can execute the decree without getting an actual transfer or the decree to himself from the benamidar or from the Court. (*Bennett and Beevor, JJ.*) Bhuneshwar *v.* Ramraja. 26 Pat. 408=A.I.R. 1948 Pat. 323.

———**O. 21, R. 16 and Ss. 44-A and 146**—*Applicability—Decree of Rangoon High Court transferred to Court in British India for execution before separation of Burma—Insolvency of decree-holder after separation of Burma—Continuation of execution of Official Receiver of insolvent's estate—Application to Rangoon High Court to recognise him as transferee—If essential—Procedure.*

In 1934, on the decree-holder's application, the Rangoon High Court transferred a decree of that Court to the District Court of Ramand for execuion. The order of transfer was accompanied by a certificate of non-satisfaction. On the 2nd November, 1934, the District Judge of Ramnad transferred the decree to the Court of the Subordinate Judge of Devakottai. After various applications an order for attachment was passed on the 8th April, 1937, and the sale fixed for the 15th October, 1937. An order of adjudication in insolvency of the judgment-debtor on 11th September, 1937, resulted in the order of sale being stayed and the application for execution being declared closed on 3rd December, 1937. The order of adjudication was ultimately set aside on appeal. On the 26th October, 1940, the decree-holder was himself adjudged insolvent, by the Subordinate Judge of Sivaganga and the estate devolved on the Official Receiver of Ramnad who applied on 7th December, 1940 to the Subordinate Judge of Devakottai to continue the execution petition which was "closed" on 23rd December, 1937. On 11th February, 1941, the Subordinate Judge passed an order attaching the properties which had already been attached in the 1937 E.P. This application became infructuous as the Official Receiver failed to pay the batta charges and was dismissed by an order dated 10th March 1941; on 7th February 1944, the Official Receiver filed another E.P. in which he asked the Court to treat that petition as a coninuation of the 1937 E.P. and to attach once again the same properties. The judgment-debtor filed a statement of objections one of which was that the Official Receiver had failed to apply to the Rangoon High Court under O. 21, R. 16, C. P. Code, to recognise him as the transferee of the decree by operation of law. That contention prevailed in the lower Court. On appeal,

Held:—O. 21, R. 16 of the C. P. Code only applied to decrees passed by Courts to which the C.P. Code applied. The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India. They can have no application outside British India. After the separation of Burma from India in 1937 the decree of the Rangoon High Court became a decree of a foreign Court and consequently O. 21, R. 16 no longer had application.

Ss. 44-A and 146 of the Code are applicable to the case. S. 44-A says that in such a case the decree may be executed in British India as if it had been passed by the District Court itself. The filing of the copy of the decree and the certificate of non-satisfaction in effect complied with the requirements of sub-sections (1) and (2), S. 44-A. In view of the wording of S. 146 of the Code it is not incumbent on the Official Receiver to apply to the District Court of Ramnad for permission to proceed in execution of the decree in the Court of the Subordinate Judge. The estate of the decree-holder having devolved on the Official Receiver, he was entitled to apply for the execution of the decree or to continue any such application which may be pending. (*Leach, C.J. and Lakshmana Rao, J.*) The Official Receiver of Ramnad *v.* Muthiah Chettiar. I.L.R. (1947) Mad. 307=228 I.C. 451=1947 Mad. (Rul.) 78=A.I.R. 1947 Mad. 34=59 L.W. 445=1946 M.W.N. 530 =(1946 2 M.L.J. 132.

———**O. 21, R. 16**—Applicability—Joint application for execution by transferor and transferee. [*See* Q.D. 1941-1945, Vol. I, Col. 1133.] Satya Narayan Banerji *v.* Kalyani Prasad Singh. I.L.R. (1946) 1 Cal. 45=80 C.L.J. 198.

———**O. 21, R. 16 and O. 34, R. 6**—*Application under O. 34, R. 6, by assignee-decree-holder—Maintainability — Requisites — Proceedings in execution of final decree, if should have been completed by actual delivery—Assignee to bear profit and loss of transaction—Validity of assignment.*

It is not necessary for the maintainability of an application under O. 34, R. 6, C. P. Code, that the proceedings in execution of the final decree should be completed by actual delivery of the property sold in execution to the auction-purchaser. All that O. 34, R. 6, requires is that the net proceeds of any sale held under R. 5 should be found insufficient to pay the amount due to the plaintiff. If that condition is satisfied the application under O. 34, R. 6, becomes maintainable.

There are no words of restriction or exclusion to be found in R. 6 of O. 34 as would justify the contention that the right to apply under O. 34, R. 6, C. P. Code, is peculiar or personal to the *original* plaintiff in the mortgage action and does not avail an assignee from the plaintiff.

The mere fact that under the assignment deed, it was stated that the assignee was to bear the profit and loss of the *transaction* would not make it invalid as being a mere right to litigate and not transferable under S. 6 (*e*) of the Transfer of Property Act. (1942) 1 M.L.J. 22, dist. (*Horwill and Raghava Rao, JJ.*) Shanmugam *v.* Radha Krishna Sarma. 63 L.W. 54=(1949) 2 M.L.J. 741.

———**O. 21, R. 16**—*Assignment in writing—Partition Suit—Arbitration—Award giving share in property—Transfer of for consideration—Recital that all rights under "decree" are conveyed—Subsequent decree on award—Right of transferee to execute decree.*

The transfer of an award made by an umpire on a reference to arbitration in a partition suit by a deed in writing which transfers to the assignee all the transferor's rights in the "decree" for consideration which award subsequently ripens into a decree or Court, would operate as an assignment of the decree in writing and entitle the transferee to execute the decree under O. 21, R. 16, C. P. Code. (*Divatia Sen and Weston, JJ.*) Chimanlal Hargovinddas *v.* Gulam Nabi. I.L.R. (1946) Bom. 276=225 I.C. 304 =48 Bom.L.R. 16=A.I.R. 1946 Bom. 272 (F. B.).

———**O. 21, Rr. 16 and 11 (2) and S. 146**—*—Assignment of decree pending execution case—Application by assignee to continue execution without filing fresh execution application—Maintainability.*

The executing Court has jurisdiction to substitute an assignee of a decree in a pending execution case in the place of the assignor, the original decree-holder, and to permit him to continue the execution case started by the assignor, and the order of the executing Court is not liable to be set aside on the ground **that no application** for execution was filed by the assignee under O. 21, R. 11 (2) or that O. 21, R. 16, was not applicable to the pending execution case. (*Pollock and Sen, JJ.*) GOVINDRAO LAKSHMAN *v.* GANPATRAO. I.L.R. (1946) Nag. 895=A.I.R. 1947 Nag. 116=227 I.C. 19=1946 N.L.J. 614.

———O. 21, R. 16—*Assignment of part of decree—Permissibility.*

The Law does not contemplate transfer of a part of a decree. A decree is one and indivisible whole and several executions cannot be levied for portions of the whole decree. A decree for partition, mesne profits and costs is one and indivisible, and the decree-holder cannot split it up into a decree for partition and decree for mesne profits plus costs, and transfer that portion of the decree which relates to mesne profits and costs. 58 B. 226, rel. on. 44 M. 919, Diss. from. (*Khosla and Kapur, JJ.*) SIRI NARAIN *v.* SHEIKH EHSAN ELAHI. 52 P.L.R. 92=5 D.L.R. (Simla) 115.

———O. 21, R. 16—*Assignment of decree—What amounts to—Form of assignment if any—Applications by assignor and assignee—If amounts to.*

No particular form of writing is required to effect an assignment of a decree. Where the original decree-holder files a petition in Court stating that he has sold it to another (named) and that his name may be cancelled and the name of the vendee be substituted as decree-purchaser in place of his own, and the vendee also files a petition stating that the original decree-holder had sold his decree to the vendee who has become the owner and that his name may be substituted as decree-purchaser, it must be held that a case of assignment has been made out. (*Varma, J.*) PARBATI DEBYA *v.* BHASKAR SAMANTRA. 12 Cut.L.T. 16=231 I.C. 118=A.I.R. 1947 Pat. 233=13 B.R. 498.

———O. 21, R. 16—*Form of application—Order recognising assignee and transferring decree—Application to transferee Court for execution—Step-in-aid—"Proper Court."*

No form is prescribed for an application under O. 21, R. 16, C.P. Code; a mere statement that the applicant is an assignee of the decree sought to be executed is sufficient. It is then for the Court to issue notice under the rule and decide the applicant's right to execute the decree. When once the Court recognises the applicant as entitled to execute the decree and orders transfer of the decree to another Court for execution the latter Court is bound to execute it and a darkhasht presented in that Court is one made to the proper Court and a proper step in execution. (*Lokur, J.*) BHAGWANDAS TEJAJI *v.* MOTILAL. I.L.R. (1946) Bom. 977=A.I.R. 1947 Bom. 113=48 Bom.L.R. 583.

———O. 21, R. 16—*Form and contents of application under—Prayer for execution—Necessity.*

An application under O. 21 R. 16, C. P. Code, by the assignee of a decree, must be for the execution of the decree and not merely be one for the recognition of the assignment and for leave to execute the decree. (*Mackin and Rajadhyaksha, JJ.*) BHAGWANT BALAJIRAO *v.* RAJARAM SAJNAJI. I.L.R. (1946) Bom. 1048=48 Bom. L. R. 817=A.I.R. 1947 Bom. 157=231 I.C. 311.

———O. 21, R. 16—*Jurisdiction—Application by assignee—Notice not issued to judgment-debtor—Order of attachment—Subsequent objections by judgment-debtor—Court hearing and holding in favour of assignee—Notice under O. 21, R. 66—Proceedings if void* in toto.

Under O. 21, R. 16, C. P. Code; there is no bar against an assignee filing his darkhast and applying for execution, but all processes in execution, taken before the judgment-debtor's objections are heard and before the title of the assignee is established, are bad in law.

Where without notice being issued to the judgment-debtor, the assignee applies for execution and the judgment-debtor's property is attached, and subsequently the judgment-debtor appears on getting knowledge of the executions and raises objections which are heard and disposed of the Court holding that the assignment was good and that the assignee had established his title, and a notice under O. 21, R. 66, C. P. Code, is issued, it cannot be held that the application for execution and all the proceedings are invalid and bad. The execution petition and the notice under O. 21, R. 66, are not bad; but will stand; though the order of attachment must be set aside, as the Court is not entitled to order attachment at that stage before the objections of the judgment-debtor are heard and the assignee's title established. (*Chagla, Ag.C.J., Bavdekar and Gajendragadkar, JJ.*) ODHAVJI LAKHAMSHI *v.* SAKARCHAND DAHYABHAI. I.L.R. (1948) Bom. 625=A.I.R. 1949 Bom. 63=50 Bom.L.R. 598 (F.B.).

———O. 21, R. 16—*Legal representative, if can continue application made by deceased.*

R. 16 of O. 21, C. P. Code, on a plain regarding permits transferee or the legal representative of a decree-holder to apply for execution in place of the transferor or the deceased but it does not forbid expressly or by implication, an application on the part of a legal representative to continue the application made by the deceased. (*Ghulam Hasan and Kaul, JJ.*) MAHABIR PRASAD *v.* RAJA MOHAN MANUCHA. 21 Luck. 271=223 I.C. 289=1946 Oudh (Rul.) 164=1946 A.W.R. (C.C.) 82=1946 O.A. (C.C.) 82=1946 C.W.N. 157=A.I.R. 1946 Oudh 154.

———O. 21, R. 16—*Right of execution—To whom alone available.*

O. 21, R. 16, C. P. Code, extends the right of execution only to an assignee of a decree but not to the assignee of the property covered by the decree. (*Misra, J.*) HAMID ALI KHAN *v.* SHANTI DEVI. 5 D.L.R. (A.) 147=1950 A.W.R. 272.

———O. 21, R. 16—*Scope—Execution pending appeal—Assignment of decree—Application by* *assignee after decision of appeal to be impleaded in execution and to continue same—Competency.*

It is true that O. 21, R. 16, C. P. Code does not seem to contemplate a case of an assignment during the pendency of an application for execution and the assignee being brought on the record of the darkhast; but it does not mean that he cannot be brought on the record of a pending darkhast. Where therefore a decree is assigned during the pendency of a darkhast under appeal, the assignee can apply to the Court after the appeal is decided to get himself impleaded as assignee decree-holder and to continue the execution. (*Macklim and Bavdekar, JJ.*) Jivaji Keshav *v.* Vishnu Ranganath. 49 Bom.L.R. 182=A.I.R. 1947 Bom. 380 (1).

———**O. 21, R. 16**—*Scope—Mandatory character of—Asignee's right to apply for execution before issue of notice and hearing of objections—If barred.*

Although an assignee, under O. 21, R. 16, C. P. Code, is entitled to apply for execution, he cannot get the decree executed unless he has established his title to be the assignee after giving notice to the judgment-debtor and after his objections, if any, have been heard by the Court. Notice to the judgment-debtor is mandatory; it is the very foundation of the jurisdiction, the object of the notice being to enable the judgment-debtor to place before the Court his objections, if any, to the execution of the decree. What is prohibited is the execution of the decree without hearing the objections of the judgment-debtor and not the filing of the execution petition. (*Chagla, Ag.C.J., Bavdekar and Gajendragadkar, JJ.*) Odhavji Lakhamshi *v.* Sakarchand Dahyabhai. I.L.R. (1948) Bom. 625=A.I.R. 1949 Bom. 63=50 Bom.L.R. 598 (F.B.).

———**O. 21, R. 16**—Scope—Notice—Necessity—Absence of notice to judgment-debtors not interested in proceedings and against whom decree is not sought to be executed—Effect on validity of order in execution. [*See* Q.D. 1941-1945, Vol. I, Col. 1136.] Sabapathi Chettiar *v.* Lakshmanan Chettiar. I.L.R. (1945) Mad. 882=(1945) 2 M.L.J. 22.

———**O. 21, R. 16**—Transfer of decree—Application by transferee for execution—Plea that transferee is benamidar for judgment-debtor—Sustainability—O. 21, R. 2 (3). [*See* Q.D. 1941-1945, Vol. I, Col. 1137.] Ranchhod Mathurdas *v.* Kanchanlal. 222 I.C. 131=1946 Bom. (Rul.) 78.

———**O. 21, R. 16, Proviso**—*Scope and effect.*

The exceptions to the proviso to O. 21, R. 16, C. P. C., do not provide that if the requirements mentioned therein are complied with, no notice to the transferor and the judgment-debtor need be given. All that they provide is that if one or other of them applies, the execution need not be stayed till the objections of the transferor or the judgment-debtor are heard and disposed of, but may proceed and the objections may be heard in the course of execution, the validity of the proceeding abiding the result. This can only mean that on notice being given, the execution may nevertheless proceed, subject to such exceptions as may be taken. (*Chakravartti and Ellis, JJ.*) Sailendra Kumar *v.* Bank of Calcutta, Ltd. 52 C.W.N. 58=A.I.R. 1948 Cal. 131=1948 Comp. C. 1.

———**O. 21, R. 16, Proviso**—*Transfer of assets of one company to another under scheme of amalgamation sanctioned by Court—Whether transfer by assignment—Notice to judgment-debtor—If necessary—Companies Act, S. 153-A.*

O. 21, R. 16, C. P. Code; requires a notice to be given to the transferor and the judgment-debtor only in a case of transfer by assignment. A transfer of the assets and liabilities of one company to another in accordance with a scheme of amalgamation sanctioned by Court under S. 153-A of the Companies Act, is not a transfer by assignment, and accordingly no notice under O. 21, R. 16 is necessary. (*Chakravartti and Ellis, JJ.*) Sailendra Kumar *v.* Bank of Calcutta, Ltd. 52 C.W.N. 58=A.I.R. 1948 Cal. 131=1948 Comp. C. 1.

———**O. 21, R. 17**—*Amendment—Relation back to date of application.*

It is now well established that amendments in an execution application date back to the date of the application and the corrected application is deemed to have been presented on the date on which the defective application was first presented. (*Kaul and Bhargava, JJ.*) Sri Narain *v.* Gur Charan. 1949 A.L.J. 532=A.I.R. 1950 A. 177.

———**O. 21, R. 17 (2)**—*Applicability—Conditions.*

Sub-rule (2) of R. 17 of O. 21, C. P. Code, applied only when any defects as contemplated under sub-rule (1) exist or are brought to light. Where no defects exist, no question of amendment arises and the provisions of sub-rules (1) and (2) do not come into operation. (*Ghulam Hasan, Kidwai and Chandiramani, JJ.*) Janki Sahu Trust *v.* Ram Palat. 1950 A.L.J. 833=A.I.R. 1950 A. 580=5 D.L.R. (All.) 275 (F.B.).

———**O. 21, R. 17**—*Application for amendment amounting to fresh application—Such application not complying with R. 11—Power of Court to allow amendment.*

If an application for amendment of a previous application for execution amounts to a fresh application and such application does not comply with O. 21, R. 11, C. P. Code; it is within the competence of the executing Court under O. 21, R. 17, C. P. Code; to allow the decree-holder to put in a proper application with all the details required by R. 11. (*Hidayatullah, J.*) Deorao Surabhanji *v.* Ramchandra Amrutlal. I.L.R. (1948) Nag. 230=A.I.R. 1948 Nag. 272.

———**O. 21, R. 17**—*Discretion of Court—Execution by Collector of decree against agriculturist—Decree unsatisfied—Application for execution—Amendment to include other property filed beyond 12 years of decree—Permissibility.*

O. 21, R. 17 gives the Court a discretion to allow an amendment of an execution application, even if the application for amendment is beyond the period of 12 years prescribed by S. 48, C. P. Code, if the amendment is in respect of a pending execution case, and the decree-holder is not shown to be guilty of any lack of diligence in prosecuting his execution. Provided the execution application is in accordance with law, and has been duly registered, a later application filed for the purpose of amending the list of properties against which the decree-holder wishes to proceed, the Court has a discretion to deal with the matter according to the circumstances of the case. It would be unfair to penalise the decree-holder for his failure to apply for the attachment and sale of more property merely because after several years the Collector by whom the execution was carried on (the decree being against an agriculturist) has failed to secure a price which would satisfy the decree fully. In such cases the Court would be exercising its discretion properly by allowing the amendment. To refuse the amendment in such a case would be altogether unfair. (*Macklin and Bavdekar, JJ.*) HANAMAPPA SHIDDAPPA *v.* NINGAPPA RANGAPPA. 49 Bom.L.R. 673 =A.I.R. 1948 Bom. 116.

———O. 21, R. 17—*Scope—Execution application—Death of one judgment-debtor before decree brought to notice of decree-holder by objection by another judgment-debtor—Application for amendment—Competency—Effect of amendment.*

Where after the filing of an application for execution a decree-holder becomes aware of the death of one of the judgment-debtors by reason of an objection filed by another judgment-debtor he can apply to have the execution application amended; if he applies prpomptly to get the petition amended, his application has to be allowed and the amendment will relate back to the date of the original application. An order for an amendment, when a defect is brought to the notice of the Court, is an order under O. 21; R. 17; C. P. Code, and its effect is to relate back to the date of the original application. (*Manohar Lall and Reuben, JJ.*) PRATAP UDAI NATH SAH DEO *v.* BARAIK LAL SAHI. 225 I.C. 152=1946 Pat. 301 =A.I.R. 1947 Pat. 129=1946 P.W.N. 245=12 B.R, 562.

———O. 21, R. 17 (2)—*Scope—Execution application defective—Withdrawal and filing after removal of defects—Effect—Date of filing—Original date of presentation or date of filing after amendment.*

Where an execution application which was defective is withdrawn and taken back, and represented after removal of the deffects by necessary amendments, the application as amended must be deemed to have been filed on the date on which it was originally filed. 1936 Mad. 613, dist. 22 I.A. 44, ref. (*Imam and Das, JJ.*) AMINUDDIN *v.* RAMKHELAWAN. 27 Pat. 218=A.I.R. 1949 Pat. 427.

———O. 21, R. 18 and S. 54—*Partition of* malik-makbuza *holding—Jurisdiction of Collector—Decree of Court containing no direction.*

Under S. 54, C. P. Code, the partition of an estate assessed to revenue must be transferred to a Collector, and as *malik-makbuza* holding is assessed to revenue S. 54 will apply to it, R. 18, O. 20, C. P. Code, will consequently apply. According to it, the decree should not only declare the rights of the several parties interested in the property but should also direct that such partition or separation shall be made by the Collector. If no such direction is included, the Collector will have no jurisdiction to proceed with the partition of such land. Neither the C. P. Land Revenue Act nor any rule framed thereunder empowers that officer to partition such land simply on an application of a person even if that person is declared under a decree to have a defined share in it. Such person should move the Civil Court passing the decree to direct the Collector to have the land partitioned in the manner provided in O. 20, R. 18, C. P. Code. (*Sanyab.*) SHALIGRAM *v.* HANMANTA. 1950 N.L.J. 144.

———O. 21, R. 19—*Applicability—Preliminary decree in suit for redemption of mortgage—Appeal by mortgagee—Dismissal—Order for costs against mortgagee—Execution for costs by mortgagor—If barred.*

A preliminary decree in a mortgage suit for redemption is not a decree under which the mortgagee is entitled to recover the amount declared to be due to him so as to entitle him to plead R. 19 of O. 21, C. P. Code, as a bar to the execution of the decree for costs obtained by the mortgagor against him in an appeal by the latter against the preliminary decree. It is only after the decree is made final that the mortgagee becomes entitled to recover the amount due to him. Hence, the mortgagor who holds the decree for costs can execute it against the mortgagee; O. 21, R. 19 is no bar to such execution. (*Lokur, J.*) DATTATRAYA BHASKAR *v.* RAMKRISHNA MARTOBA. I.L.R. (1946) Bom. 891=A.I.R. 1948 Bom. 399=50 Bom.L.R. 279.

———O. 21, R. 19—*Claim of set-off under—Limitation—If can arise.*

It follows from the provisions of R. 19 of O. 21, C. P. Code, that the person having a decree for the smaller sum cannot execute his decree at all and hence no question of limitation can ever arise in respect of a claim of set-off under that rule. (*Chandiramani, J.*) JUGAL KISHORE *v.* BHAGWAT SAHAI. 1948 O. A. (C.C.) 28=1948 N.W.R. (C.C.) 28=A.I.R. 1948 Oudh 222=1948 O.W.N. 93=2 D.L.R. 483.

———O. 21, R. 21—*Applicability—Default due to counsel's error.*

No order under O. 21, R. 21, C. P. Code, ought to be passed against a party, unless the default by him is wilful. A party ought not to suffer for a counsel's error, provided of course, the error is *bona fide*. 11 Lah. 209 and A.I.R. 1935 R. 310, rel. on. (*Mudholkar, J.*) JAWANDSINGH *v.* KRISHNAKUMAR. I.L.R. (1950) Nag. 46.

———O. 21, R. 21—*Applicability—Order under—Powers of Court to pass—Absence of order under R. 11—Effect of.*

The granting of leave to a defendant under O. 11, R. 1, C. P. Code; to deliver interrogatories to the plaintiff and directing the plaintiff to answer, does not amount to an order on the plaintiff to answer interrogatories under R. 11 of O. 21, C. P. Code. Hence, if the plaintiff fails to answer interrogatories within time, the Court has no power to pass an order under O. 21, R. 21, dismissing the suit. (*Mootham, J.*) CHANDER BHAN SINGH *v.* LALLU SINGH. I.L.R. (1947) All. 389=229 I.C. 26=1947 All. (Rul.) 112=1947 A.L.W. 238=A.I.R. 1947 A. 343.

———**O. 21, R. 22**—Amendment of—If affects the question whether an insolvent judgment-debtor is a person interested within the meaning of O. 21, R. 90, C. P. Code. *See* C. P. CODE (V OF 1908), O. 21, R. 90—PERSON INTERESTED. (1947) 1 M.L.J. 37.

———**O. 21, R. 22**—Applicability—Rent decree—Execution sale—Notice under rule—Necessity. *See* BIHAR TENANCY ACT, S. 158-B (2). 25 Pat. 267.

———**O. 21, R. 22**—*Applicability—Application to amend pending application by adding to list of properties to be attached and sold—Power to allow—Fresh notice to judgment-debtor—Necessity.*

A Court is competent at any time, before the execution proceeding terminates and before the decree is barred by limitation, to allow a decree-holder whose application for execution is pending before it, to amend the application by adding other properties to the list of properties sought to be attached and sold. A fresh notice under O. 21, R. 22, C. P. Code, is not required to be served on the judgment-debtor on the application to add a new property. 27 C.L.J. 398; 2 Pat. 328, foll. 8 Pat. 462; 21 Pat. 838; 27 P.L.T. 407; 41 I.A. 251, dist. 1931 Cal. 476, ref. (*Agarwala, A.C.J. and Ramaswami, J.*) DEONARAIN *v.* KHATOON 27 Pat. 43=A.I.R. 1949 Pat. 401.

———**O. 21, R. 22**—*Irregularity in service of notice on one minor decree-holder—If renders the entire sale null and void.*

Where in a rent suit the decree is a sufficient warrant for the sale of the entire holding the executing Court has full jurisdiction to execute the decree and to put up the property for sale which it had advertised on a proper sale proclamation in the presence of all the judgment-debtors, notwithstanding that a minor defendant was not properly served in that no formal steps had been taken to appoint a regular guardian for him. The mere fact that the provisions of O. 21, R. 22 of the C. P. Code were not complied with in respect to a minor judgment-debtor is not sufficient to make the entire execution proceedings null and void. (*Manohar Lall and Reuben, JJ.*) BEEHU MISSIR *v.* KAMESHWAR SINGH BAHADUR. 225 I.C. 408=27 P.L.T. 169=12 B.R. 604=A.I.R. 1947 Pat. 65=1947 P.W.N. 49.

———**O. 21, R. 22 (Patna)**—*Irregularity in service of notice—Sale, if void or voidable.*

The irregularity in the service of a notice under O. 21, R. 22, C. P. Code (as distinct from failure to issue, or want of such a notice), does not go to the root of the jurisdiction of the Court executing the decree and make a sale held in execution wholly ineffective and void. It only renders the sale voidable by the taking of appropriate proceeding within the time allowed by law. (*Agarwala, Ag. C.J., Imam and Das, JJ.*) RAMLAL SAHU *v.* MT. RAMIA. 26 Pat. 340=A.I.R. 1947 Pat. 454=1948 P.W.N. 7=29 P.L.T. 34 (F.B.).

———**O. 21, R. 22**—*Necessity for notice—On whom notice is to be served—Limitation Act (IX of* 1908), *Art.* 181.

(i) Notice under O. 21, R. 22 of the C. P. Code is a necessary condition for conferring jurisdiction upon the executing Court to sell the judgment-debtor's properties and a sale without such notice is a nullity.

(ii) If the initial notice under O. 21, R. 22 was served on the parties the sale would not be void even though at the later stages notice was not served on all the parties, if as a matter of fact the estate was sufficiently represented by one of the parties.

(iii) The sale would be valid if the notice under O. 21, R. 22 was served on a person who was held by the Court to be the representative of the deceased party, even though it subsequently turned out that he was not the real or only representative of the deceased party.

(iv) After a decree is passed, the question of representation of a party is no longer governed by Hindu law but by the relevant provisions of the Code.

So, where minor defendants were represented during the pendency of the suit by the father and after his death after a decree was passed, by their mother and no notice was served on them represented by their mother, but only on another major defendant who was the elder brother of the minor defendants, who never represented his minor brothers, so far as the minor defendants are concerned, the sale of their share of the family properties in execution of the decree is a nullity and it is open to them to ignore it. The period of limitation is governed by Art. 181 and they need not take note of the void sale till their possession was effectively interfered with. Case-law discussed. (*Subba Rao and Panchapakesa Ayyar, JJ.*) VENKATA SUBBARAO *v.* KANAKARAJU. 1950 M.W.N. 464=63 L.W. 802=A.I.R. 1950 Mad. 801=(1950) 2 M.L.J. 290.

———**O. 21, R. 22**—*Notice served on minor judgment-debtor as major—Irregularity.*

Where a notice under O. 21, R. 22, C. P. Code, was served upon a judgment-debtor as a major, whereas he was, in fact, a minor, there is at most an irregularity and not an absence of service. (*Meredith and Ray, JJ.*) SHYAMNANDAN SINHA *v.* NAWRANGI SINGH. 222 I.C. 306=1946 Pat. (Rul.) 92=12 B.R. 243=1946 P.W.N. 268=A.I.R. 1946 Pat. 270.

———**O. 21, Rr. 22 and 90**—*Notice under—Proof of service—Evidence of process server without any evidence that the persons served were identified—Not sufficient—Sale for gross undervaluation—Setting aside.*

Where service of notice under O. 21, R. 22 is denied by the persons on whom service is said to have been made, and on the other side there is merely the statement of the peon that service was effected but the peon did not profess to have been personally acquainted with the judgment-debtors, there is no legal evidence that service was in fact effected upon them and the denial of service by the judgment-debtors must be accepted and the sale held void, especially when there is a gross under-valuation. (*Reuben, J.*) CHANDRA BHUKHAN MISSIR *v.* RAM DUTT MAHTO. 12 B.R. 615=225 I.C. 528=A.I.R. 1947 Pat. 139.

———**O. 21, R. 22**—*Scope—Failure to serve notice on some judgment-debtors—Effect on sale—Decree against Hindu father, sons and grandsons—Execution—Some sons and grandsons not impleaded or served with notice—Execution sale of family property—If passes interest of sons and grandsons not impleaded.*

Where in a suit against a Hindu father his five sons and three grandsons, on a hand-note executed by the father, the decree-holder obtains a money decree against all of them, but in execution of the decree, only the father and three of his sons are impleaded as parties, and the other two sons and grandsons are not impleaded and are not served with notice under O. 21, R. 22, C. P. Code, a sale in such execution cannot pass to the purchaser the interest of the sons and grandsons not impleaded in the execution in the property sold. It cannot be held in such a case that the father represented all the sons and grandsons or that the decree was obtained against the father in his representative capacity. Nor can the interest of the sons and grandsons not impleaded be claimed to have passed by reason of the pious obligation under the Hindu Law. 23 P.L.T. 403, dist. (1941) 1 M.L.J. 270; 18 Pat. 783, rel. (*Agarwala, A.C. J. and Ramaswami, J.*) DEONARAIN *v.* KHATOON. 27 Pat. 43=A.I.R. 1949 Pat. 401.

———**O. 21, Rr. 24 and 44**—*Warrant of attachment—Seal of Court not affixed—Effect on attachment.*

Where all the requirements of the law have been complied with the mere fact that the warrant of attachment did not bear the seal of the Court (though it was signed and dated by the Judge) would not render the attachment and the subsequent proceedings illegal. A person accused of an offence under S. 424, I. P. Code in respect of property so attached, cannot plead that as the attachment was illegal, he was not guilty of the offence charged. (*Harishchandra, J.*) NIRPAT SINGH *v.* EMPEROR. I.L.R. (1948) All. 132=1947 A.L.J. 619=1947 A.W.R. (H.C.) 400=1948 A.L.W. 27=A.I.R. 1948 All. 167=49 Cr.L.J. 160.

———**O. 21, R. 24 (2)** —Process delivered to Naib Nazar—Latter, if can deliver it to process-server for execution. [*See* Q.D. 1941-1945, Vol. I, Col. 1144.] TIKARAM *v.* EMPEROR. 221 I.C. 403=1946 Nag. (Rul.) 33=47 Cr.L.J. 175.

———**O. 21, R. 28**—*Stay order of transferor Court in force—Jurisdiction of transferee Court to raise attachment.*

Under O. 21, R. 28, C. P. Code, any order passed by the transferor Court is binding upon the

Court to which the decree is transferred for execution. The transferee Court has no jurisdiction to ignore a stay order of the transferor Court and raise the attachment. (*Hidayatullah and Kaushalendra Rao, JJ.*) KUNDANBAI *v.* SATYANARAYAN. I.L.R. (1950) Nag. 491=1950 N. L.J. 281.

———**O. 21, R. 32**—*Applicability—Breach of order prohibiting defendant from obstructing village path.*

O. 21 R. 32, C. P. Code, applies to a breach of an order of Court prohibiting the defendant from obstructing a village path. (*Meredith and Ray, JJ.*) SHYAM SUNDER PRASAD *v.* RAMDAS SINGH. 25 Pat. 397=12 B.R. 466=224 I.C. 37=1946 Pat. (Rul.) 248=A.I.R. 1946 Pat. 392.

———**O. 21, R. 32**—*Wilfully—Meaning of—Decree for restitution of conjugal rights—Refusal of judgment-debtor (wife) to live with the decree-holder (husband) expressed in unequivocal terms—If "wilful"—Right to execute—Discretion of execution Court to refuse execution.*

It cannot be said that the expression "wilfully" in O. 21 R. 32 of the C. P. Code should be construed as "unreasonable." The refusal of the judgment-debtor (wife) to live with the (husband) decree-holder expressed in unequivocal terms is "wilful" within the meaning of O. 21, R. 32 and the right of the decree-holder to execute the decree in the manner provided for by the rule cannot be denied. But the use of the expression "may" in the rule vests the executing Court with a discretion. (*Rajagopalan, J.*) NOOKARATNAM *v.* VENKATA SURYANARAYANA. I. L.R. (1949) Mad. 589=A.I.R. 1949 Mad. 374=61 L.W. 655=1948 M.W.N. 702=(1948) 2 M.L.J. 372.

———**O. 21, R. 32 (5)**—*Applicability—Prohibitory injunctions.*

O. 21, R. 32 (5) of the C. P. Code is intended to cover only mandatory injunctions. It does not apply to prohibitory injunctions preventing interference by defendants with plaintiffs' right of way. (*Panchapakesa Ayyar, J.*) CHINNABBA CHETTY *v.* CHENGALROYA CHETTY. I.L.R. (1950) Mad. 764=A.I.R. 1950 Mad. 237=1949 M.W.N. 706=62 L.W. 867=(1949) 2 M.L.J. 705.

———**O. 21, R. 32 (5)**—*Power of executing Court—Execution of decree for specific performance of contract of sale—Delivery of possession when there is no prayer for possession.*

A contract for sale includes not only the execution of the necessary document but also putting the vendee in possession. Therefore even if there is an omission in plaint in a suit for specific performance of a contract of sale or in the decree about possession, the executing Court is not "debarred from granting the plaintiff the possession of the property". A.I.R. 1931 Pat. 179; 5 P. L.J. 314, rel. on. (*Wali Ullah and Sankar Saran, JJ.*) ARJUN SINGH *v.* MAHRAJ NARAIN. 1950 A.W.R. 162=A.I.R. 1950 A. 415=1950 A. L.J. 296.

———**O. 21, R. 35**—*Building sites purchased in execution of money decree—Buildings held ex-*

empted from sale—Suit by purchaser for possession—Proper order.

A certain land belonging to the defendant was sold in execution of a money decree against him and purchased by the plaintiff who got delivery of possession of the same. As the decree still remained unsatisfied, certain houses which stood upon that land were sought to be sold, but on objection by the defendant claiming that the houses could not be sold as he was an agriculturist the houses were exempted from sale. In a suit for possession by the plaintiff,

Held, that the plaintiff was entitled to recover possession of the sites and an order directing that the houses be demolished and the materials be removed by the defendant at his own cost was the only order which could be passed in the circumstances of the case. (*Fazl Ali, C.J. and Agarwala J.*) PARBATI CHARAN DAS *v.* JAGDAMBA PRASAD SINHA. 12 B.R. 359=223 I.C. 240=1946 Pat. (Rul.) 168=A.I.R. 1946 Pat. 309.

——**O. 21, Rr. 35 (2), 35 and S. 51 (e)**—*Joint decree for vacant possession—Transfer of interest of one of the decree-holders to one of the judgment-debtors—Effect—Mode of execution.*

If the interest of any of the joint decree-holders in a decree for vacant possession of immovable property is transferred to one of the judgment-debtors the decree is extinguished *pro tanto* as regards the property and thereafter the decree may well be regarded as one for joint possession in favour of the remaining decree-holders and executed by delivery of symbolical possession under O. 21, R. 35 (2), or R. 36 or S. 51 (*e*), C. P. Code. (*Das, J.*) KHELAT CHANDRA RAY *v.* PYARI LAL MALLIK. I.L.R. (1945) 1 Cal. 233=A.I.R. 1949 Cal. 155.

——**O. 21, R. 36**—*Decree for actual possession—Delivery of symbolical possession—Technical irregularities in—Effect of.*

Technical irregularities committed in delivery of symbolical possession, in a case where the decree provides for actual possession, are not very material as between the parties to the proceedings, and such formal possession, in spite of the irregularities, is as effectual as a complete transfer of possession from one party to another. 24 I.C. 850, 68 I.C. 182, 1926 Lah. 35, 1935 Lah. 612 and 1941 Lah 357, rel. on. (*Chopra and Kesho Ram Passey, JJ.*) JAWALA PARSHAD *v.* JIWAN RAM. 5 D.L.R. (Pepsu) 5=A.I.R. 1950 Pepsu 22.

——**O. 21, R. 36**—*Delivery of symbolical possession—Effect of—Termination of tenant's possession.*

Where property is in the occupation of a tenant of the judgment-debtor, the giving of symbolical possession under O. 21, R. 36, C. P. Code, effectively terminates the possession of the judgment-debtor and the tenant. 22 C.W.N. 330 (P.C.), referred to. (*Sir John Beaumont.*) ADYANATH GHATAK *v.* KRISHNA PRASAD SINGH. 28 Pat. 207=53 C.W.N. 383=A.I.R. 1949 P.C. 124=4 D.L.R. (P.C.) 154=30 P.L.T. 1 (P.C.).

——**O. 21, Rr. 37 and 40**—Notice issued under R. 37—Court if bound to proceed under R. 40. [See Q.D. 1941-1945, Vol. I, Col. 1147.] ARRATOON & CO. *v.* MIMRAJ PURAN MULL. I.L.R. (1944) 2 Cal. 588=A.I.R. 1947 Cal. 262.

——**O. 21, R. 43**—Powers of attaching officer—Attachment of property on person of defendant—Use of force or violence by bailiff executing warrant—Legality—Resistance by defendant—If offence. *See* PENAL CODE, S. 353. I.L.R. (1946) Kar. 57.

——**O. 21, R. 46 and O. 38, R. 5**—*Applicability—Attachment before judgment of debt due to defendant by another—Notice and order of attachment taken out to garnishee—Sufficiency—Order of attachment headed under O. 38, R. 5—If invalid.*

Where a debt due to the defendant in a suit is sought to be attached before judgment, and is in fact attached by notice to the person owing the debt or holding the amount or fund of the defendant the attachment is in accordance with the procedure under O. 21, R. 46, C. P. Code, and is perfectly valid as being in conformity with O. 21, R. 46. The fact that the attachment order issued out was headed under O. 38, R. 5 instead of under O. 21, R. 46, is immaterial and would not invalidate the attachment. (*Meredith, J.*) MUKTILAL AGARWALA *v.* TIN PLATE COMPANY OF INDIA, LTD. 4 D.L.R. (Pat.) 23=A.I.R. 1949 Pat. 337.

——**O. 21, Rr. 46 and 49 and S. 52**—Applicability—Partnership—Death of a partner—Suit on a promissory note by—Decree against legal representatives against assets of deceased—Mode of enforcing—Special procedure under R. 49 if available—Interference in revision. [*See* Q.D. 1941-1945, Vol. I, Col. 1149.] RANGAYYA *v.* NAGAPOTHA RAO. A.I.R. 1946 Mad. 176.

——**O. 21, Rr. 46 and 51**—*Attachment of cheque—Validity.*

When a cheque is issued in payment of a debt either the debt is extinguished or it remains. If the debt is extinguished and is replaced by the cheque, then the only proper mode of attachment is by actual seizure of the cheque under O. 21, R. 51, C. P. Code. If on the other hand, the debt subsists until the cheque is cashed, the debt is secured by that cheque which is a negotiable instrument, and its attachment under O. 21, R. 46, C. P. Code, is not a proper mode of attachment and is not valid and effective. It should actually be seized under O. 21, R. 51. (*Das, J.*) CENTRAL BANK OF INDIA, LTD. *v.* M. V. V. RAO. I.L.R. (1945) 1 Cal. 277=A.I.R. 1949 Cal. 144.

——**O. 21, R. 46**—*Debt charged on immoveable property—If attachable without enforcing charge.*

There is a clear distinction between a debt and security in the shape of immovable property for that debt. The debt exists as moveable property and does not become identified with the security. It is, therefore, competent to the judgment-creditor to attach the debt without enforcing the charge on the immoveable property. (*Thadani, J.*) SHANKER ASSANMAL *v.* ASSANMAL MUL-

CHAND. I.L.R. (1946) Kar. 43=1946 Sind (Rul.) 161=223 I.C. 454=A.I.R. 1946 Sind 148.

———**O. 21, R. 46**—*Procedure—"Garnishee"—Provident Fund of employee in hands of company—Rules of fund vesting control and management only in "trustees", but ownership and custody not vested in trustees—Attachment of fund of employee—Attachment order to company—Validity—Notice to trustees—Necessity.*

Where the control and management only of the amounts in a Provident Fund in a comppany of employers of labour is vested in certain persons called trustees, but the amount itself is not vested in them, neither the ownership nor the custody of the fund vests in the trustees so called. The company or employer is still the holder of the fund, and for purposes of O. 21, R. 46, C. P. Code, in respect of attachment of an amount in the fund belonging to an employee of the company or employer, the order of attachment has to be properly issued to the company or the employer and not to the "trustees" so called who are merely its controllers or managers. 1946 Pat. 430, foll. (*Meredith, J.*) MUKTILAL AGARWALA *v.* TIN PLATE CO. OF INDIA, LTD. 4 D.L.R. (Pat.) 23=A.I.R. 1949 Pat. 337.

———**O. 21, R. 46**—*Scope—Mandatory character—Failure to comply with all requirements—Effect—Omission to affix notice in Court-house—If nullifies proceedings.*

The omission to affix a copy of the prohibitory order under O. 21, R. 46, C. P. Code, on a conspicuous part of the Court-house renders the attachment illegal. R. 46 is mandatory and the provisions thereof definitely provide that there must be a prohibitory order upon the debtor and the judgment-debtor, and further, that a copy of such order shall be affixed on some conspicuous part of the Court-house. All the requisites prescribed in the rule have to be strictly observed and complied with, and failure to comply with any one of these renders the attachment invalid, because it nullifies the whole proceeding, all the requirements being mandatory. (*Imam and Bennett, JJ.*) NARENDRA PRASAD SINHA *v.* MAHARANI JANKI KUER. 25 Pat. 739=228 I.C. 175=1947 Pat. (Rul.) 80=13 B.R. 143=A.I.R. 1947 Pat. 385.

———**O. 21, R. 48**—Decree passed by Court in India—Execution by Court in Pakistan. *See* C. P. CODE, Ss 136, 60 AND O. 21, R. 48. 54 C.W.N. 491.

———**O. 21, R. 49**—*Interest of partner—If movable property.*

When the interest in a partnership of a person who is a partner is dealt with under O. 21, R. 49, C. P. Code, that interest is to be regarded as movable property, notwithstanding that at the time when it is charged or sold, the partnership assets include immovable property. (*Din Mahomed, Ram Lall and Cornelius, JJ.*) AJUDHIA PERSHAD RAM PERSHAD *v.* SHAM SUNDER. I.L.R. (1947) Lah. 417=229 I.C. 307=1947 Lah. (Rul.) 168=A.I.R. 1947 Lah. 13 (F.B.).

———**O. 21, R. 50 (2)**—*Applicability—Hindu joint family business—Proceedings to ascertain liability of members as undisclosed partners—Permissibility—"Firm".*

O. 21, R. 50, on its plain reading, does not apply to the case of a Hindu joint family concern carrying on business in an assumed name; its application is limited to cases of actual partnership only. Proceedings under R. 50 (2) are therefore not appropriate in the case of a joint Hindu family business and R. 50 (2) cannot be invoked so as to enable the Court to hold an inquiry into the liability of the members of a joint Hindu family as undisclosed partners. "Firm" in R. 50 of O. 21 applies only to a contractual firm and not a joint family business. 7 Cut.L.T. 21; A.I.R. 1930 Pat. 205; A.I.R. 1940 Pat. 149, dist. and expl. (*Ray, C.J. and Panigrahi, J.*) MATURI MALI *v.* BHAGABAN DAS. 5 D.L.R. (Cut.) 36=A.I.R. 1950 Orissa 189=16 Cut. L.T. 136.

———**O. 21, Rr. 50 (2) and 11**—Combined application for leave and for execution—Permissibility—Practise of the Calcutta High Court. [*See* Q.D. 1941-1945, Vol. I, Col. 1155.] JAGANNATH JUGALKISHORE *v.* CHIMAN LAL. I.L.R. (1945) 1 Cal. 102=A.I.R. 1949 Cal. 113.

———**O. 21, R. 50 (2)**—Leave to execute decree—If can be granted by transferee Court. [*See* Q.D. 1941-1945, Vol. I, Col. 1155.] PULIN BIHARI PAL *v.* ISWAR CHANDRA PAL. I.L.R. (1945) 2 Cal. 57.

———**O. 21, R. 50 (2)**—*Liability of person under—Determination of—Service of summons in suit—If necessary.*

There is no substance in the contention that there can be no determination of liability under O. 21, R. 50 (2), C. P. Code, unless the persons sought to be made liable as partners had been served with the summons in the suit. (*Majumdar, J.*) ISSUR CHANDRA PAL *v.* RAMKRISTO PAL. 51 C.W.N. 560.

———**O. 21, R. 50 (2)**—*Scope and effect—Execution against person who is admittedly a partner—Latter, if can dispute his liability under decree.*

What is intended by sub-R. (2) of R. 50 of O. 21, C. P. Code, is that the liability of a person as a partner may be put in issue, but that once his liability as a partner has been decided or where it has been admitted, the sub-rule enables the decree-holder to execute the decree against all partners, and the partner against whom execution is sought is not entitled to contest the validity of the decree or his own liability thereunder. (*McNair and Gentle, JJ.*) G. M. SHAHANI *v.* HAVERO TRADING CO., LTD. 51 C.W.N. 488.

———**O. 21, R. 50 (2)**—Separate application for leave—If necessary. [*See* Q.D. 1941-1945, Vol. I, Col. 1155.] PULIN BIHARI PAL *v.* ISWAR CHANDRA PAL. I.L.R. (1945) 2 Cal. 57.

———**O. 21, R. 52**—*Applicability—Money due to judgment-debtor with Municipal Council—Attachment by notice to Chairman—Legality—"Public Officer."*

A Chairman of a Municipality is not a "public officer" as contemplated by O. 21, R. 52, C. P. Code, having regard to the definition of the term in S. 2 (17), C. P. Code, O. 21, R. 52, therefore cannot be applied for the purpose of attaching money due to a judgment-debtor by a Municipality, and an order under O. 21, R. 52, by a notice to the Chairman is illegal, and is no attachment at all. (*Imam and Bennett, JJ.*) Narendra Prasad Sinha *v.* Janki Kuer. 25 Pat. 739 =228 I.C. 175=1947 Pat. (Rul.) 80=13 B.R. 143=A.I.R. 1947 Pat. 385.

———**O. 21, R. 52**—*Attachment of property outside territorial jurisdiction—Jurisdiction of executing Court.*

As a general rule territorial jurisdiction is a condition precedent to a Court executing a decree, and neither the Court which passed the decree nor the Court to which it is sent for execution can execute it in respect of property lying outside its territorial jurisdiction. O. 21, R. 52, C. P. Code, is not an exception to this rule. There are no words in it which permit attachment of property outside the jurisdiction of the executing Court. 17 C. 699; 57 C. 964; 43 M. 135 and 18 P. 670, referred to. (*Mangalmurti, J.*) Gyarsilal Jagannath *v.* Shankar. I.L.R. (1950) Nag. 18=A.I.R. 1950 Nag. 46=5 D.L.R. (Nag.) 51=1950 N.L.J. 44.

———**O. 21, R. 52**—*Payment or distribution of attached property—Power of custody Court.*

O. 21, R. 52, C. P. Code, requires the custody Court to hold the property subject to further orders of the attaching Court. This suggests that the payment or distribution of the property is not to be made by the custody Court but by the attaching Court. 44 M. 100, referred to. (*Mangalmurti, J.*) Gyarsilal Jagannath *v.* Shankar. I.L.R. (1950) Nag. 18=A.I.R. 1950 Nag. 46= 5 D.L.R. (Nag.) 51=1950 N.L.J. 44.

———**O. 21, R. 52**—*Receiver in execution of mortgage decree—Money in the hands of—Attachment by simple money decree-holder—Procedure.*

Where money standing to the credit of a receiver appointed in execution of a mortgage is attached by a simple money decree-holder the Court executing the latter decree ought to follow the procedure indicated in O. 21, R. 52 of the C. P. Code, and cannot make an order attaching the amount and direct it to be paid to the simple money decree-holder. The Court which appointed the receiver must deal with the matter. (*Shearer, J.*) Ramanugrah Prasad *v.* Rameshwar Singh. 225 I.C. 383=12 B.R. 602=A.I.R. 1947 Pat. 112.

———**O. 21, R. 53**—*Attachment of decree—Execution by attaching decree-holder—Power to accept sum less than decree amount from judgment-debtor to detriment of original decree-holder.*

An attaching decree-holder cannot enter into a compromise with the judgment-debtor under the decree attached to the detriment of the holder of the decree attached. He cannot in execution of the decree attached by him compromise with the judgment-debtor and accept payment of a sum less than the amount of the decree and enter satisfaction to the detriment of his own judgment-debtor who is the holder of the decree attached. (*Mukherjea and Ormond, JJ.*) Sachindra Nath *v.* Probodh Chandra. 2 D.L.R. 222=A.I.R. 1948 Cal. 126.

———**O. 21, R. 53**—Attachment of decree in execution of another decree—Attachment subsequently removed and execution case dismissed by executing Court—Order of executing Court set aside on appeal—Satisfaction of attached decree by sale of judgment-debtor's property in the meantime—Attachment, if can be revived—Remedy of attaching decree-holder. [*See* Q.D. 1941-1945, Vol. I, Col 1157.] Tara Pada Basu *v.* Mahendra Nath Biswas. I.L.R. (1945) 2 Cal. 98.

———**O. 21, R. 53 (1) (a) (b) and S. 42**—*Money decree passed by transferee Court—Attachment of that decree by such Court in execution of transferred decree—Procedure—Absence of notice—Omission to take objection—Validity of attachment.*

S. 42, C. P. Code, does not lay down that the decree transferred for execution becomes the decree of the Court to which it is transferred, so that it may be treated as the decree "passed by the same Court" within the meaning of O. 21, R. 51 (1) (*a*), C. P. Code. A transferee Court cannot, therefore, attach in execution of the transferred decree a money decree passed by it under O. 21, R. 53 (1) (*a*) but must follow the procedure prescribed by O. 21, R. 53 (1) (*b*), C. P. Code. If no notice is issued under O. 21, R. 53 (1) (*b*) the attachment is not valid and effective. As issue of notice is a requisite condition of attachment, mere omission to take objection on the ground that notice was not issued, cannot validate the attachment, the more so as against a third person, who claims an interest in the attached property. 43 C.W.N. 374, ref. to. (*Akram, J.*) Prafulla Chandra Ghosh *v.* Ramesh Chandra Ghosh. I.L.R. (1948) 1 Cal. 36=A.I.R. 1948 Cal. 74=51 C. W.N. 515.

———**O. 21, R. 53 (3)**—*Right of attaching decree-holder to execute the attached decree—Limit of time—Rule as to.*

It cannot be said that a creditor who has attached a decree in favour of his debtor cannot execute the attached decree after the expiry of the limitation of his own decree. For the purposes of executing the attached decree, the attaching creditor possesses all the rights which the decree-holder of the attached decree possesses and he can execute that decree for as long as the decree-holder of the attached decree can under the law execute it. (*Iqbal Ahmad, C. J. and Bind Basni Prasad, J.*) Ram Bux Nath Mal *v.* Mansa Ram. I.L.R. (1947) All. 35=A.I.R. 1947 All. 174=227 I.C. 214=1946 A.W.R. (H.C.) 556=1946 A.L.J. 354.

———**O. 21, R. 54**—*Applicablity—Interest of mortgagee in land—Mode of attachment before judgment—Notice in Form 5, Appendix F—Sufficiency—Proper procedure—O. 38.*

The interest of a mortgagee in the mortgaged property is immovable property and not movable property for purposes of attachment under the C. P. Code. Since the term "immovable" property is not defined in the Code, the definition of the term in the General Clauses Act has to be applied; and according to that definition, immovable property is not merely land (something physical), but includes immaterial rights arising out of land. The interest of a mortgagee in land has to be attached according to the procedure prescribed by O. 21, R. 54, C. P. Code, and the order of attachment, when the attachment is before judgment under O. 38, C. P. Code, must be in Form 24 of Appendix E, C. P. Code, and not in Form 5 of Appendix F. An attachment effected under an order in Form 5 of Appendix F is not in compliance with law and therefore ineffectual. (*Reuben and Mukharji, JJ.*) Harihar Pandey *v.* Vindhyachal Rai. **27 Pat. 114=A.I.R. 1949 Pat. 170=29 P.L.T. 48.**

———**O. 21, R. 54**—*Attachment of ancestral property—Effect of—Attachment ceasing to subsist—Death of coparcener—Passing of his interest by survivorship.*

An attachment normally has only the effect of preventing alienation and does not confer title. But when an attachment in execution takes place of an ancestral property, it has the effect of creating a charge by operation of law so that it suspends the accrual of interest by survivorship. There is also no doubt that if an attachment made during the execution of a decree ceases to subsist, the interest of a coparcener who dies passes by survivorship to the other coparceners. The property which thus passes can no longer be attached. (*Hidayatullah and Kaushalendra Rao, JJ.*) Kundanbai *v.* Satnarayan. **I.L.R. (1950) Nag. 491=1950 N.L.J. 281.**

———**O. 21, R. 54**—*Order of attachment—Mode of complying with—Affixture to several properties—Presumption as to regular performance of official or judicial act—When can be drawn—Evidence Act (I of 1872), S. 114, illustration (e).*

The fact that an order for attachment has been pending is not sufficient to establish the factum of attachment. An attachment cannot be said to have been made unless and until the provisions of both sub-rules of O. 21, R. 54, C. P. Code, have been complied with, that is to, say, there must first be an order prohibiting the judgment-debtor from transferring or charging the property in any way and secondly the order must be proclaimed by beat of tom-tom near the property and copies of the prohibitory orders must be affixed on a conspicuous part of the property, on a conspicuous part of the Court house and where the property is land paying revenue to the Government in the office of the Collector of the District in which the land is situate. Where several properties are sought to be attached in pursuance to an order of attachment there must be proof of affixture on everyone of the properties.

Illustration (*e*) to S. 114 of the Indian Evidence Act no doubt declares that judicial and administrative acts may be presumed to have been regularly performed. But it does not say that it may be presumed that any particular judicial or official act has been performed. No doubt when the only evidence is that a particular judicial or official act has been performed and there is no other evidence on record, it may be presumed that the particular judicial or official act was regularly performed. But when the dispute is whether a particular judicial or official act was performed or not, there is nothing in law which enables a Court to presume that that act was as a matter of fact performed. Where the question is whether there was any affixture at all of the attachment order on the properties sought to be attached and there is no reliable evidence as to the fact of affixture the party cannot prove the affixture by relying on the presumption under the Evidence Act. Also in such a case it is discretionary for the Court to rely on the presumption and it may refuse to do so where the party seeks it long after all the material evidence on the point has ceased to be available. (*Rajamannar, J.*) Murugappa Chettiar *v.* Thirumalai Nadar. **60 L.W. 623=1947 M.W.N. 618=A.I.R. 1948 Mad. 191=(1947) 2 M.L.J. 310.**

———**O. 21, R. 54**—*Property to be attached consisting of several plots—Affixing of order of attachment on each plot—If necessary.*

Where the property to be attached is in several plots, contiguous or otherwise, the order of attachment need not be affixed on each separate plot under O. 21, R. 54, C.P.C. It is sufficient if the order is affixed on a conspicuous part of the property. (*Das Gupta, J.*) Syed Ayezali Mir *v.* Mahananda Barui. **83 C.L.J. 104=A.I.R. 1949 Cal. 320.**

———**O. 21, R. 54 (2)**—Land does not include building thereon. [*See* Q.D. 1941-1945, Vol. I, Col. 1160.] Vir Bhan *v.* Shan Singh. **I.L.R. (1946) Lah. 52.**

———**O. 21, R. 57 (as amended in Madras)**—*Applicability—Application for sale in execution of property attached before judgment—Dismissal without notice to decree-holder as the property was out of the jurisdiction of that Court—Validity of order—Attachment if extinguished.*

On an application for sale in execution of a decree of properties attached before judgment after an order for sale was made, a note was put up by the office pointing out that it was then discovered that the properties which were sought to be sold were not within the jurisdiction of that Court but outside it and the Court passed an order without any notice to the decree-holder as follows: "Advanced and dismissed. Attachment to subsist for six months." When the decree-holder learnt of the order he had the decree transmitted to the Court having jurisdiction in respect of the attached properties and filed a petition before that Court for sale of the properties which was beyond six months of the order of dismissal. Meantime, the properties had been purchased by a stranger who contended that by the lapse of the period of six months the attachment had ceased and her title became perfected. The claim having been allowed the decree-holder filed a suit to set aside the claim order.

Held: The order dismissing the petition passed behind the back of the decree-holder was a nullity and further the order passed was by a Court which had no jurisdiction to entertain the application itself and the attachment did not cease and continued to be in force notwithstanding the expiry of the period of six months from the date of the order of dismissal. Accordingly the sale in favour of the claimant was of no avail against the attachment effected by the decree-holder. (*Satyanarayana Rao, J.*) SABAPATHI PILLAI *v.* MOHAMMAD ILAIS SAIT. 1948 M.W.N. 706=61 L.W. 670=A.I.R. 1949 Mad. 352=(1948) 2 M.L.J. 352.

———O. 21, R. 57—*Applicability—Attachment before judgment.*

O. 21, R. 57, C.P. Code, applies only to an attachment in execution of a decree and not to an attachment before judgment. An order for attachment before judgment subsists after the decree for the purpose not merely of the original application for execution but even after the original application for execution has been dismissed and subsists for the purpose of subsequent application for execution as well. 47 M. 483 (F.B.), Diss. from (*Das Gupta, J.*) SYED AYEZALI MIR *v.* MAHANAND BARUI. 83 C.L.J. 104=A.I.R. 1949 Cal. 320.

———O. 21, R. 57—*Applicability—Dismissal of execution application on grounds other than default.*

O. 21, R. 57, C. P. Code, clearly applies only where an application for execution is dismissed in default. It has no application to dismissal for any other reason. (*Harries, C.J. and Sen, J.*) SUSHILA BALA DASI *v.* GUEST KEEN WILLAMS, LTD. I.L.R. (1949) 1 Cal. 177.

———O. 21, R. 57—Attachment before judgment—Execution petition for sale "struck off"—If a dismissal for default. *See* C. P. CODE (V OF 1908), S. 64 AND O. 21, R. 57. (1949) 1 M.L.J. 436.

———O. 21, R. 57—*Attachment—When ceases—Dismissal for non-compliance with unnecessary direction of Court—If entails penal consequences.*

An attachment will cease only if the application on which the attachment is effected is dismissed for default and not when a subsequent application is dismissed for default. (1939) 2 M.L.J. 916, relied on. Where the dismissal of an execution application is for non-compliance with an unnecessary direction of the Court, it would not entail the penal consequences contemplated by R. 57 of O. 21, C. P. Code. (*Satyanarayana Rao, J.*) SUBRAMANIAN CHETTIAR *v.* OFFICIAL RECEIVER OF RAMNAD. 1949 M.W.N. 8=A.I.R. 1949 Mad. 594=4 D.L.R. (Mad.) 241=(1949) 1 M.L.J. 143.

———O. 21, R. 57—*"Default"—Decree-holder being unable to proceed with application.*

A decree-holder is in 'default' within the meaning of R. 57 of O. 21, C. P. Code, when he is unable to proceed with his application and have the property sold. (*Mootham, J.*) DHONDHA MISIR *v.* SHEIKH QURBAN. 1947 A.W.R. (H.C.) 110=1947 A.L.J. 227=1947 A.L.W. 362=A.I.R. 1947 A. 313.

———O. 21, R. 57 (as amended in Madras)—*Rejection of unnumbered execution petition on default in re-presenting with sale papers—Effect on attachment before judgment—Order of rejection not saying that attachment will cease—Effect—Alienee of property—How far bound by orders in the execution proceedings.*

By an agreement dated 5th May, 1935, *X* agreed to mortgage his house to a co-operative society which demanded additional security from him. The society obtained an award in respect of the amount due to it against *X* on 21st July, 1937. In pursuance of this award the properties of *X* were brought to sale and were purchased by *Y*. With a view to get that sale set aside *X* raised funds by mortgaging the house to *A* by a mortgage dated 20th August, 1937. The amount was paid by *A* to the society and the sale was consequently set aside on 30th August, 1937.

Meanwhile *Y* instituted a suit against *X* for the recovery of an amount which it was alleged had been misappropriated by *X* as a karnam of one of the villages belonging to *Y* (a Zamindar) and *X's* house was attached before judgment on the 15th of October, 1936, and the suit was decreed on the 24th September, 1937. On the 26th October 1938, *Y* filed an execution petition which was unnumbered for bringing the attached house to sale and for leave to set off. That petition was returned on the 29th October, 1938, for filing the sale papers and the encumbrance certificates, granting two weeks' time. It was re-presented by *Y* on the 12th November, 1938, with a prayer to grant a further week's time, as the encumbrance certificate which was applied for was not received by them. By an order of 15th November, 1938, the petition was rejected by the Court. *Y* filed a second execution petition in 1939 for bringing the property to sale and after receiving notice *X* objected to the sale on the ground that the attachment before judgment made in the suit had come to an end under O. 21, R. 57, C. P. Code, by reason of dismissal for default of the first execution petition and that a fresh attachment was necessary before a sale could be ordered. The Court held on 23rd August, 1939 that the prior petition being unnumbered had no legal eristence and its dismissal had not the consequence of terminating the attachment. The order was confirmed on appeal. In pursuance of the execution petition however the sale was not effected and the proceedings terminated. Meanwhile *A* obtained preliminary and final decrees on the basis of the mortgage in his favour in 1939 and brought the hypotheca to sale and purchased it himself on 30th January, 1940 and obtained delivery of possession in 1943.

In 1942, *Y* filed a third execution application to bring the suit house to sale in execution of his decree. *A* intervened with a claim petition objecting to the sale of the property on the ground that with the rejection of the first execution petition the attachment before judgment had ceased and that *A* had acquired a good title by reason of his purchase. That application was dismissed and the property was sold and *Y* purchased it in Court auction. *A* thereupon filed a suit for setting aside the summary order rejecting his claim. The suit was allowed by the District Munsiff, but on appeal, the decision was reversed by the Subordinate Judge. On second appeal,

Held: **(1) the order rejecting the first execution petition must be treated as one of dis-**

missal. The unnumbered petition cannot be said to be one which had no legal existence and the effect of the dismissal of that petition will be that the attachment before judgment ceased. The language of O. 21, R. 57 (Madras) does not make it a condition precedent for the termination of the attachment that the Court should make an order that the attachment ceased. It merely directs the Court to state the consequences of the dismissal that is, the termination of the attachment. It is the dismissal by reason of the decree-holder's default that brings about the termination of the attachment and the Court is merely directed to state in the order that consequence. If the Court omitted to state so, it would not prevent the attachment from coming to end.

For the determination of the attachment in cases not covered by the proviso to R. 57, ordinarily an order of the Court would be necessary and the omission to state whether the attachment continues or ceases, would probably result in the continuance of the attachment.

(2) As the proceedings (second execution petition filed by *Y*) in which the subsistence of the attachment was established between *Y* and *X*, were initiated subsequent to the transfer in favour of *A*, *A* would not be bound by that decision. The principle of *lis pendens* was not applicable to the facts of the case. 62 M.L.J. 302: I.L.R. 55 Mad. 495, distinguished.

If there were to be a fresh execution proceeding the adjudication in the earlier execution proceedings would not bind the purchaser unless he was made a party to it. *A* is not therefore bound by the decision in the second execution petition and acquired a good title under his purchase. (*Satyanarayana Rao and Panchapagesa Sastri, JJ.*) VENKATA RAO *v.* SURYA RAO BAHADUR. I.L.R. (1950) Mad. 39=A.I.R. 1950 Mad. 2=1949 M.W.N. 199=62 L.W. 264=(1949) 1 M.L.J. 320.

———O. 21, R. 57—Scope—Dismissal of execution case—Attachment kept alive by special order—If makes case pending after date of dismissal. *See* BENG. MONEY LENDERS ACT, Ss. 2 (22) AND 36 (1), PROVISO (ii). 4 D.L.R. (Cal.) 57.

———O. 21, R. 58—Applicability—Claim by legal representative of deceased judgment-debtor to property—If falls under rule—Order—Appeal. *See* C. P. CODE, S. 47. A.I.R. 1950 Pat. 90.

———O. 21, Rr. 58 and 63—*Applicability—Claim that attached property should be sold subject to mortgage.*

O. 21, R. 58, C. P. Code, contemplates a claim that attached property should be sold subject to a mortgage or lease, and the provisions of R. 63 apply to the order allowing or disallowing such a claim. An application asking that the proclamation of sale should be notified subject to the applicant's own mortgage, is one falling under R. 58 and not under R. 66. 26 N.L.R. 136; I.L.R. (1939) Nag. 665; I.L.R. (1942) Nag. 166; I.L.R. (1945) Nag. 571; I.L.R. (1939) 2 Cal. 291; A.I.R. 1939 All. 657; 49 A. 903 and 9 R. 367, rel. on. (*Grille, C.J. and Hidayatullah, J.*) NIMRA GAUBA *v.* NARAYAN PAIKAJI. 1950 N.L.J. 218.

———O. 21, R. 58—Applicability—Claim by legal representative of deceased judgment-debtor to property—If falls under rule—Order—Appeal. *See* C. P. CODE, S. 47. A.I.R. 1950 Pat. 90.

———O. 21, Rr. 58 to 63—Applicability—Execution sales for decrees for rent under the Bihar Tenancy Act—Claim to attached property—Maintainability. *See* BIHAR TENANCY ACT, S. 170 (1). 1946 P.W.N. 52.

———O. 21, R. 58—Applicability—Objection to attachment by judgment-debtor—If falls under—Appeal. *See* C. P. CODE, S. 47. 5 D.L.R. (Cal.) 18.

———O. 21, Rr. 58 and 63—Applicability—Order on claim and decree in suit to set aside claim order—Conclusive character and operation of—Extent. [*See* Q.D. 1941-1945, Vol. I, Col. 1165.] NARASIMHA CHARIAR *v* RAGHAVA PADAYACHI. I.L.R. (1946) Mad. 79=1946 Mad. (Rul.) 26.

———O. 21, Rr. 58 and 63—*Applicability—Sale to enforce charge—Claim—Maintainability—Order allowing—Omission by decree-holder to sue within one year—If bars later suit under O. 21, R. 100.*

O. 21, R. 58, C. P. Code, has no application to a proceeding for sale of properties subject to a charge, as no attachment is required prior to sale. If such a claim is made and allowed, the order allowing the claim is without jurisdiction and cannot operate as a bar to a subsequent suit brought after the lapse of one year under R. 100 of O. 21, C. P. Code. 55 I.A. 256, Appl. (*Manohar Lall and Mahabir Prasad, JJ.*) MT. BHAGERNA KUER *v.* RAMDEVI RAI. 4 D.L.R. (Pat.) 151.

———O. 21, Rr. 58 and 63—*Application asking that sale should be subject to applicant's mortgage—Order dismissing application on ground of delay—Suit not filed within one year—Order, if conclusive against mortgagee.*

An application asking that attached property should be sold subject to the applicant's own mortgage falls under O. 21, R. 58 and not under O. 21, R. 66, C. P. Code. An order dismissing that application as having been made too late is as effective as a decision under O. 21, R. 62, would have been declaring that the Court was not satisfied as to the existence of the mortgage. The order therefore becomes conclusive if no suit is brought within one year under O. 21, R. 63, C. P. Code, and the mortgagee cannot set up his mortgage subsequently either as plaintiff or as defendant. (*Grille, C.J. and Hidayatullah, J.*) NIMBA GAUBA *v.* NARAIN PAIKAJI. I.L.R. (1948) Nag. 584=A.I.R. 1948 Nag. 369.

———O. 21, R. 58—Claim to property attached in execution of order against contributory in winding up of company—Scope—Summary nature of investigation—Questions as to fraudulent nature of transfer to person in possession—Cannot be gone into—Proper remedy is to proceed by way of regular suit under O. 21, R. 63 to have the transfer declared fraudulent. [*See* Q.D. 1941-1945, Vol. I, Col. 1166.] CYRIL GILL *v.* MAHOMED NAWAZ KHAN. 225 I.C. 36=1946 M.W.N. 459=1946 Comp.C. 18=1946 Mad. (Rul.) 202=59 L.W. 675=A.I.R. 1946 Mad. 174.

———**O. 21, Rr. 58 and 63**—*Decision against mortgagor—If conclusive against mortgagee.*

A decision in an objection under O. 21, R. 58, Civil Procedure Code and a decision to the same effect in a subsequent suit under O. 21, R. 63, Civil Procedure Code, against a mortgagor, is not binding on the mortgagee where mortgage is of a date prior to the litigation. 12 W.R. 362, 4 C. 692 and 22 Cal. 364, rel. on. 40 B. 679, referred to. (*Das Gupta and Mitra, JJ.*) CHANDI PROSAD GANGULY *v.* GADADHAR SINGHA ROY. A.I.R. 1949 Cal. 666.

———**O. 21, Rr. 58 and 63**—*Objection to attachment on ground of mortgage by mortgagee—Decision, when conclusive.*

O. 21, R. 62, Civil Procedure Code, indicates the relief that can be given by the Court, when objection to an attachment on the ground of mortgage is made by any person. It is quite clear, however, that even without making any such objection on the ground of the property being affected by mortgage, an interested party may pray that the existence of a mortgage claim may be mentioned in the sale proclamation. The admission or rejection of such a prayer will not operate as a binding decision on the question whether the property is in fact subject to the mortgage. Whether the decision will have a binding effect under the provisions of O. 21, R. 63 depends clearly therefore on the nature of the relief asked for. If all that is asked for is that the mortgage asserted be inserted in the sale proclamation there is no scope for the operation of O. 21, R. 63. If what is asked for in substance, is that the attachment and consequently the sale be made subject to the mortgage, the application must be held to be one under O. 21, R. 58, Civil Procedure Code, and so the decision will be conclusive under O. 21, R. 63, as between the parties to the application.

Where there is no clear prayer for either of the reliefs indicated above, the substance of the matter has to be looked into. If it cannot be ascertained whether the relief asked for is for the continuance of attachment subject to mortgage, or for insertion of the mortgage claim in the sale proclamation, it must be held that O. 21, R. 63, Civil Procedure Code, has no application, for these drastic provisions cannot be extended to doubtful cases. A.I.R. 1936 Cal. 590, referred to. (*Das Gupta and Mitra, JJ.*) CHANDI PROSAD GANGULY *v.* GADADHAR SINGHA ROY. A.I.R. 1949 Cal. 666.

———**O. 21, R. 58**—*Order under—Revision—Interference by High Court—C. P. Code, S. 115.*

The High Court in a proper case, can interfere and revise an order passed under O. 21, R. 58, C. P. Code. But where the Court below has not refused to exercise its jurisdiction and has heard and disposed of the objection petition under R. 58, non-interference in revision will not result in miscarriage of justice as the aggrieved party has a statutory right of suit under R. 63. 1938 A.M.L.J. 115, referred to. (*Ramabhadran, J. C.*) MADHOLAL *v.* GULAB CHAND. 4 D.L.R. (A. & M.) 60=A.I.R. 1949 Ajmer 40.

———**O. 21, R. 58**—*Person who failed in application under—If barred from applying under O. 21, R. 89, to have the sale set aside.*

A person who has failed in an application under O. 21, R. 58 of the C. P. Code can still file an application to have the sale set aside by depositing the decree amount plus the necessary poundage, etc., under O. 21, R. 89. The decision in the earlier application will not operate as *res judicata* to bar the application under O. 21, R. 89. 44 M.L.J. 325, rel. (1945) 2 M.L.J. 89 (F.B.), dist. (*Horwill and Govinda Menon, JJ.*) VIRIAH *v.* SUBBA RAO. 62 L.W. 208=A.I.R. 1949 Mad. 687=1949 M.W.N. 300=(1949) 1 M.L.J. 316.

———**O. 21, R. 58 (2)**—Power of Court in claim suit to stay sale in execution of decree in a suit against a third party. *See* C. P. CODE (V OF 1908), Ss. 94 (*e*) AND 151 AND O. 21, R. 58 (2). (1950) 2 M.L.J. 492.

———**O. 21, R. 58**—*Right to raise objection—Plea of property attached belonging to third party—If can be raised by judgment-debtor.*

An objection that property attached in execution of a decree belongs not to the judgment-debtor but to a third party cannot be raised by the judgment-debtor. It is for such third party himself to raise such objection, and not for the judgment-debtor, and to ask for an adjudication. (*Davis, C.J.*) BHAGWANDAS DWARKADAS *v.* HEEJULBAI. I.L.R. (1947) Kar. 45=A.I.R. 1948 Sind 24.

———**O. 21, R. 58**—*Scope of enquiry—Question of benami—If can be gone into—Revision—Interference.*

In a claim case arising under O. 21, R. 58, C. P. Code, the Court is not entitled to go into a question of benami. If it decides such question which by law it could not do, the High Court will interfere in revision with its order. (*Harries, C.J.*) PROTIVA SUNDARI *v.* RELIANCE BANK, LTD. 52 C.W.N. 56.

———**O. 21, R. 58**—*Scope of enquiry—Question of benami.*

A Court investigating a claim to attached property under O. 21, R. 58, C. P. Code, cannot go into the question as to whether a transaction is benami or not. 52 C.W.N. 56, foll. (*Harries, C.J. and Sinha, J.*) RELIANCE DEVELOPMENT AND ENGINEERING, LTD. *v.* BHABANI CH. BANERJEE. 54 C.W.N. 372=A.I.R. 1950 Cal. 342.

———**O. 21, Rr. 58 and 63**—***Suit to set aside claim order by wife in whose name the property was purchased—Onus.***

Though there is no presumption that property purchased in the name of a married woman belongs to her husband, where she is suing to set aside a claim order against her under R. 58 of O. 21, C. P. Code, it is for her initially to prove that it was she, and not her husband who was the owner of the property which was being sought to be attached. (*Sapru, J.*) Mahadei *v.* Lachmi Narain. 1947 A.W.R. (H.C.) 283=1947 A.L.W. 449=A.I.R. 1947 A. 399=1948 A.L.J. 24.

———O. 21, R. 60—Applicability—Decree against assets of deceased in hands of defendant—Attachment in execution—Objection that attached property belongs to deity and held by judgment-debtor as marfatdar—Order on—Appeal—C. P. Code, S. 47. *See* C. P. Code, S. 47. 13 Cut.L.T. 57.

———O. 21, R. 63—Applicability—Claim to property attached before judgment rejected—Limitation for suit—Limitation Act, Arts. 11, 13 and 120. [*See* Q.D. 1941-1945, Vol. I, Col. 1169.] Dhan Bibi *v.* Mrinalini Ghosh. I.L.R. (1945) 1 Cal. 547.

———O. 21, R. 63—*Applicability—"Oder against" claimant—Order striking off claim petition for non-payment of process fee—Effect of—Finality.*

An order "striking off" a claim petition for non-payment of process fee is an order adverse to the claimant within the meaning of O. 21, R. 63, C. P. Code, as it is an order dismissing the claim. If no suit is brought by him to set aside the order within the time limited, he is precluded from setting up the claim. (*Sen, J.*) Laxman Ganesh Shukla *v.* Baliram Lahanu. 49 Bom.L.R. 853=A.I.R. 1948 Bom. 187.

———O. 21, R. 63—*Burden of proof.*

In a suit instituted under O. 21, R. 63, C. P. Code, after summary rejection of a claim under R. 58, the onus of establishing that the transaction on which the suit is based was entered into in good faith lies on the plaintiff. (*Grille, C.J. and Hidayatullah, J.*) Raliyatbai *v.* Kanhaiyalal. I.L.R. (1948) Nag. 757=A.I.R. 1948 Nag. 375.

———O. 21, R. 63—*Conclusiveness of order—Applicability against defendant.*

An order passed under O. 21, Rr. 58 and 63, C. P. Code, is conclusive (unless a suit is brought within one year) whether the person concluded is the plaintiff or the defendant. There is no reason for holding that the conclusiveness of a decision where the applicant makes use of the summary remedies provided and fails to abide by the conditions thereby imposed should be waived in favour of the defendant against whom a declaratory suit is necessary. (*Grille, C.J. and Hidayatullah, J.*) Nimba Gauba *v.* Narayan Paikaji. 1950 N.L.J. 218.

———O. 21, Rr. 63 and 103—*Facts to be proved in suits under—Distinction.*

In a suit under O. 21, R. 63, C. P. Code, the onus is very heavy on the defeated claimant to prove affirmatively his case. There is one distinction between what has to be proved in a suit under O. 21, R. 63 and that in a suit under O. 21, R. 103, C. P. Code. So far as the class of suits contemplated by the latter provisions is concerned, the Code lays down affirmatively that the plaintiff should prove his title. So far as suits under O. 21, R. 63 are concerned all that the Code requires is that the plaintiff should prove the right to possession. The question of title is not intended to be so elaborately gone into as in a case under O. 21, R. 103, C. P. Code. (*Govinda Menon, J.*) Bhimayya *v.* Nagappa. 62 L.W. 415=A.I.R. 1949 Mad. 718=(1949) 1 M.L.J. 627.

———O. 21, R. 63—Nature of the provisions of—If overrides the general principle enunciated in S. 11, C. P. Code. *See* C. P. Code (V of 1908), S. 11, Expl. IV and O. 21, R. 63. (1949) 1 M.L.J. 593.

———O. 21, R. 63—Scope—Order in claim case becoming final—Effect of—Title of claimant—If extinguished. *See* Execution—Executing Court. 14 **Cut.L.T. 70.**

———O. 21, R. 63—*Suit to set aside an order on claim petition—Claimant's title based upon a sham and fictitious transaction—No question of adverse possession arises—Limitation— Art. 11 (1) of the Limitation Act applicable.*

The first respondent filed a suit to set aside an order passed in an execution application upholding the claim of the appellant to the suit property which had been attached by the 1st respondent in execution of a decree obtained in an original suit against the husband of the appellant. The appellant based her claim on a sale deed executed in her favour by the husband the judgment-debtor, which sale was found to be a sham and fictitious transaction not supported by consideration.

Held, (*i*) as the sale was a sham transaction and the so-called possession of the appellant was really possession not on her account, but possession of the husband, no question of adverse possession or acquisition of title by prescription arises.

(*ii*) The suit was one under O. 21, R. 63 of the Code and the only Article applicable was Art. 11 (1) of the Limitation Act and no question of the applicability of Art. 120 could arise. (*Rajamannar, O.C.J. and Satyanarayana Rao, J.*) Andalamma *v.* Natesam Pillai. 61 L.W. 487=1948 M.W.N. 493 (2)=A.I.R. 1949 Mad. 114=(1948) **2 M.L.J. 85.**

———O. 21, R. 63—*Suit under—Allegation that transfer by Judgment-debtor is fraudulent within S. 53 of Transfer of Property Act—Suit, if should be a representative one.*

Obiter: Even if in a suit by a judgment-creditor under O. 21, R. 63, C. P. Code, it is necessary to find the transfer by the judgment-debtor is fraudulent within the meaning of S. 53 of the Transfer of Property Act, the provisions of Transfer of Property Act which require such a suit to be brought on behalf of the creditors and will not permit such a suit to be brought by one creditor alone, will not apply to a suit under O. 21, R. 63. O. 1, R. 8 does not necessarily apply to such a suit. (*Davis, C.J., and Thadani, J.*) Budhermal Sadhuram *v.* Mahraj Verharam. I.L.R. (1946) Kar. 98 =1946 Sind (Rul.) 29=221 I.C. 626=A.I.R. 1946 Sind 78.

———O. 21, R. 63—Suit under—Reliefs which Court is competent to give. [*See* **Q.D. 1941-1945,** Vol. I, Col. 1177.] Banwarilal Ram Bharosey *v.* Mansay Lakhansay. 18 R.A. 75.

———**O. 21, R. 63**—*Suit under—What has to be proved.*

The onus is *prima facie* on the plaintiff asserting a title in a suit under O. 21, R. 63, C. P. Code, to prove it. To prove a sale where a third party contests it there must be proof of the existence in the vendor of the title the sale-deed purports to convey; and there must also be proof of consideration. It must be proved further that the sale deed is as good as it looks. I.L.R. 55 Mad. 478; A.I.R. 1948 Nag. 375, followed. (*Sanghi and Rege, JJ.*) Ramachandra *v.* Daulat Durga. 5 D.L.R. (M.B.) 34.

———**O. 21, R. 66**—*Absence of proclamation—Effect on sale—Application to set aside sale—Limitation Act (IX of* 1908), *Arts.* 166 *and* 181—*Article applicable.*

It is no doubt not easy to draw the line between irregularity and illegality in an execution sale, but where a substantial provision of law like O. 21, R. 66 of the C. P. Code, is violated the sale should be regarded as having been illegally conducted and would be void. The object of O. 21, R. 66 is to afford a security for the fairness of public sales, that it has been properly published and that it would attract purchasers. But, if the specific provision as to proclamation is violated, there could be no doubt that the sale cannot be allowed to stand. It cannot be said that the total failure to make the proclamation under O. 21, R. 66 of the Code is a mere irregularity in the publication or conduct of the sale. (1920) 39 M.L.J. 188: I.L.R. 44 Mad. 35, followed.

It is Art. 181 of the Limitation Act that would be applicable to an application to set aside such an illegal sale, that is three years from the time when the right to apply accrues, and not Art. 166. (*Krishnaswami Nayudu, J.*) Venkateswara Ethu Naicker *v.* Ayyamma. 1950 M.W.N. 44=A.I.R. 1950 Mad. 367=(1950) 1 M.L.J. 22.

———**O. 21, R. 66**—*Auction sale not subject to mortgage—Right of auction-purchaser to impeach mortgage.*

Where an auction sale of mortgaged property in execution of a money-decree is not made subject to the mortgage, the validity of the mortgage can be impeached by the auction-purchaser although he might have been aware of its existence. (*Padhye, J.*) Ramnath Balibhadra *v.* Sundarabai. I.L.R. (1948) Nag. 310=A.I.R. 1948 Nag. 290=1948 N.L.J. 149.

———**O. 21, R. 66 and O. 43, R. 1**—*Order settling proclamation of sale—Nature of—Appealability.*

The settlement of a proclamation of sale and its terms by the Judge is not the adjudication of any right but is merely an administrative order and consequently there is no right of appeal from such an order.

O. 43, R. 1, C. P. Code, does not include in its provisions an order settling the proclamation of sale. (*Gentle, C.J. and Govinda Menon, J.*) Rangachariar *v.* The Trinity Bank, Ltd. 1948 M.W.N. 64 (2)=61 L.W. 73=A.I.R. 1948 Mad. 411=(1948) 1 M.L.J. 61.

———**O. 21, R. 66 (2)**—*Sale proclamation—Issue of—Absence of notice to parties—Irregularity—Effect.*

The issue of a sale proclamation without previous notice to the parties is a serious irregularity and would be an adequate ground for cancellation of the sale. (*Pedley, J.M. and Bates, A.M.*) Babu Ram *v.* Bibi Sagir Bano Begam. 1948 A.W.R. (Rev.) 297.

———**O. 21, Rr. 66 (2) and 90**—*Absence of notice to judgment-debtor for drawing up proclamation—If and when a ground for setting aside a sale.*

Though no notice was sent to the judgment-debtor for drawing up the proclamation of sale, before the sale can be set aside under R. 90 of O. 21, C. P. Code, it has to be further shown that by reason of the irregularity or illegality the judgment-debtor has suffered substantial injury. (*Baxi, J.C.*) Bhimani Raghaji *v.* Govindgarji. A.I.R. 1950 Kutc. 93.

———**O. 21, R. 66 (2) (b) and 90**—Failure to mention in sale proclamation revenue assessed on property—If Material irregularity—No separate revenue fixed on portion of estate sold. [*See* Q.D. 1941-1945, Vol. I, Col. 1180.] Naganna Naidu *v.* Venkatrayulu Naidu. 72 I.A. 297=I.L.R. (1946) Mad. 379=1946 A.L.J. 1=1946 O.A. (P.C.) 90=I.L.R. (1945) Kar. (P.C.) 330=1946 A.W.R. (P.C.) 90 (P.C.).

———**O. 21, R. 66 (2) (e) and (f) (Madras)**—*Sale proclamation—Market value—Court, if bound to mention its own valuation.*

It is not obligatory upon the executing Court to embark upon an enquiry regarding the value of the property to be sold and insert such value in the proclamation of sale.

Cl. (*e*) of O. 21, R. 66 (2), C. P. Code, only requires that the proclamation should contain the value of the property as stated by the decree holder and judgment-debtor. It cannot be said that in spite of this provision a duty is cast on the Court by clause (*f*) of O. 21, R. 66 (2) to fix its own valuation and to insert it in the sale proclamation. By enacting the new clause (*e*) it should be deemed that the residuary clause (*f*) is intended to cover matters other than the market value. (*Govinda Menon, J.*) Srinivasan *v.* Andhra Bank, Ltd. 1948 M.W.N. 827=61 L.W. 852=A.I.R. 1949 Mad. 398=(1948) 2 M.L.J. 569.

———**O. 21, Rr. 69 and 90**—*Adjournment of sale beyond month without publishing new sale proclamation—Material irregularity—Jurisdiction of executing court to hold sale.*

Non-issue of a sale proclamation when the law requires the publication of a fresh sale proclamation stands on the same footing as the non-service or suppression of service of a sale proclamation in the matter of the reversal of a sale. They would be material irregularities and would not affect the jurisdiction of the executing Court to hold the sale. The adjournment of a sale beyond a month without publishing a new sale proclamation would stand on the same footing. These two grounds can only be the subject-matter of an application under O. 21, R. 90, C. P. Code, and so cannot be the subject-matter of an objection under S. 47, C. P. Code. *(Mitter and Sharpe, JJ.)* Jatindra Mohan Sarkar *v.* Mahipal Nayek. 83 C.L.J. 115=A.I.R. 1948 Cal. 203.

———**O. 21, R. 69**—*Bid accepted more than 15 days after sale—Validity of sale—Collector's case.*

A sale in a Collector's case is not invalid although the bid is formally accepted by him more than fifteen days after the last date of the sale. *(Ramsden, F.C.)* Mt. Basmatibai *v.* Bhargava Commercial Bank, Ltd. 1946 N.L.J. 137.

———**O. 21, R. 71**—Applicability—Failure of purchaser to pay up arrears of rent. *See* S. 168-A (1) (*b*) of B.T. Act. 223 I.C. 117.

———**O. 21, R. 71**—*Auction-purchaser misled by material omission in sale proclamation—Whether liable for deficiency in price—Decree-holder omitting to mention charge in his favour—Auction-purchaser same on both occasions—Effect.*

An auction-purchaser can resist the demand for the deficiency in price arising on a resale on the ground that he was deceived and misled into making a larger bid by reason of material omission in the proclamation of the sale.

If the same person has been the purchaser on both the occasions, no equities except those existing between the decree-holder and the auction-purchaser have to be considered. Where the property is sold in furtherance of a charge decree and the charge which is a recuring charge on the property in favour of the decree-holder has not been mentioned by him in the sale proclamation issued on the two occasions, the decree-holder would be *prima facie* estopped from enforcing his rights at a subsequent stage against the auction-purchaser, and the auction-purchaser would, therefore, be liable to pay the deficiency in price. *(Hidayatullah, J.)* Madhao Narayanrao *v.* Watsalabai. I.L.R. (1947) Nag. 939=A.I.R. 1948 Nag. 142=1948 N.L.J. 15.

———**O. 21, Rr. 71 and 84**—*Re-sale after a year—Deficiency in price—Whether recoverable from auction-purchaser.*

O. 21, R. 71, C. P. Code, applies to all cases in which a re-sale has been occasioned due to the failure of the auction-purchaser to deposit either the 25 per cent. of the sale price or the balance thereof. Under O. 21, R. 84, if 25 per cent of the price is not deposited the officer conducting the sale has to re-sell the property "forthwith". The word "fortwith" must be understood to mean "within a reasonable time". Therefore the deficiency in price arising on a resale can be recovered from the auction-purchaser even if the resale took place a year later, unless he can escape liability in any other way. *(Hidayatullah, J.)* Madhao Narayanrao *v.* Watsalabai. I.L.R. (1947) Nag. 939=A.I.R. 1948 Nag. 142=1948 N.L.J. 15.

———**O. 21, R. 72 (1)**—*Purchase by decree-holder without permission of Court—If void or voidable.*

A purchase of the property by the decree-holder without the permission of the Court under O. 21, R. 72 (1), C. P. Code, is not absolutely void, but merely voidable. 1 P. 733 (P.C.), 11 B. 588 and 41 B. 357, foll. *(Mangalmurthi, J.)* Vithu *v.* Thakurdas. I.L.R. (1949) Nag. 307=A.I.R. 1949 Nag. 414=1949 N.L.J. 398.

———**O. 21, R. 72 (3) and 90**—*Scope—Failure to embody the valuation placed by both parties in the sale proclamation as directed by Court—Effect—Decree-holder purchasing at a subsequent sale at reduced upset price on the strength of permission to bid obtained for prior sale at higher upset price—Discretion of Court to confirm or set aside sale—Sale subject to attack—Title to property when passes—Right of decree-holder to apply for scaling down under Madras Act IV of* 1938.

The Court ordered, when each party placed a different valuation on the property and the valuations were widely different, that the sale proclamation should embody both the valuations. But some oversight this direction was not carried out and the sale proclamation merely noted the figure of the upset price which was considerably higher than the valuation given by the decree-holder and considerably lower than the valuation given by the judgment-debtors. In the sale proclamation by some oversight the decree amount was overstated. The decree-holder obtained permission to bid and set-off his decree. When the sale was held subject to the upset price there were no bidders and the upset price was subsequently reduced and the property was eventually sold to the decree-holder himself at a little over the reduced upset price. The mistake as to the decree amount was discovered and the decree-holder deposited the excess of the sale price over the decree amount. On an application under O. 21, R. 90, S. 47 and O. 21, R. 72 (3) of the C. P. Code to set aside the sale.

Held, (1) It cannot be held in the circumstances that the price was inadequate or that the inadequacy if any was due to the omission to publish the two widely divergent esimates of the property. (ii) The effect of the overstatement of the amount of the decree was to make the decree-holder pay more for the property he would otherwise have paid and it cannot be said that the decree-holder was put into a position to drive other bidders away. (iii) Under O. 21, R. 72, C. P. Code, even assuming that the leave to bid obtained before the first sale could not enure for the second sale, where the decree-holder purchases without permission the Court may if it thinks fit, set aside the sale. In the circumstances of the case the decree-holder had no intention to bid without permission at the ultimate sale and accordingly an order for resale was not called for. (iv) when a sale is still subject to attack and is being attacked, the ownership of the property remains with the judgment-debtor, subject to the possibility that in the event of the sale being confirmed that ownership will be deemed to have passed to the purchaser retrospectively with effect from the date of the actual sale. The confirmation of the sale on the rejection of an application to set it aside results in the conclusion that **the title of the judgment-**

debtor to the property is deemed to have been lost with effect from the date of the sale and if it was before the period contemplated by S. 3 of Madras Act IV of 1938 the decree-holder cannot apply for scaling down the decree. (*Wadsworth and Patanjali Sastri, JJ.*) CHELLAMMA *v.* RAMAKRISHNARAO. I.L.R. (1946) Mad. 795=1946 M.W.N. 195 (2)=A.I.R. 1946 Mad. 337=(1946) 1 M.L.J. 17.

———**O. 21, R. 73**—*Applicability—Pleader commissioned by party to offer bids on his behalf at execution sale purchasing property on his own account—Validity of purchase—Pleader's right to declaratory decree.*

A pleader commissioned by a party to look after his interests at an execution sale and to offer bids on his behalf for purchasing the property is a person other than an officer of the Court, having a duty to perform in connection with the sale, within the meaning of O. 21, R. 73, C. P. Code. A.I.R. 1929 Nag. 305, ref. to.

Even if the language of O. 21, R. 73, C. P. Code, does not cover in terms the case of such a pleader, he cannot retain the benefit of the purchase on the principle that a person standing in a fiduciary and confidential situation like a pleader cannot be permitted to make himself an interested party in the very transaction which he, as a trustee, was bound most vigilantly to superintend, on behalf of his client. 15 M. 389, applied.

Assuming that the purchase by the pleader is not a nullity and that he acquires a title which subsists till it is set aside by appropriate proceedings, still the pleader cannot be allowed to have a declaration of title against the very persons, in breach of his duty towards whom he made the purchase at the execution sale. (*Blank and Chakravartti, JJ.*) SAURANGINI DASI *v.* KALI PADA CHATTERJI. I.L.R. (1948) 1 Cal. 70.

———**O. 21, R. 73**—"Or other person"—If includes legal practitioner. *See* LEGAL PRACTITIONERS ACT, MADRAS RULES, R. 17. (1946) 1 M.L.J. 218 (F.B.).

———**O. 21, R. 73**—*Purchase by decree-holder's pleader—Validity.*

An auction-purchase by a pleader of the decree-holder is hit by O. 21, R. 73, C. P. Code, but the purchase is merely voidable and is not a nullity. (*Das and Guha, JJ.*) JAMUNA PROSAD *v.* MOTILAL SANTHALIA. 54 C.W.N. 182=A.I.R. 1950 Cal. 63.

———**O. 21, Rr. 77 (2) and (90)**—*Sale of moveable property—Finality on passing of receipt—Applicability—O. 21. R. 90.*

Under O. 21, R. 77 (2), C. P. Code a sale of moveable property becomes final as soon as the officer conducting the sale grants a receipt for the purchase money and R. 90 of O. 21, applies only to sales of immoveable property. A sale of moveable property cannot be set aside on the ground of inadequacy of the price fetched. (*Acton, S.M. and Bates, A.M.*) PAHALWAN SINGH *v.* RADHEY LAL. (1946) A.W.R. (Rev.) 37 (1).

———**O. 21, R. 84 (1) and Appx. E, Form 29**—*'Declared' in O. 21, R. 84 (1)—Meaning of—Scope of the power of the Amin to accept bid at sale.*

The word "declared" in R. 84 (1) of O. 21, as also in para. 3 of the conditions of sale in Form E in Appx. E, C. P. Code, simply implies and has reference to a necessary consequence that should follow a bidder having made the highest bid. As soon as that stage has arrived, namely as soon as it has been found that no higher bidder is forthcoming, the amin conducting the sale has to take cognizance of the fact and his mere recognition of the position that a particular person and none other is the highest bidder by itself constitutes a "declaration" of the fact that he is the highest bidder. No formal or separate order, not even by the amin himself, is necessary to constitute a "declaration" that so and so is the highest bidder. (*Mushtaq Ahmad, J.*) EBADULLAH KHAN *v.* MUNICIPAL BOARD, ALLAHABAD. 5 D.L.R. (A.) 289=A.I.R. 1950 All. 450=1950 A.L.J. 653=1950 A.W.R. 617.

———**O. 21, Rr. 87, 98, 99 and 103**—*Application to remove obstruction—One day's delay in filing it—Application dismissed as 'not pressed'—Fresh application for removal on a later execution petition—Whether maintainable.*

A decree-holder executed his decree and the present petitioners obstructed him and therefore he filed his application against them under O. 21, R. 97, C. P. Code, on 26th January, 1946; and this application was dismissed as 'not pressed' on 17th March, 1947, as there was one day's delay in presentation, the limitation period being 30 days from the date of obstruction under Art. 167, Limitation Act. A fresh application was again preferred under O 21, R. 97 along with an execution petition. On the question whether the fresh application for removal of obstruction was barred by the decision on the previous one.

Held: that on the facts of the case, the second application arising out of a subsequent execution petition was maintainable and not barred by any law in view of the dismissal of the earlier application which was filed under O. 21, R. 97, one day late, and on which no order under O. 21, R. 98 or 99 was in fact passed. (1941) 2 M.L.J. 956: I.L.R. (1942) Mad. 336 (F.B.) and (1945) 2 M.L.J. 403, dist. (*Mack, J.*) NARAYANASWAMI REDDI *v.* VEERAPPA CHETTIAR. 62 L.W. 368=A.I.R. 1949 Mad. 753=1949 M.W.N. 396=(1949) 1 M.L.J. 656.

———**O. 21, R. 89**—*Application and deposit by third party under direction of judgment-debtor—Maintainability.*

In execution of a decree a house belonging to the judgment-debtor was sold on 14th October, 1947. The judgment-debtor thereafter executed a usufructuary mortgage of some other property in favour of the petitioner herein and directed him specifically to deposit in Court as part of the consideration the decree amount and get the house released from attachment. In accordance with that specific direction, the usufructuary mortgagee filed an application under O. 21, R. 89, on 10th November, 1947, and made the necessary deposit in the execution Court. On the question whether the petitioner had a *locus standi* to file the application.

Held: (1) That in view of the specific direction and obligation imposed on petitioner in the registered mortgage deed, he could not be deemed a person not interested in the property brought to sale.

(1945) 1 M.L.J. 66: I.L.R. (1945) Mad. 566, ref. and (1943) 2 M.L.J. 281, dist.

(2) That the petitioner acted as an agent of the judgment-debtor by virtue of the authorisation contained in the mortgage bond and his claim to file the application should not be defeated on grounds of sheer technicality. (*Mack, J.*) KANDASWAMI GOUNDAN *v.* KRISHNAMA NAIDU. 1949 M.W.N. 285 (2)=(1949) 1 M.L.J. 579.

———**O. 21, R. 89**—*Application by judgment-debtor for setting aside sale of his village shares—Co-sharer in village applying for pre-emption—Whether can oppose.*

Where a judgment-debtor applies under O. 21, R. 89, C. P. Code, for setting aside the sale of his shares in a village, a co-sharer in the village who has applied for pre-emption under S. 151 of the C. P. Land Revenue Act cannot oppose the application. He has no *locus standi* in proceedings under O. 21, R. 89, C. P. Code. (*Padhye, J.*) LAXMANSING *v.* LAXMINARAYAN. I.L.R. (1947) Nag. 802=A.I.R. 1948 Nag. 127=1947 N.L.J. 506.

———**O. 21, R. 89**—*Application for setting aside sale—Applicant for rateable distribution—Whether can oppose.*

A creditor applying for rateable distribution has no *locus standi* in proceedings for setting aside sale or in appeal therefrom and cannot oppose the setting aside of the sale. It is clear from O. 21, R. 89, C.P. Code, that the only persons concerned in these proceedings are the person applying, the decree-holder and the auction-purchaser. The question of rateable distribution is one between the decree-holders *inter se* in which neither the judgment-debtor nor the auction-purchaser has any concern. The creditor applying for rateable distribution is entitled to a share in the sale proceeds when the amount becomes distributable after the sale is confirmed. (*Padhye, J.*) LAXMANSING *v.* LAXMINARAYAN. I.L.R. (1947) Nag. 802=A.I.R. 1948 Nag. 127=1947 N.L.J. 506.

———**O. 21, R. 89**—*Application to make the necessary deposit—If can be deemed to be on application to set aside sale.*

An application to deposit the sale price and the penalty of five per cent. thereon must be deemed to be an application not only for the deposit of the money but also to have the sale set aside. (*Seth, J.*) HIRANIA *v.* RAM PIARI. 1950 A.W.R. 164=A.I.R. 1950 A. 367.

———**O. 21, R. 89**—*Application under—Making of deposit—If condition precedent.*

The making of a deposit is a condition precedent to the making of an application under O. 21, R. 89, C. P. Code. (*Hidayatullah, J.*) UMED SINGH BALIRAM *v.* SHANKERLAL. I.L.R. (1947) Nag. 494=A.I.R. 1948 Nag. 63=1947 N.L.J. 279.

———**O. 21, R. 89**—*Application under—Necessary parties—Auction-purchaser.*

The law nowhere requires that an auction-purchaser should be impleaded as a party to an application under O. 21, R. 89. It is sufficient if he has notice of the application before it is disposed of. (*Padhye, J.*) VITHORA *v.* MAHADEO. I.L.R. (1948) Nag. 695=1948 N.L.J. 270=A.I.R. 1948 Nag. 303.

———**O. 21, R. 89**—*Application under—Necessity—Mere deposit of decretal amount—Sufficiency.*

The mere deposit of the decretal amount would not be enough to enable a Court to set aside the sale but there must be an application oral or written for setting aside the sale. (*Haider, J.M. II and Lal, J.M. I.*) RATAN PRAKASH *v.* HET RAM. 1949 R.D. 113.

———**O. 21, R. 89**—*Deposit by a prior purchaser from the judgment-debtor of some items sold in execution sale—Statement in affidavit that the deposit was without prejudice to petitioner's contentions in another appeal and to his right to recover the amount deposited in case of his success in that appeal—Deposit, if a conditional one disentitling depositor to have the sale set aside.*

A previous purchaser from the judgment-debtor of some properties sold in execution applied under O. 21, R. 89, C. P. Code, to have the sale set aside and in making the deposit stated in his affidavit that the deposit was "without prejudice" to his contentions in another appeal and his right to recover the amount deposited in case of his success in that appeal. On a contention that the deposit was not unconditional and was made under protest and so was not a valid deposit under O. 21, R. 89.

Held, that the deposit was not a valid deposit under the law and as the applicant wanted to keep the dispute open, he cannot claim the benefit of R. 89 of O. 21 and have the sale set aside. 59 M.L.J. 893; 53 Mad. 943, referred to and 69 M.L.J. 349; 58 Mad. 972 (F.B.), relied on. (*Govinda Menon, J.*) EDWARD MATHURAM *v.* ABDUL LATIF SAHIB. 62 L.W. 311=A.I.R. 1949 Mad. 764=1949 M.W.N. 327=(1949) 1 M.L.J. 447.

———**O. 21, R. 89**—*Deposit in respect of commission short by Re. 1-4-0 owing to mistake in calculation—Deficiency made up when pointed out, but after expiry of the thirty days—Court has no jurisdiction to excuse the delay.*

The responsibility for paying the correct amount into Court as required by O. 21, R. 89, C. P. Code lies with the payer who wishes to have the sale set aside and not with the clerk who receives the lodgment schedule. Where a petitioner had admittedly complied with the provisions of O. 21, R. 89, C. P. Code in making a deposit to have a sale set aside, except for the fact that by mistake he was Re. 1-4-0 short in the amount which he had deposited in respect of the commission, which deficiency was made up as soon as it was pointed, but after the thirty days had expired, on a question whether the delay can be excused.

Held: The delay cannot be excused either on the ground that the mistake was not that of the payer but of the clerk who received the lodgment schedule who should have pointed out the error or that the small deficiency which led to the delay should be excused on the principle of *de minimis non curate lex* or again on the ground that the amount paid towards poundage could have been appropriated towards the deficiency. (*Happell, J.*) KALIDASA CHETTY *v.* SIDDHA CHETTY. 59 L.W. 409=1946 M.W.N. 496=229 I.C. 243=A.I.R. 1947 Mad. 56=1947 Mad. (Rul.) 132=(1946) 2 M.L.J. 110.

———**O. 21, R. 89**—*Deposit of amount—If to to personally by judgment-debtor—Deposit of amount by mortgagee of judgment-debtor for and on his behalf out of consideration money left with mortgagee for that purpose—Sufficiency.*

O. 21, R. 89, C. P. Code, does not require that the deposit of the amount should be made by the judgment-debtor personally or by a recognised agent under O. 3, R. 2. All that is necessary is that the deposit should be made on behalf of the judgment-debtor and under his direction. Where, after the execution sale, the judgment-debtor mortgages the property for raising money for depositing in Court for getting the sale set aside, and authorises the mortgagee to deposit in Court the necessary amount out of the consideration for the mortgage and the mortgagee makes the deposit in Court, and subsequently the judgment-debtor and the mortgagee jointly make an application within the period of limitation for having the execution sale set aside, the requirements of O. 21, R. 89 are sufficiently complied with. 1931 All. 449, Diss. 49 All. 839; (1945) Mad. 566, rel. (*Chagla, C.J. and Gajendragadkar, J.*) MUPPANNAPPA KANNAPPA *v.* FAKIRAGOUDA CHANBASANGOUDA. I.L.R. (1949) Bom. 53=51 Bom.L.R. 242=A.I.R. 1949 Bom. 213.

———**O. 21, R. 89**—Deposit under—Last day for deposit, the re-opening day of Court, a bank holiday—Application and lodgment schedule filed on re-opening day—Chalan issued next working day—Deposit in Bank on the same day—If within time. *See* MADRAS CIVIL RULES OF PRACTICE, RR. 157 AND 159. (1946) 1 M.L.J. 395.

———**O. 21, R. 89**—Locus standi *to apply—Co-sharer.*

A co-sharer who is not a party to the suit or execution proceedings is certainly a person whose interest is affected by the sale, and he is entitled to make a deposit under O. 21, R. 89, C. P. Code. A.I.R. 1927 Cal. 82; A.I.R. 1926 Nag. 68 and 2 P. 386, disc.; A.I.R. 1941 Pat. 204 & A.I.R. 1948 Pat. 66, rel. on. (*Roxburgh, J.*) ANANDA PROSAD PAKHIRA *v.* HARIHAR MANNA. 54 C.W.N. 582=A.I.R. 1950 Cal. 374.

———**O. 21, R. 89**—Locus standi *to apply—Interest—Meaning of—Hindu judgment-debtor—Sale of property in execution—Application by wife to set aside—Competency.*

The word "interest" in O. 21, R. 89, C. P. Code should not be read in any narrow sense; it is wide enough to cover the interest of the wife of a Hindu governed by the Mitakshara. A Hindu wife is therefore entitled to apply to set aside a sale of the property of her husband under O. 21, R. 89, C. P. Code, although her interest may be regarded as a contingent interest and although she cannot be treated as her husband's recognised agent within the meaning of O. 3, R. 2, C. P. Code. (*Beevor, J.*) KAMIRUDDIN KHAN *v.* SACHIDANANDA JENA. 13 Cut.L.T. 25=A.I.R. 1948 Pat. 66.

———**O. 21, R. 89**—Locus standi *to apply—Person interested—Test.*

After the amendment of R. 89 of O. 21, C. P. Code, it is sufficient for the applicant to claim an interest in the property at the time of making the application under O. 21, R. 89. Recorded tenants in peaceful possession of the property sold have sufficient interest to entitle them to apply under R. 89 of O. 21. (*Padhye, J.*) VITHOBA *v.* MAHADEO. I.L.R. (1948) Nag. 695=1948 N.L.J. 270=A.I.R. 1948 Nag. 303.

———**O. 21, R. 89**—Requirements under—Specific prayer for setting aside sale—Necessity—Deposit if should be made along with the application. [*See* Q.D. 1941-1945, Vol. I, Col. 1188.] KISHUN LAL *v.* HARDEVI KUAR. 20 Luck. 525=A.I.R. 1946 Oudh 45.

———**O. 21, R. 89**—*Setting aside sale in part—Permissibility.*

O. 21, R. 89, C. P. Code, does not contemplate a sale being set aside in part; it is either set aside or not. Nor is it necessary that all the persons owning property should be the applicants. (*Padhye, J.*) LAXMANSING *v.* LAXMINARAYAN. I.L.R. (1947) Nag. 802=A.I.R. 1948 Nag. 127=1947 N.L.J. 506.

———**O. 21, R. 89 (1) (Patna Amendment)**—*Right to apply under—Vendee from judgment-debtor before application but getting deed registered only afterwards—Right to get sale set aside.*

Under O. 21, R. 89, C. P. Code (as amended by the Patna High Court), a judgment-debtor or any person deriving title from him as well as any person who holds an interest in the property at the date of the application, is entitled to make an application to set aside the sale. The material point of time is the date of the application and not the date of the sale. A vendee from the judgment-debtor whose sale deed is executed before but registered only long after the date of his application for setting aside the sale cannot maintain an application. (*Manohar Lall and Imam, JJ.*) DEOPATI *v.* MAHABIR. 25 Pat. 529=A.I.R. 1947 Pat. 293.

———**O. 21, R. 89 (1) (a) and (b)**—*Decree reversed on appeal after sale—Judgment-debtor making no deposit under cl. (b)—Sale, if may be set aside.*

In execution of a decree the property of the judgment-debtor was put up to sale, but a few days later the decree was reversed on appeal. Thereupon the judgment-debtor applied within 30 days of the sale to have the sale set aside under O. 21, R. 80, C. P. Code. He deposited the 5 per cent. payable to the auction-purchaser under R. 89 (*a*) but made no deposit under R. 89 (*b*) for payment to the decree-holder on the ground that the decree having been reversed nothing was now due to the decree-holder, and the sale was set aside. On revision,

Held that there was sufficient compliance with O. 21, R. 89, C. P. Code, and the sale was properly set aside. The sale was good despite any subsequent reversal of the decree but the decree was no longer good and as between the judgment-debtor and the decree holder was wiped out, and therefore there was under the law a constructive receipt within the meaning of R. 89 (*b*) by the decree-holder of what was once due to him. (*Bose, J.*) VITHOBA BHAGWANJI *v.* DHANAJI. I.L.R. (1947) Nag. 638=A.I.R. 1948 Nag. 126=1947 N.L.J. 494.

———**O. 21, R. 89 (1) (b)**—*Compliance with requirement—Admission by decree-holder that decree has been satisfied—If sufficient.*

Clause (*b*) of O. 21, R. 89 (1), C. P. Code, is satisfied by an unequivocal admission of the decree-holder that his decree has been satisfied out of Court. An agreement between the judgment-debtor and the decree-holder outside Court whereby the decree is satisfied is sufficient compliance with the clause. (*Padhye, J.*) LAXMANSING *v.* LAXMINARAYAN. I.L.R. (1947) Nag. 802=A.I.R. 1948 Nag. 127=1947 N.L.J. 506.

———**O. 21, R. 89 (2)**—*Scope of—Application under O. 21, R. 90, pending—Second application under R. 89--Competency of.*

Where an application has been made for setting aside a sale under O. 21, R. 90, C. P. Code, and is pending, it is not competent to the judgment-debtor to make or present another application under O. 21, R. 89, C. P. Code, in view of the provisions of O. 21, R. 89 (2). I.L.R. (1943) 2 Cal. 485; 58 Mad. 972, dist. and doubted. 1937 Nag. 161; 1940 Sind 181, foll. (*Jahagirdar, J.*) GOVERDHANDAS KANHAYALAL *v.* RANCHHODDAS BHIKHARILAL. I.L.R. (1949) Bom. 249=51 Bom.L.R. 230=A.I.R. 1949 Bom. 271.

———**O. 21, R. 90 and 92**—*Applicability—Fraud extraneous to conduct of sale.*

It is only where there is an allegation of material irregularity or fraud in publishing or conducting the sale that O. 21, Rr. 90 and 92, C. P. Code, would come in for application. Where the allegation of fraud relates to a matter which has nothing to do with the publication or conduct of a sale, the bar provided by R. 92 (3) will not arise. The question whether the sale was brought about by the fraud of the decree-holder, the auction-purchaser and others and the question whether the decree itself was obtained by fraud are matters outside the scope of O. 21, R. 90. (*Yahya Ali, J.*) SANJAMMA *v.* ANNA SAYANNA. 60 L.W. 202=1947 M.W.N. 189=A.I.R. 1948 Mad. 67=(1947) 1 M.L.J. 252.

———**O. 21, R. 90**—Applicability—Fraud in publishing and conducting sale—Proof of on part of decree-holder—Sufficiency—Absence of proof of fraud on part of purchaser—If fatal. *See* LIMITATIN ACT, S. 18. 1949 D.L.R. (Cal.) 18.

———**O. 21, R. 90**—Applicability—Order setting aside sale in execution of rent decree under the Estates Land Act. *See* MADRAS ESTATES LAND ACT (I OF 1908), Ss. 131 AND 132. (1946) 2 M.L.J. 476.

———**O. 21, R. 90**—Applicability—Purchase by decree-holder—Failure to deposit balance sale price—Effect—Application to set aside sale beyond thirty days—Competency—Limitation. *See* C. P. CODE, S. 47 AND O. 21, R. 90=5 D.L.R. (Cal.) 11.

———**O. 21, R. 90**—*Applicability—Sale contrary to agreement between decree-holder and the person interested in the property--Sale for under-value --Fraud and substantial injury—Sale, liability to be set aside.*

Sale of property contrary to an agreement between the decree-holder, the assignee-decree-holder and the person interested in it that the property would not be brought to sale if the latter pays a certain sum of money, amounts to fraud on the part of the decree-holder. Once fraud is made out on the part of the decree-holder and it has resulted in substantial injury, the property being sold for an inadequate price, the fact that the purchase by the auction-purchaser was a *bona fide* one without notice of the fraud does not matter and the sale has to be set aside.

There is no warrant for limiting fraud to a fraud in conducting the sale. (*Chandrasekhara Aiyar, J.*) KANDASWAMI MUDALI *v.* NARASIMHA AYYAR. 61 L.W. 331 (2)=1948 M.W.N. 315=A.I.R. 1948 Mad. 280=3 D.L.R. (Mad.) 10=(1948) 1 M.L.J. 333.

———**O. 21, R. 90**—*Applicability—Sale of Receiver's property under O. 40, R. 4.*

The provisions of O. 21, R. 90, C. P. Code, cannot apply to an attachment and sale of the property of a Receiver under O. 40, R. 4, C. P. Code, as there is nothing expressly extending the provisions of O. 21 to this form of attachment and sale. No application is, therefore, maintainable under O. 21, R. 90 to set aside such a sale. (*Harries, C.J. and Sarkar, J.*) RAM JADU LAHIRI *v.* DIN DAYAL SHAH. 54 C.W.N. 810.

———**O. 21, R. 90**—*Application to set aside sale on the ground of scaling down of decree subsequent to sale—Maintainability.*

In deciding the question whether by reason of the scaling down of the decree subsequent to the sale in execution, the sale is liable to be set aside, the principle to be applied is to consider what would have been the position had the scaled down decree been passed by the Court in the first instance.

Where though there were three plots of land they were brought to sale as one plot without any objection and the decree was subsequently scaled down, in the circumstances it could not be said that if the decree had been scaled down prior to the date of the sale, there would have been no need to sell the property and as such it cannot be maintained that the subsequent scaling down of the decree rendered the sale invalid. (*Govindarajachari, J.*) KUMARASWAMI *v.* MAHALAKSHMAMMA. 61 L.W. 576 (2)=1948 M.

W.N. 611=A.I.R. 1949 Mad. 272=(1948) 2 M.L.J. 232.

——O. 21, Rr. 90 and 92 (2)—*Application under O. 21, R. 90, impleading only one of two joint purchasers—Failure to implead the other, if a ground for dismissal of application.*

Where two persons bid jointly and the sale is knocked down in their joint names and the judgment-debtors file an application under O. 21, R. 90, C. P. Code, impleading only one of the joint purchasers, the application cannot be dismissed on that account. It is unnecessary under the proviso to sub-section (2) of R. 92 of O. 21, that all the persons affected should be formally impleaded. In a proper case a sale can be set aside if notice goes to all persons affected. (*Horwill and Balakrishna Ayyar, JJ.*) Bhaskara Rao *v.* Hemalatamma. 62 L.W. 803=1949 M.W.N. 688=A.I.R. 1950 Mad. 150=5 D.L.R. (Mad.) 142=(1949) 2 M.L.J. 552.

——O. 21, R. 90—*Application under—Nature of—Impleading of auction-purchaser if essential—Application after thirty days of the sale to bring on record the auction-purchaser—Sustainability.*

Applications under R. 90 of O. 21 of the C.P. Code to set aside a sale of immovable property in execution of a decree are in effect applications made to the Court pointing out irregularities or fraud in the Court sale. There is nothing in this rule or in any of the rules of O. 21 to show that the auction-purchaser should appear in the array of parties as a respondent. The only provision that safeguards the interest of an auction-purchaser in this respect is the proviso to sub-rule (2) of R. 92, which is to the effect that no order shall be made unless notice of the application has been given to all persons affected by the sale. The proviso applies not only to applications under R. 89 but also to applications under R. 90. Failure to implead the auction-purchaser within the thirty days of the sale is not a fatal defect which will render the application incompetent and a petition for impleading the auction-purchaser though filed beyond the thirty days should accordingly by allowed. (*Horwill and Shahabuddin, JJ.*) Venkatarama Ayya *v.* Sait Khial Dass Topandoss. 60 L.W. 375=A.I.R. 1948 Mad. 66=(1947) 1 M.L.J. 355.

——O. 21, Rr. 90 and 92—*Excessive execution—Remedy.*

Where the property sold in execution is in excess of that attached, the sale is only voidable and not void and it could be avoided by an application under O. 21, Rr. 90-92, where the sale is challenged on grounds of fraud and material irregularity in publishing and conducting the sale. Though such an application may be described as one under Ss. 47|151, C. P. Code, it must be deemed to be one under O. 21, R. 90 read with R. 92. There will be no second appeal in such a case in view of O. 43, R. 1 (*j*) read with S. 104. (*Kaul, J.*) Sabit Ali *v.* Sardar Husain. I.L.R. (1949) All. 595.

——O. 21, Rr. 91, 92 and 93—*Scope—Execution sale—Judgment-debtor found to have no saleable interest—Suit by auction-purchaser for refund of purchase money—Maintainability—Sale not set aside under O. 21, R. 92—Effect—Remedy of purchaser.*

The right given to an auction-purchaser by O. 21, R. 93, C. P. Code, is a limited right for equitable considerations and the auction-purchaser would be entitled to refund of the purchase money only if the conditions provided by the Code are fulfilled, namely, that the sale must be made on an application made in time by the auction-purchaser. When there was no order setting aside a sale under R. 92 of O. 21, an auction-purchaser has no right of suit to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold either independently or under the C. P. Code, other than a suit for money had and received. 35 Bom. 29, dist. 39 All. 114; 45 All. 369 (F.B.), explained. 44 Bom. 833, foll. 5 I.A. 116; 17 Cal. 436 (P.C.); 13 Lah. 618 (F.B.); 17 Mad. 228, ref. (*Bavdekar and Dixit, JJ.*) Santimmappa *v.* Balbhim Co-operative Credit Society. 52 Bom.L.R. 112=A.I.R. 1950 Bom. 313.

——O. 21, Rr. 90 and 92—Execution sale—Title under—When vests—Sale set aside but restored on appeal—Title of purchaser—When vests—Priority over sale held after order setting aside and before order allowing appeal against order setting aside. *See* C. P. Code, S. 65 and O. 21, Rr. 90 and 92. 4 D.L.R. (Pat.) 39.

——O. 21, R. 90—*Immovable property—Mortgagee rights of fixed rate tenancy.*

The mortgagee rights of a fixed rate tenancy is immovable property within the meaning of O. 21, R. 90, C. P. Code. (*Nehru, A.M.*) Raja Ram Halwai *v.* Gokul Prasad. 1947 A.W.R. (Rev.) 96.

——O. 21, R. 90—*Inadequacy of price by reason of defective proceedings—Ground for setting aside sale.*

Though mere inadequacy of price may not be a ground for setting aside a sale, if it is due to the defective proceedings and substantial injury has been caused thereby the sale can be set aside. (*Nehru, A.M.*) Shiv Narain *v.* Ojha Dariyao Singh. 1948 R.D. 55.

——O. 21, R. 90—Locus standi *to apply—Auction-purchaser.*

An auction-purchaser who had no interest in the property prior to sale, is not entitled to apply under O. 21, R. 90, C. P. Code. (*Clough, J.*) Baidyanath *v.* Radharani. 50 C.W.N. 394.

——O. 21, R. 90—*Material irregularity—Joint and single sale of different properties comprised in different proclamations.*

Where in respect of four items of property of the judgment-debtor separate sale proclamations have been issued, it is a material irregularity to sell all the items jointly in one lot. A sale of two items might have been sufficient to meet the decretal amount. By a joint sale of all items, the judgment-debtor lost a chance of preserving at last some of the items. (*Davies.*) Lachmi Narain *v.* Mohri Lal. 1936 A. M.L.J. 16.

——O. 21, R. 90—Material irregularity—Noncompliance with O. 21, R. 69—What amount to—Sale not adjourned but continued from day to day by agreement of parties till date of hearing of appeal from order refusing stay of sale—Dismissal of appeal and sale on date of dismissal—Legality—Fresh proclamation—Necessity. [*See* Q.D. 1941-1945, Vol. I, Col 1195.] VENKATARAMANA AYYA *v.* NATESA PILLAI. I.L.R. (1945) Kar. (P.C.) 164=12 B.R. 107=1946 P.C. (Rul.) 37 (P.C.).

———**O. 21, Rr. 90 and 66**—*Material irregularity—Non-reference to deed of dedication in sale proclamation.*

A deed of dedication in respect of a property is an encumbrance on it, or any rate, within the meaning of O. 21, R. 66 (2-*e*), C. P. Code, a thing which was material for the purchaser to know in order to judge the nature and the value of the property. The omission to refer to it in the sale proclamation is, therefore, a material irregularity within the meaning of O. 21, R. 90, C. P. Code. (*Clough, J.*) BAIDYANATH *v.* RADHARANI. 50 C.W.N. 394.

———**O. 21, R. 90**—Material irregularity—Property sold at under-value—Failure of Court and decree-holder to discharge duty under O. 21, R. 66—Effect on sale—Setting aside—Dilatory conduct of judgment-debtor—If bar. [*See* Q.D. 1941-1945, Vol. I, Col. 1196.] MARUDANAYAGAM PILLAI *v.* MANICKAVASAKAM CHETTIAR. 221 I.C. 501=12 B.R. 215=1946 P.C. (Rul.) 78=1946 A.W.R. (P.C.) 35=1946 O.A. (P.C.) 35 (P.C.).

———**O. 21, R. 90 and O. 9, R. 15**—*Mortgage suit against minors—Uncle appointed guardian* ad litem—*Decree and sale—Application filed under O. 21, R. 90 by mother as next friend and security bond also filed—Return of bond furnishing particulars—Time granted till a particular date—Calling of the application and dismissal for default on the date fixed—Jurisdiction to dismiss application—Presentation of petition by a wrong person as next friend not a nullity.*

In a mortgage suit against minors represented by their uncle as guardian *ad litem*, a decree for sale was obtained. On 12th October, 1943, the property was brought to sale. On 1st November, 1943, the defendants (minors) by petition though their mother filed an application under O. 21, R. 90, C. P. Code and later filed a security bond also in the proceedings under O. 21, R. 90. The security bond was returned for obtaining certain correct information, and time was granted till 3rd December, 1943. But the petition was called for hearing on 3rd December, 1943, and dismissed for default of appearance of petitioners. The petitioners applied to have the order of dismissal set aside and it was dismissed on the ground that O. 9, R. 15, C. P. Code, had no application to such a matter. An appeal also was filed against the order of 3rd December, 1943. The respondents raised an objection in this appeal that the application under O. 21, R. 90 was bad inasmuch as in it the minors were represented by their mother, whereas their uncle was the guardian *ad litem* appointed by the Court and this was upheld. In revision.

Held, (1) that when time was given for the performance of any act till a particular date, the time given includes that date also. Hence the rejection of the application on the 3rd December, 1943, was without jurisdiction. (2) That the petition filed by the person other than the person appointed by the Court as guardian *ad litem* is not a nullity. Hence the dismissal on that ground also was not proper. (*Clark, J.*) VENKATA RAO *v.* RATTAMMA. 1947 M.W.N. 36=60 L.W. 74=A.I.R. 1947 Mad. 244=(1946) 2 M.L.J. 473.

———**O. 21, R. 90**—*Person interested—Insolvent—Application by insolvent to set aside sale—Maintainability—Amendment of O. 21, R. 22, if affects the question.*

An insolvent is a person interested within the ordinary meaning of that expression and an application by him under O. 21, R. 90, C. P. Code, is maintainable. The decisions based on insolvency law in which it has been held that the insolvent was not a person aggrieved have no application to petitions under O. 21, R. 90 of the Code. The amendment of R. 22 of O. 21 does not affect the question whether the insolvent was a person interested within the meaning of O. 21, R. 90. (*Horwill and Shahabuddin, JJ.*) PONNUSAMI MUDALIAR *v.* SUBBARAYA MUDALIAR. 60 L.W. 49 (1)=1947 M.W.N. 98=A.I.R. 1947 Mad. 298=(1947) 1 M.L.J. 37.

———**O. 21, R. 90 (as amended in Nagpur)**—*Power of Court—Ground not pleaded by applicant—Setting aside of sale on—Permissibility.*

Under O. 21, R. 90, C. P. Code, if the Court does not find material irregularity in the publication and conduct of the sale as alleged in the application, it cannot set aside the sale upon other grounds not pleaded by the applicant. *A fortiori,* an objection not so taken cannot be considered by an appellate Court when hearing an appeal from an order of the Court below rejecting an application to set aside the sale. (*Sarwate, J.*) SARJOOBAI *v.* DEEP CHAND. I.L.R. (1949) Nag. 179=A.I.R. 1949 Nag. 137=1948 N.L.J. 578=3 D.L.R. (Nag.) 86.

———**O. 21, R. 90**—*Right to apply—Rent decree in favour of co-sharer landlord—Sale of holding for arrears of rent—Death of one judgment-debtor—Execution without impleading heirs—Latter's interest if affected by sale.*

Where after the death of one of several judgment-debtors under a decree for rent obtained by a co-sharer landlord, execution is taken out and a sale is held without impleading the legal representative of the deceased judgment-debtor, the sale is void to the extent of the interest of the deceased in the property and his legal representative is not therefore entitled to apply to set aside the sale under O. 21, R. 90, C.P. Code, as he is not a person whose interests are affected by the sale within the meaning of the rule. (*Pande, J.*) MRINMAYEE RAY *v.* SREEPATI CHARAN DAS. 11 Cut.L.T. 56=A.I.R. 1946 Pat. 133.

———**O. 21, R. 90**—Sale notified to be held during monthly sale on certain date—Sale held during monthly sales but on later date—No order of adjournment recorded—Validity of sale. [*See* Q.D. 1941-1945, Vol. I, Col. 1198.] ABDUL SAMAD *v.* ASLAM MUNSHI. 1946 Cal. (Rul.) 1.

———O. 21, R. 90—*Sale without attachment —Validity—When liable to be set aside.*

Though attachment is a necessary preliminary to a judicial sale, a sale without attachment is is not a nullity. Omission to attach is a material irregularity which renders the sale liable to be set aside if substantial injury is proved. (*Patanjali Sastri and Bell, JJ.*) Swaminatha Iyer *v.* Krishnaswamy Iyer. I.L.R. (1947) Mad. 471 =A.I.R. 1947 Mad. 213=59 L.W. 602=1946 M.W.N. 676=(1946) 2 M.L.J. 307.

———O. 21, R. 90—*Second appeal—Application also based on fraudulent suppression of notice under O. 21, R. 22.*

Although no second appeal lies from an order passed under O. 21, R. 90, C. P. Code; on an application under that rule to set aside a sale on the ground of irregularity or fraud in publishing or conducting the sale, yet if the application is also based on fraudulent suppression of the notice required by O. 21, R. 22, a second appeal does lie, and in that appeal the High Court is competent to deal with the application under R. 90. (*Agarwala, Ag. C.J., Imam and Das. JJ.*) Ramlal Sahu *v.* Mt. Ramia. 26 Pat. 340=1948 P.W.N. 7=A.I.R. 1947 Pat. 454=29 P.L.T. 34 (F.B.).

———O. 21, R. 90—Setting aside sale after confirmation under inherent powers of Court—Jurisdiction. *See* C. P. Code, S. 151 and O. 21, R. 90. (1947) 1 M.L.J. 10.

———O. 21, R. 90—Proviso—Proof of substantial injury by season of material irregularity—Direct evidence—If necessary. [*See* Q.D. 1941-1945, Vol. I, Col. 1200.] Naganna Naidu *v.* Venkatarayulu Naidu. 72 I.A. 287=I.L.R. (1946) Mad. 379=1946 A.L.J. 1=1946 O.A. (P.C.) 90=I.L.R. (1945) Kar. (P.C.) 330=1946 A. W.R. (P.C.) 90 (P.C.).

———O. 21, R. 90, Proviso (2) (added by Calcutta High Court)—*Drawing up of sale proclamation—Judgment-debtor not objecting to non-compliance with S. 35 of Bengal Money-Lenders Act—Effect of.*

Per *Chakravartti, J.*—S. 35 of the Bengal Money-Lenders Act is a provision relating to the contents of the sale proclamation, and any objection regarding non-compliance with that section in specifying the propperty to be sold is a defect in the sale proclamation within the meaning of the second proviso to O. 21, R. 90, C. P. Code. It follows that an objection that the sale proclamation did not conform to S. 35 of the Bengal Money-Lenders Act cannot avail a judgment-debtor in an application under O. 21, R. 90, C. P. Code, if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time. (*Akram and Chakravartti, JJ.*) Manindra Chandra Roy *v.* Jagadish Chandra. 50 C.W.N. 266.

———O. 21, R. 91—*Suit by auction-purchaser for refund of purchase-money—Judgment-debtor having no saleable interest in property—Allegation of fraud against decree-holder—Suit, if maintainable—Limitation for such suit—Starting point—Limitation Act, Arts. 62 and 120.*

Notwithstanding the provisions of O. 21, R. 91, C. P. Code, a suit by the auction-purchaser against the decree-holder for the recovery of the purchase money on the ground that the judgment-debtor had no saleable interest in the property is maintainable, where there was fraud on the part of the decree-holder and possibly also where there was misrepresentation on his part. In such a suit a decree can also be passed in favour of the plaintiff for the costs incurred by him in defending a title suit instituted against him. I.L.R. (1938) 1 Cal. 512, foll.

Such a suit is governed not by Art. 62 but by Art. 120 of the Limitation Act, and the starting point of limitation is the date of the decree in the title suit in which it was found that the judgment-debtor had no saleable interest in the property. 50 C. 115, foll.

Art. 62 of the Limitation Act applies for recovery of the purchase-money by a purchaser who has purchased the property by private treaty where the conveyance made to him was ineffective, either by reason of the want of title on the part of the vendor or want of capacity on his part to convey. The true principle is that due effect must be given to the phrase "for the plaintiff's use" occurring in Art. 62. Money can be said to have been received by the defendant to the plaintiff's use only when, either from the jural relationship between the parties or other circumstances, a promise on the part of the defendant to pay the plaintiff can be implied; or in the case of a *quasi-contract*. In the case of a private sale there is always the implied warranty of title given by the vendor, and if there is a breach of that warranty the law would imply on the part of the vendor a promise to pay back the purchase-money to the purchaser. But in a sale by the Court or its officer there is no warranty of title, and the money which the purchaser pays cannot, either in law or equity, be said to have been received by the Court or its officer for the use of the auction-purchaser. 18 I.A. 158 and 35 A. 419, ref. to. (*Mitter and Ahmad, JJ.*) Dibyendu Prosad Ray Chaudhuri *v.* Latika Rani Mitra. I.L.R. (1948) 1 Cal. 479.

———O. 21, Rr. 91 and 93 and Limitation Act (IX of 1908), Art. 120—*Suit for refund of purchase-money by auction-purchaser who had been deprived of the property bought—Maintainability—Limitation.*

Where an auction-purchaser is deprived of the property bought by him by reason of the paramount title of another claimant, it being found that the judgment-debtor had no saleable interest in the property sold, he can maintain a suit to recover the price paid by him. Limitation for such a suit is governed by Art. 120 of the Limitation Act. (*Teja Singh and Achhru Ram, JJ.*) Amolak Chand Mewa Ram *v.* Mohd. Shaji. 50 P.L.R. 90=A.I.R. 1948 East Punj. 1=3 D. L.R. (Simla) 1.

———O. 21, R. 92—*Applicability—Claim under S. 56, T. P. Act—Premature sale.*

O. 21, R. 92, C. P. Code, has no application to the case of a premature sale; where the time to sell a property in accordance with S. 56, T.

P. Act, has not yet arrived, the provisions of O. 21, C. P. Code, regarding sale of property and its subsequent setting aside have nothing to do with cases of sale under S. 56, T. P. Act, which are premature. (*Sharif, J.*) SAIN DITTA MAL *v.* BULAQI RAM & SONS. 226 I.C. 366=A. I.R. 1947 Lah. 230=1946 Lah. (Rul.) 454.

———**O. 21, R. 92**—Applicability—Sale in execution under mortgage decree for property not covered by mortgage or decree—Void sale—Suit by judgment-debtor for possession—If barred. *See* C. P. CODE, S. 47. 52 Bom.L.R. 358.

———**O. 21, R. 92**—*Confirmation of sale—Effect of—Loss of judgment-deptor's interest in property sold—Date of.*

The confirmation of the sale makes the sale valid and binding with effect from the date of the sale. On confirmation of the sale therefore the judgment-debtor must be deemed to have lost all interest in the property sold with effect not from the date of the confirmation but from the date of the sale itself. (*Achhru Ram, J.*) MAHOMED UMAR *v.* PREM SINGH. 229 I.C. 57=A. I.R. 1947 Lah. 100=1947 Lah. (Rul.) 139=48 P.L.R. 168.

———**O. 21, R. 92**—*Scope—All interested parties agreeing that sale need not be confirmed—Court, if bound to confirm sale.*

R. 92 of O. 21, C. P. Code, does not apply, and is not intended to compel a Judge to confirm a sale when all parties, the judgment-debtor, the judgment-creditor and the auction-purchaser agree that in certain exceptional circumstances the sale should not, on the happening of a certain contingency, be confirmed. (*Davis, C.J.*) TIRATHDAS *v.* VIRUMAL. I.L.R. (1946) Kar. 124=A.I.R. 1947 Sind 24=1947 Sind (Rul.) 52=229 I.C. 66.

———**O. 21, R. 92 (3)**—*Applicability—Sale attacked on ground of lack of jurisdiction—Suit, if barred.*

Under O. 21, R. 92 (3), C. P. Code, there is no bar to a suit if the objection to the sale does not relate to Rr. 89, 90 or 91. Where the sale is attacked on the ground of fraud or lack of jurisdiction to hold the sale, R. 92 has no application. Where by reason of the amendment which was allowed to the judgment-debtors under the U.P. Agriculturists' Relief Act, and the U. P. Debt Redemption Act, a new decree entirely different from the original had come into existence, a sale held in pursuance of the original decree and its confirmation is invalid and without jurisdiction, and a suit to set aside that sale is, therefore, not barred by O. 21, R. 92 (3), C.P. Code. (*Sinha, J.*) DAL CHAND *v.* PARSHADI LAL. 1947 A.L.J. 451=1947 A.W.R. (H.C.) 315=A.I.R. 1947 All. 400.

———**O. 21, R. 92 (3)**—*Applicability—Sale confirmed by Collector—Suit—If barred.*

There is no warrant for the contention that O. 21, R. 92 (3) has no application when an auction sale is confirmed by the Collector. If the sale is confirmed under O. 21, R. 92 (1), either by the Collector or by the Court, then O. 21, R. 92 (3) bars a suit to have the sale set aside on any of the grounds mentioned in

R. 89, 90, or 91, C. P. Code. (*Lokur, J.*) NAGINDAS CHHOTALAL *v.* KUNVESHA HORMUSH. I.L.R. (1947) Bom. 37=230 I.C. 375=1947 Bom. (Rul.) 251=48 Bom.L.R. 812=A.I.R. 1947 Bom. 131.

———**O. 21, R. 92 (3)**—*Confirmation of sale in execution of* ex parte *decree on very date of sale—Suit by judgment-debtor to set aside sale on ground of fraud—Maintainability.*

In execution of an *ex parte* decree against the plaintiff, certain property belonging to him was sold and the sale was confirmed on the very date on which it was held. The plaintiff brought a suit for a declaration that the sale was null and void on ground of fraud practised on the Court.

Held, that the indecent haste with which the sale was confirmed could not but be deemed to have been in fraud of the plaintiff in order to prevent him from obtaining relief under O. 21, R. 90, C. P. Code, that the sale consequently became voidable and that the plaintiff was entitled to bring a suit to set aside the confirmation of the sale. (*Bannerji, J.C.*) GAURI RAM *v.* JAISHI RAM. A.I.R. 1950 H.P. 1.

———**O. 21, Rr. 92 (3), 93 and S. 9**—*Suit to recover purchase money after auction sale is set aside—If barred by O. 21, R. 92 (3)—Applicability of S. 9 to such a suit.*

A suit filed by an auction-purchaser to recover the purchase money paid in a case where the auction has been set aside in proceedings under O. 21, C. P. Code, is not barred by O. 21, R. 92 (3) of the C. P. Code, as the recovery is sought not on the ground that the judgment-debtor had no saleable interest in the property, but on the ground that the sale had been set aside. On the sale being set aside a clear equity arises in favour of the auction-purchaser and he becomes entitled to recover back the purchase money by reason of this equity without resorting to any statutory right conferred upon him by the C. P. Code. A suit to enforce this equitable right would be maintainable as it is not expressly or impliedly barred either by O. 21, R. 92 (3) or any provision of law. Case-law discussed. (*Seth, J.*) SATISH CHANDRA *v.* JWALA PRASAD. 1950 A.W.R. 494=A.I.R. 1950 All. 461=1950 A.L.J. 747.

———**O. 21, R. 94**—*Sale certificate—Ambiguity as to identity—Right to prove by other evidence.*

Where the boundaries mentioned in a sale certificate embrace two properties while in fact only one of the properties was alone sold, it is open to the party who so asserts to prove by other evidence as to which of the properties was in fact covered by the certificate of sale. I.L.R. 41 Mad. 483 (P.C.), distinguished. (*Chandiramani, J.*) BHAGWATI SARAN *v.* GARGI DIN. A.I.R. 1950 All. 186.

———**O. 21, R. 95**—*Applicability—Obstruction by Judgment-debtor's son—Latter not in physical possession, and claiming propperty to be ancestral.*

O. 21, R. 95, C. P. Code, applies when obstruction to delivery of possession is made by the judgment-debtor's son who was not a party to the Civil suit, when he is not in physical possession of any part of the property and claims a share in it on the ground of its being ancestral but does not claim special exemption from the liability to pay the debt. (*Ramsden, F.C.*) NAMDEO KARKAJI *v.* AMRAOTI CENTRAL BANK. 1946 N.L.J. 109.

———O. 21, R. 95—*Delivery of possession—Land without kutcha huts thereon purchased by auction-purchaser—Power of Court to order removal of huts.*

The Court, in ordering delivery of possession under O. 21, R. 95, C. P. Code, can order removal of the kutcha huts standing on the land, where the auction-purchaser who asks for delivery of possession, has purchased the land but has not purchased the huts. As a part of delivering possession, the Court's officer can remove the huts provided he does it with due regard to the rights of the judgment-debtor. 57 C.L.J. 41, foll. 38 C.W.N. 1051, Dist. (*Das Gupta, J.*) HEM CHANDRA DUTTA *v.* HARAN CHANDRA. 54 C.W.N. 164=A.I.R. 1950 Cal. 322.

———O. 21, R. 95—Delivery of possession under—Effect of. *See* LIMITATION ACT, ART. 144. 3 D.L.R. (Pat.) 4.

———O. 21, R. 97—*Appeal—Order dismissing application under—Appealability.*

No appeal lies against an order dismissing an application under O. 21, R. 97, C. P. Code, against a person other than the judgment-debtor who claimed in good faith to be in possession of the property on his own account. (*Shearer and Pande, JJ.*) GUNA DURGA PRASAD RAO *v.* KRISHNA RAO. 24 Pat. 695=11 Cut.L.T. 57=A.I.R. 1946 Pat. 134=228 I.C. 278=13 B.R. 174=1947 Pat. (Rul.) 108.

———O. 21, Rr. 98 and 103 and S. 144—*Defeated obstructor's suit for declaration of title pending when order under O. 21, R. 98 is passed against him—Defeated obstructor not filing a fresh suit under ON. 21, R. 103--If can recover possession and mesne profits by way of restitution on his succeeding in the appeal in his suit for declaration of his title—Scope of powers of Court in ordering restitution.*

It cannot be said that even when there is in respect of the same property a suit or appeal filed by a defeated obstructor pending at the time when an order under O. 21, R. 98, C. P. Code, is passed against him, it is still obligatory on his part to file another suit under O. 21, R. 103, after the passing of the said order.

B obtained decrees for possession of two parcels of lands on 30th August, 1938. On 25th October, 1938, one *P* filed a suit against *B* for a declaration that those two parcels of lands were his mulgeni holdings and that the decrees were not binding on him. *B's* application for delivery of possession alleging *P's* obstruction was dismissed as *P's* suit was pending. *P's* suit was dismissed on 21st July, 1941. Relying on that dismissal *B* filed fresh applications which were ordered under O. 21, R. 98. Meanwhile *P* filed an appeal against the dismissal of his suit which was allowed in his favaur on 16th March, 1944. As *B* had taken possession of the properties in pursuance of the order of 4th August, 1942, *P* sought to recover possession and mesne profits by way of restitution which was resisted on the ground that as *P* filed no suit as contemplated by O. 21, R. 103, within one year of the orders of 4th August, 1942, those orders had become final and that the reliefs of possession and mesne profits could not be given in restitution proceedings as those reliefs were not asked for in *P's* suit.

Held, as there was already a suit in respect of the same property it could not be held that notwithstanding the later decision in that suit in *P's* favour his title must be regarded as having been negatived by his inaction in so far as he did not file a fresh suit within one year after the passing of the order under O. 21, R. 98. Further, as between two inconsistent decisions of 1942 and 1944 between the same parties in regard to the same subject-matter, the later would have to prevail.

The jurisdiction to grant restitution is not confined to those cases which directly fall within the strict language of S. 144, C. P. Code and the power and duty of the Court to grant restitution is extensive and is not circumscribed by the wording of S. 144. The order of possession in favour of *B* was based upon the dismissal of *P's* suit and when that decision was reversed in appeal there should be restitution as a matter of course. The mere fact that in the appellate decree in *P's* suit there is no direction for delivery of possession or for payment of mesne profits, etc., is no reason whatever for the Court refusing those reliefs as they necessarily flow out of *P's* title to the properties in question. (*Govindarajachari, J.*) UMANATH BHANDARY *v.* PEDRU SOUZA. A.I.R. 1950 Mad. 19=(1949) 1 M.L.J. 286.

———O. 21, R. 99—*Applicability—Application under O. 21, R. 97—Order dismissing as barred by limitation—Appeal.*

It is impossible to regard an order dismissing an application under O. 21, R. 97, C. P. C., as time-barred as an order falling under R. 99 of O. 21, so as to bar an appeal from such an order. (*Thadani, J.*) KOTUMAL KHEMCHAND *v.* GUR ASHARAM. I.L.R. (1946) Kar. 317=A.I.R. 1947 Sind 118.

———O. 21, R. 100—*Applicability—Conditions Facts to be proved.*

R. 100 of O. 21, C. P. Code, provides the remedy for a person who is himself not a judgment-debtor but who has been dispossessed on account of the execution of a decree against a third party. He has to prove that he was in possession on the date of the dispossession in execution. (*Haider, J.M.*) RAM KISHAN *v.* BHAGIRATH. 1948 A.W.R. (Rev.) 265 (2)=1948 R.D. 414.

———O. 21, R. 100—*Applicability—Dispossession subsequent to execution proceedings—Application held not maintainable—Limitation for suit —Limitation Act, Art.* 11-A.

O. 21, R. 100, C. P. Code, cannot be interpreted to be attracted in a case where dispossession is alleged not in course of execution but subsequent thereto.

If an application is held not to be an application maintainable under O. 21, R. 100, C. P. Code, Art. 11-A of the Limitation Act will not be attracted. Although the Article does not refer to any section, the order must be an order under O. 21, R. 103, C. P. Code. That rule expressly refers to Rr. 98 and 101 and these rules provide for investigating into a petition of objection. The right of suit is given by R. 103 only when there is order under Rr. 98, 99, or 101 and Art. 11-A merely provides for limitation applicable to such suits. 26 C.W.N. 853, foll.; 65 C.L.J. 416, diss. from. A.I.R. 1929 Pat. 553, 36 C.W.N. 965 and 70 C.L.J. 111, rel. on. (*Mookerjee, J.*) Hare Krishna Rana *v.* Jamini Sundari Dasi. 85 C.L.J. 155=A.I.R. 1950 Cal. 555.

———O. 21, Rr. 100 to 102—*Application under R. 100—Court dealing with—Considerations—Delivery of possession to decree holder—Claim for re-delivery of possession—Petitioner found to have obtained possession from judgment-debtor during pendency of the suit—Doctrine of* lis pendens *if applies—Meaning of the words "Transferred the property" in R. 102—Excessive execution—Stranger to suit—Remedy.*

On 18th November, 1943, a suit for recovery of possession of a portion of a house was filed by the respondent and he obtained a decree. But in the meanwhile on 24th November, 1943, the petitioner got delivery of possession of the house from the judgment-debtor in that suit on the strength of a sale in his favour. The respondent in execution of his decree obtained possession from the judgment-debtor. Thereupon, the petitioner applied under O. 21 R. 100 for re-delivery of possession to himself alleging that he had been in posssession of the property in his own right and that he had been wrongly dispossessed in the execution proceedings.

Held, (1) that a Court dealing with an application under O. 21, R. 100 is not concerned with the determination of the title to the property which is the subject-matter of the application. It is only connected with the *factum* of possession at the time when the applicant is alleged to have been dispossessed and the nature of such possession, *viz.*, whether it was on his own account or on account of a person other than the judgment-debtor. S. 52 of the Transfer of Property Act in terms has no application to a petition under O. 21, R. 100. To a certain extent the principle underlying the section has been embodied O. 21, R. 102, C. P. Code and it is not permissible to travel beyond that provision to rely upon the analogy of S. 52.

(2) Having regard to the groups of sections beginning with O. 21, R. 95, C. P. Code, the words "transferred the property" in R. 102 should be understood in a wide sense as to include both "transfer of title" as well as "transfer of possession". It could even be said that primarily it refers to transfer of possession. Hence, the judgment-debtor in surrendering possession to the petitioner in this case must be deemed to have "transferred" the property within the meaning of the rule and it follows that the petitioner

would not be entitled to any relief under R. 101.

(3) Even if there has been an excessive execution, it is the judgment-debtor that can get relief under S. 47, C. P. Code, but it is doubtful whether a stranger to the suit like the petitioner could invoke the provisions of S. 47 in his aid. His remedy might only be a suit. In no event can his remedy be under O. 21, R. 100 because that rule applies only to re-delivery of possession of property delivered to the decree-holder in execution of the decree. (*Rajamanndr, J.*) Kanagasabhai Pathar *v.* Poornathammal. I.L.R. (1948) Mad. 415=60 L.W. 422=1947 M.W.N. 423=A.I.R. 1947 Mad. 458=(1947) 2 M.L.J. 97.

———O. 21, R. 100—Locus standi *to apply under—Applicant alleging that judgment-debtor in possession is his tenant.*

Where an applicant under O. 21, R. 100, C. P. Code, comes to Court with an allegation that the dispossessed judgment-debtor was his tenant, on the face of it he has no *locus standi* to file the application. (*Trivedi, J.C.*) Jethmal Liladhar *v.* Rajgor Joshi Kaku. A.I.R. 1950 Kut. 68.

———O. 21, R. 101—*Order under—Appealability.*

An order passed under R. 101 of O. 21, C. P. Code, cannot be questioned in appeal. It is not covered by O. 43, R. 1 and it is clear that no appeal lies against it. (*Sultan Ahmad, S.J. M.*) Mustafa *v.* Najibullah. 1948 A.W.R. (Rev.) 11.

———O. 21, R. 102—*Applicability—Involuntary sale.*

O. 21, R. 102, C.P.Code, does not in terms apply to an involuntary sale. (*Shearer and Pande, JJ.*) Guna Durga Prasad Rao *v.* Krishna Rao. 24 Pat. 695=11 Cut.L.T. 57=A.I.R. 1946 Pat. 134=228 I.C. 278=13 B.R. 174=1947 Pat. (Rul.) 108.

———O. 21, R. 102—Transferred the property"—Meaning of. *See* C. P. Code, O. 21, Rr. 100 and 102. (1947) 2 M.L.J. 97.

———O. 21, R. 103—Applicability—Final decree in mortgage suit with wrong legal representative of mortgagor—Sale and delivery of possession to decree-holder purchaser—Successful application under O. 21, R. 100 by rightful heirs—Remedy of decree-holder—Application for fresh final decree—Competency. *See* C. P. Code, O. 34, R. 4. 4 D.L.R. (Pat.) 10.

———O. 21, R. 103—*Failure to file the suit—Effect.*

One *K* effected a simple mortgage on his properties in favour of *R* who transferred the mortgage right to the defendant, who in his turn transferred it to the plaintiff's father *B.* After *B's* death, plaintiffs obtained a decree against *K* and in execution purchased the hypotheca themselves. The sale was duly confirmed and full satisfaction of the decree recorded by the execution court. But when the plaintiffs sought to obtain delivery they were obstructed by a third party against whom the plaintiffs filed a petition for removal of obstruction which petition was dismissed. Thereupon the plaintiffs filed the suit for recovery of money on foot of failure of consideration for the transfer in favour of their father.

Held, that the suit was not maintainable. Though the plaintiffs need not have got the order confirming the sale set aside or the order recording the full satisfaction vacated, the plaintiffs could not file the suit without pursuing their remedy of a suit under O. 21, R. 103 of the Code, as the order which became conclusive on failure to file a suit, was conclusive only between the parties and did not establish conclusively absence of title in the plaintiff's vendor to the property in question so as to afford the plaintiffs a cause of action on the basis of such a want of title. (*Raghava Rao, J.*) Venkata Ramiah Chetty *v.* Chinna Pulliah. 62 L.W. 715=A.I.R. 1950 Mad. 41=1949 M.W.N. 654=(1949) 2 M.L.J. 466.

———**O. 21, R. 103**—*Failure to file suit within one year of adverse order—Effect—Retaking of possession forcibly—Second dispossession—If confers a fresh right to reagitate his title.*

A decree-holder failed to file a suit as required by R. 103 of O. 21, C. P. Code within one year of the allowing of an objection under R. 100 of O. 21. But sometime later, he took forcible possession of the property from the person to whom it was delivered under R. 101 of O. 21. He was again dispossessed by proceedings under S. 9 of the Specific Relief Act and he thereupon filed a suit for declaration of title. On an objection that it was barred by R. 103 of O. 21, C. P. Code.

Held, that the plaintiff's title was extinguished by his failure to file a suit within one year of the date of the adverse order against him and his subsequently taking forcible possession could not confer a fresh right to reagistate the extinguished title. (*Misra, J.*) Mahadeo *v.* Brij Lal. 22 Luck. 192=229 I.C. 30=1947 A.W.R. (C. C.) 32=1947 O.A. (C.C.) 32=A.I.R. 1948 Oudh 22=1947 Oudh (Rul.) 43=1947 O.W.N. 136.

———**O. 21, R. 103**—Fresh suit—When barred. *See* Limitation Act. (IX of 1908), Art. 11-A. (1946) 1 M.L.J. 104.

———**O. 21, R. 103**—Mortgagor dying after preliminary decree—Final decree passed after substitution of wrong heirs—Decree-holder purchasing property in execution and obtaining possession—Property restored to real heir on application under O. 21, R. 100—Remedy of decree-holder—*See* C. P. Code, S. 151 and O. 21, R. 103. A.I.R. 1949 Pat. 259.

———**O. 21, R. 103**—*Nature of suit—Right to Confirmation of sale in contravention of O. 21, R. 86—Sale set aside subsequently—Justification under inherent powers and powers of review.*

Where though the deposit was not paid as required by O. 21, R. 85, C. P. Code, the sale was confirmed on the deposit being made later and the sale is subsequently set aside on objection by the judgment-debtor, the order could be justified either on the ground of the power of the Court to review its own order on the ground of a mistake apparent on the face of the record or under

the inherent powers of Court under S. 151, C. P. Code. (*Haider, J.M.*) Ravi Pratap Narain Singh *v.* Inderpati. 1948 R.D. 236=1948 A.W.R. (Rev.) 183.

———**O. 21, R. 103**—*Nature of suit—Right to possession—Need for proof.*

In summary proceedings under O. 21, Rr. 98, 99, 101, C. P. Code the inquiry is directed to question of possession but the scope of the suit under R. 103 is much wider. A suit under O. 21, R. 103, C. P. Code, is not akin to a suit under S. 9 of the Specific Relief Act and the plaintiff in a suit under O. 21, R. 103, cannot succeed by merely showing that he was in possession and had been dispossessed, but he must establish his right to possession on the assumption that he was not in possession on the date of the order under Rr. 98, 99, 101. (*Das, J.*) Jitendra Nath Mondal *v.* Nandalal Das. A.I.R. 1947 Cal. 434=82 C. L.J. 320.

———**O. 21, R. 103**—*Parties to suit—Persons other than the obstructor—If can be made defendants.*

There is nothing in O. 21, R. 103, C. P. Code, which prevents a plaintiff suing under that rule from joining as party defendants persons other than the person responsible for the obstruction in his claim for possession. The rule enables the aggrieved party to bring a civil suit to establish his right to the present possession of the property, whether it be based upon title or otherwise. There is nothing to prevent him from suing not only the person who obstructed him in his claim to possession but also other persons in occupation of the property who would obstruct his claim to possession likewise. (*Davis, C.J. and Thadani, J.*) Mathradas Girdharidas *v.* Khemchand Ramdas. A.I.R. 1948 Sind 95=I.L.R. (1947) Kar. 86.

———**O. 21, R. 103**—Scope and effect—Application for removal of obstruction to delivery of possession to decree-holder—Dismissal—Failure to sue within one year—Effect—Suit after several years—Bar of. [*See* Q.D. 1941-1945, Vol. I, Col. 1207.] Kaleswarar Mills, Ltd. *v.* Govindaswami Naicker. I.L.R. (1946) Mad. 536=A.I.R. 1946 Mad. 76.

———**O. 21, R. 103**—*Suit for symolical possession—Lessee of defendant—If necessary party.*

The words of O. 21, R. 103, C. P. Code, are not restricted to actual possession only. If the plaintiff is content with getting merely symbolical possession, the lessee of the defendant who is in actual possession is not a necessary party to the suit.

A suit under O. 21, R. 63 is not precisely of the same nature as a suit under O. 21, R. 103 in which no question in respect of any attachment arises. Therefore, the principles underlying decisions in suits under O. 21, R. 63 are not applicable for decisions in suits under O. 21, R. 103, C. P. Code. (*Lodge and Akram, JJ.*) Benode Behari Misra *v.* Kalyani Prosad Singh Deo. 51 C.W.N. 857.

———**O. 21, R. 103**—Suit under—If obligatory when defeated obstructor's suit for declaration of title is pending when order under O. 21, R. 98

is passed against him. *See* C. P. Code (V of 1908), O. 21, Rr. 98 and 103 and S. 144. (1949) 1 M.L.J. 286.

———O. 21, Rr. 131 and 139—*If controlled by* S. 47.

S. 47, C. P. Code, as representing the body of the Code controls both R. 131 and R. 139 of O. 21, C. P. Code. (*Sinha and Wanchoo, JJ.*) Kailash Nath *v.* Joti Prasad. I.L.R. (1948) All. 207=1948 A.W.R. (H.C.) 51 (2)=1948 O.A. (H.C.) 51 (2)=A.I.R. 1948 A. 307=1948 A.L.J. 103=1948 A.L.W. 153.

———O. 22—*Abatement—Death of* Sarbarkar *of idol.*

No question of abatement arises in the case of the death of a *sarbarkar* of an idol during the pendency of a suit or other proceeding. It is the duty of the Court to have a successor-in-interest of the deceased *Sarbarkar* brought on the record. (*Lal, J.M. I and Faiyaz Ali, I.M. II.*) Balbhadra *v.* Shri Thakur Ji Maharaj. 1949 R. D. 375.

———O. 22—*Abatement—Deceased party's legal representatives already on record though in different capacity.*

When the legal representatives of a deceased party are already on the record, even though in another capacity, the suit or appeal will not abate because of non-substitution of the legal representatives within the prescribed period. (*Lal, J.M. I.*) Kalpnath Singh *v.* Jadhu Singh, 1949 R.D. 373.

———O. 22—*Applicability—Revision applications.*

The provisions of O. 22, C. P. Code, about abatement of suits and appeals do not apply to applications for revision. (*Ram Chandra, F.C.*) Jindan Shah *v.* Karam Chand. 26 L.L.T. 4.

———O. 22—*Applicability—Revision petitions.*

There is no provision in the C. P. Code, making the provisions of O 22, applicable to Civil Revision Petitions. Nor is there any provision making O. 22 applicable to Civil Revision petitions in R. 41-B of the Appellate Side Rules which make Certain provisions of the C. P. Code, applicable *mutatis-mutandis* to Civil Revision petitions. (*Rajamannar C.J. and Satyanarayana Rao, J.*) Manickam *v.* Ramanathan Chettair. I.L.R. 1949 Mad. 566=A.I.R. 1949 Mad. 435=4 D.L.R. (Mad.) 102=61 L.W. 780=1948 M.W.N. 788=(1948) 2 M.L.J. 521.

———O. 22—*Applicability—Revision petitions.*

Though the provisions of O. 22, C. P. Code, do not in terms apply to revision applications yet if there is a failure to add the legal representatives of a deceased party within a reasonable time, the revision would abate. 1947 O.W.N. 221, Rel. on. (*Chandiramoni, J.*) Bhattu Lal *v.* Bechey Singh. A.I.R. 1950 All. 665.

———O. 22—Applicability—Suit abating under S. 15, Indian Independence Act—Effect of—Application to set aside abatement and for substitution—Necessity. *See* Indian Independence Act, S. 15 (1) and (2). 5 D.L.R. (Pat.) 3.

———O. 22—*Death of a defendant—Widow added as legal representative in time—Will by the deceased leaving the suit property to his daughter*

—Subsequent application to add daughter—Earlier application bona fide*—Bar of limitation.*

Pending the trial of a suit, one of the defendants died on 23rd November, 1946 and the plaintiff filed an application within the prescribed period to implead the widow of the deceased defendant as his legal representative, which was ordered on 27th February, 1947. During the course of the enquiry into this petition it appeared that the deceased defendant had left a will under which the suit property was bequeathed to his daughter, whereupon on the 10th of April, 1947, the plaintiff filed another application to implead the daughter also as a legal representative. That petition was dismissed on the ground that the delay between the two dates 27th February and 10th April, 1947, was not properly explained. In revision,

Held, that the order of dismissal was materially irregular as, in a case like this, where one person has been impleaded in time as a legal representative and it is found necessary later on to implead another person as the real legal representative and there is nothing to suggest that the earlier petition impleading the wrong person as the legal representative was not *bona fide*, there was no question of limitation as such which precludes the second petition being entertained and ordered by the Court. (*Panchapagesa Sastri, J.*) Vedachala Gramani *v.* Sivasankari Ammal. 61 L.W. 589=1948 M.W.N. 610=A.I.R. 1949 Mad. 274 =(1948) 2 M.L.J. 241.

———O. 22, Rr. 1 to 4 and 10—*Applicability—Death of party between passing of preliminary and final decree.*

Rr. 1 to 4 of O. 22, C. P. Code, are restricted to the death of a party before the passing of a preliminary decree in a suit, and R. 10 is applicable to the case of a death of a party after a preliminary decree and before a final decree. (*Niyogi and Sen, JJ.*) Eknath Ramjiwanji *v.* Hanmantram. 1946 Nag. (Rul.) 281=A.I.R. 1947 Nag. 75=227 I.C. 146=1946 N.L.J. 499.

———O. 22, Rr. 1 and 11—*Applicability—Suit by person claiming to be* shebait *of debottar property—Decree—Appeal—Death of plaintiff—Effect—Right of legal representative to continue—Cause of action—If survives.*

The answer to the question whether on the death of the sole plaintiff in a suit, the cause of action would survive to his representatives or whether the suit abates, depends upon the nature of the suit. If the plaintiff is suing to establish his right to a certain property in his own right and not by virtue of his office, namely, as shebait of a deity, the cause of action would certainly survive and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the original suit or of the appeal from a decree in favour of the plaintiff. But if the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in suit, then on his death either during the pendency of the suit or during the pendency of an appeal from a decree obtained by him, the right to sue will not survive and the suit would consequently abate.

The substituted party can only prosecute the cause of action as originally framed, and if it becomes necessary to materially alter the pleadings for him to continue the action, the suit would in effect be a new suit to be tried which is not contemplated by the provisions of O. 22, C. P. Code. Where the plaintiff had sued in his personal right as the *shebait* of a *debottar* estate and had obtained a decree, but pending appeal he died, and the substitution of his disciple as his legal representative would necessitate a substantial amendment of the plaint and the raising of fresh issues for trial, there can be no substitution of such a representative. The suit in such a case abates as the original cause of action does not survive to the representative. 22 Cal. 92; 12 Lah. 1; 19 Mad. 345, appl.; 9 All. 131, dist.; 4 All. 235, doubt. (*Sinha and Mahabir Prasad, JJ.*) Ramsarup Das *v.* Rameshwar Das. 28 Pat. 989=A.I.R. 1950 Pat. 184.

———**O. 22, R. 2 and S. 151**—*Death of a defendant—Decree in ignorance of it within* 90 *days of it—Nullity or mistake—Proper procedure.*

Where though a defendant is dead a decree is passed in ignorance of his death and within 90 days of it, the decree is not an absolute nullity and is not void but it is erroneous and liable to be set aside. The matter can be dealt with under S. 151, C. P. Code, by setting aside the decree and directing the suit to be proceeded with from the stage it had reached on the day before the death of that defendant, impleading his legal representatives as parties. (*Pedley, J. M. and Bates, A.M.*) Dil Sukh *v.* Suraj. 1947 A.W.R (Rev.) 41 (2)=1947 R. D. 93.

———**O. 22, R. 2**—*Deceased's interest devolving on person already on record in same capacity—Separate application for substitution—If necessary.*

Under O. 22, R. 2, C. P. Code, the question of capacity or status is not relevant when the heir is already on the record in his individual capacity. Whether he is there as heir to *A* or *B* is wholly immaterial. If it could be shown that the person already on the record does not represent the interest of the deceased party in his individual capacity but under some other status as a trustee or a receiver then certainly a question may arise as to whether *A* in his individual capacity may be taken to be representing the interest of the deceased not in his individual capacity but under a different status as a receiver or a trustee. In such a case, a separate application for substitution will be necessary, but a simple note under O. 22, R. 2, C. P. Code, will be sufficient if the interest of the deceased party devolves on a person already on the record in the same capacity as he was from before. (*R. P. Mookerjee, J.*) M. A. Davar *v.* Ahmad Ali Khan. 5 D.L.R. (Cal.) 78.

———**O. 22, R. 2**—*Note of abatement made in order-sheet—Whether can be vacated by Court* suo motu.

Abatement on the death of a particular party takes effect on the expiry of the statutory period irrespective of the fact whether a note has been made of that fact or not. A note of abatement entered in the order-sheet cannot stand in the way of the Court *suo motu* vacating it and recording a proper order under O. 22, R. 2, C. P. Code, without any petition by the parties concerned. (*R. P. Mookerjee, J.*) M. A. Davar *v.* Ahmad Ali Khan. 5 D.L.R. (Cal.) 78.

———**O. 22, Rr. 2 and 4 and U. P. Tenancy Act (XVII of 1939), S. 213 (1) (b)**—*Survival of right of appeal in the case of the death of one of two* thekadar *respondents.*

As under S. 213 (1) (*b*) of the U. P. Tenancy Act the interest of a *thekadar* is not heritable except as provided by the terms of the *theka*, where it is not available, the presumption would be that it is not heritable. In such a case, if one of the two *thekadar* respondents dies, the right of appeal would survive against the remaining *thekadar* and it would be R. 2 and not R. 4 of O. 22, that would apply to the case and no question of abatement can arise. (*Lal, J.M. I and Haider, J.M. II.*) Kewal *v.* Pahlu. 1948 A.W.R. (Rev.) 321=1948 R.D. 428.

———**O. 22, R. 3**—*Abatement—Order as to, when appealable—Test.*

When a question is raised as to the competency of an appeal against an order of abatement, in deciding it, a distinction should be drawn between those cases of abatement where it is due to the failure of the heirs being brought on the record within the period allowed by law or due to the Court deciding that a particular applicant is not the legal representative and those cases where the abatement is due to the Court deciding that the right to sue does not survive. In the latter class of cases, there is a decree, meaning thereby a formal adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and as such would be appealable. (*Wanchoo, J.*) Brij Jivan Lal *v.* Shiam Lal. I.L.R. (1950) A. 975=A.I.R. 1950 All. 57.

———**O. 22, Rr. 3 and 4**—*Abatement of appeal by one of defendants—Appeal, if abates as a whole.*

Where the shares of several defendants in the property in dispute are either ascertained or ascertainable, the abatement of the appeal of one of them does not entail its abatement in so far as the others are concerned. (*Harries, C. J., Mehr Chand Mahajan and Achhru Ram, JJ.*) Nanak *v.* Ahmad Ali. 227 I.C. 340=48 P.L.R. 141=A.I.R. 1946 Lah. 399=1947 Lah. (Rul.) 18 (F.B.).

———**O. 22, R. 3**—*Abatement—Death of one of several plaintiffs-appellants—Failure to bring on record his Legal Representatives—Case in which any plaintiff could appeal on behalf of all.*

Where the case is one in which any one of the several plaintiffs could have appealed on behalf of all of them, the fact that one of the plaintiffs-appellants dies and his legal representatives are not brought on record in time cannot make the appeal abate. (*Faiyaz Ali, J.M. II and Lal, J. M. I.*) Ram Achraj Pandey *v.* Algu Kalwar. 1949 R.D. 244.

———O. 22, Rr. 3 and 11 and O. 41, R. 4— *Abatement of appeal—Legal Representatives of deceased appellant not impleaded—Decree, joint and indivisible—Powers of Appellate Court.*

If in a case where a decree is joint and indivisible, one of the appellants dies and his legal representatives are not impleaded, the abatement will not be limited to the deceased appellant alone. The appeal would abate in its entirety as on account of the absence of necessary parties. 1933 Lah. 353 (2), 1935 Lah. 473, 1932 Pat. 327 and 1942 Sind 157, rel. on.

O. 41, R. 4, C. P. Code, does not qualify or override O. 22, R. 3. In fact it applies to a properly constituted appeal. Where necessary parties are not impleaded or where by reason of the failure to bring legal representatives of a deceased appellant or respondent, the appeal has become imperfectly constituted, O. 41, R. 4 cannot apply. The appellate Court has, therefore, no power to proceed with the hearing of the appeal and set aside the joint decree at the instance of the appellants who are alive, under O. 41, R. 4. 1942 Sind 157 and 1940 Pat. 346, foll. (*Thadani and Ram Labhaya, JJ.*) Aravinda Sarma *v.* Payodhar Barua. 53 C.W.N. 606=A.I.R. 1950 Assam. 53.

———O. 22, R. 3—*Addition of legal representative—Extension of time for—Grounds—Mistake or negligence of counsel.*

The mistake or negligence of a counsel is no justification for allowing an extension of time to a party for bringing on record the legal representatives of a deceased party. (*Bhadkamkar, S. M. and Lal, J.M. I.*) Thakurdin *v.* Janki Kuer. 1948 A.W.R. (Rev.) 206=1948 R.D. 342.

———O. 22, Rr. 3, 11 and O. 41, R. 4— *Appeal in partition suit—Death of one of appellants—L.Rs not brought on record—Abatement of appeal—If partial or whole.*

The failure to bring the legal representatives of a deceased party to a suit or an appeal operates as a partial abatement of the suit or the appeal. The question whether the partial abatement operates as an abatement of the entire appeal depends on the nature of the claim and the circumstances of each particular case. It will also depend on the nature of the decree appealed against and the relief claimed in appeal.

In a suit for partition all persons interested in the properties are necessary parties. The reason is that the share to which a person is entitled can be determined only in the presence of all the persons interested in the properties. Similarly no final and effective partition regarding allotment of properties is possible, unless it is made in the presence of all the persons interested in the properties. Therefore, if in an appeal in a partition suit one of the appellants dies and his legal representatives are not brought on the record, the appeal abates not only against the deceased appellant but as a whole.

O. 41, R. 4, C. P. Code, does not empower the appellate Court to set aside an abatement and to reverse or vary a decree which has become final against the deceased appellant. The wording of R. 4 of O. 41 suggests that the rule was intended to apply to cases where all the plaintiffs or defendants were alive and that only one or more of such plaintiffs or defendants had appealed from the decree. The rule does not state in terms that the decree may be reversed or varied in favour of all the plaintiffs or defendants or their personal representatives or representatives in interest. The rule cannot override, or create an exception to O. 22, Rr. 3 and 11, and in the case of one or more appellants dying, even where a decree proceeds on a ground common to all, the matter must be governed solely by the provisions of those latter rules. (*Grille, C. J. and Sen, J.*) Malobi *v.* Gaus Mahomed. I.L.R. (1948) Nag. 509=A.I.R. 1949 Nag. 91=1948 N.L.J. 349.

———O. 22, Rr. 3 and 4—Applicability—Application by creditor for annulment of transfer by insolvent—If abates on his death. *See* Prov. Insol, Act, S. 53. 1950 N.L.J. 105.

———O. 22, Rr. 3, 4 and 8—*Applicability—Execution appeals—Appeal against order in execution of decree for mesne profits and costs—Legal representatives of one of respondents not brought on record—Abatement of appeal* in toto.

Appeals from orders in execution proceedings are not proceedings in execution within the meaning of O. 22, R. 12 and are, therefore, not excluded from the rules relating to abatement contained in that order. It may be taken to be settled law that execution appeals are governed by the same rules with regard to abatement as appeals from decrees and orders in suits. The provisions of Rr. 3, 4 and 8 of O. 22 are, therefore, applicable to appeals against orders in execution. An appeal against an order passed in execution in regard to a decree for mesne profits and costs abates *in toto*, if one of the respondents dies during the pendency of the appeal and his legal representatives are not brought on record within the prescribed period of limitation. A.I.R. 1947 Lah. 13, foll. 55 C. 666 and A.I.R. 1938 Sind 239, applied. (*Khosla and Kapur, JJ.*) Ahsan Elahi *v.* Mehr Elahi. 5 D.L.R. (Simla) 110=52 P.L.R. 100=A.I.R. 1950 E. P. 302.

———O. 22, R. 3—*Applicability of principle underlying to proceedings in revision.*

The principle recognized in R. 3 of O. 22, C. P. Code, applies not only to suits but also to proceedings in revision. 1948 R.D. 106, Foll. (*Zaidi, J.M. I and Prasad, J.M. II.*) Bhagwati Singh *v.* Markande Singh. 1950 R.D. 77.

———O. 22, Rr. 3 and 11—*Applicability to revisions.*

The provisions of the law relating to abatement apply to revision applications as much as to appeals. (*Sultan Ahmed, S.J.M. and Singhal, J.J.M.*) Chitrakoti Lal *v.* Sheo Nath. 1948 R.D. 106=1948 A.W.R. (Rev.) 60.

———O. 22, Rr. 3 and 4—*Applicability to Revision Petitions—No question of abatement in cases of Civil Revision Petitions.*

There is no provision in the C. P. Code, making the provisions of O. 22, applicable to Civil Revision Petitions. Nor is there any provision making O. 22, applicable to Civil Revision Petitions in R. 41-B of the Appellate Side Rules which makes certain provisions of the C. P. Code, applicable *mutatis mutandis* to Civil Revision Petitions. Likewise, there is nothing in the Indian Limitation Act making any of the Articles in Sch. I applicable to Civil Revision Petitions. As there can be no question of abatement but for the combined application of the provisions of O. 22, Rr. 3 and 4 and the material Articles of Sch. I of the Indian Limitation Act, no question of abatement can arise in the case of Civil Revision Petitions. (*Rajamannar, C.J. and Satyanarayana Rao, J.*) MANICKAM *v.* RAMANATHAN CHETTIAR. I.L.R. 1949 Mad. 566=A.I.R. 1949 Mad. 435=4 D.L.R. (Mad.) 102=61 L.W. 780 =1948 M.W.N. 788=(1948) 2 M.L.J. 521.

———O. 22, R. 3 and S. 141—*Applicability—Revisions—Limitation Act, Art. 176.*

O. 22 R. 3, C. P. Code, is not applicable to revisions and a petition for revision cannot therefore be dismissed on the ground of abatement. In terms O. 22, R. 3 applies to suits only and by virtue of R. 11 its provisions are extended to appeals.

Art. 176 of the Limitation Act only applies to an application made to bring the legal representative of a deceased plaintiff (which means in a suit) or of a deceased appellant (which means in an appeal) on record, and there is nothing in this article which would attract its provisions to a revision.

S. 141, C. P. Code, does not apply to petitions for revision. The section is so drafted as to enable a Court to apply the procedure in regard to suits to such proceedings as are *in pari materia* with suits and thus original in character. The procedure provided for suits would be mostly inapt and inappropriate to proceedings in revision.

Even if O. 22, R. 3, C. P. Code, could be held to extend to revisions by virtue of S. 141, C. P. Code, a period of limitation not provided for by Art. 176 of the Limitation Act (which contains no provision in regard to a revision) could not be applied to it. By reading the provisions of S. 141 in conjunction with O. 22, R. 3, C. P. Code, the provisions of the Limitation Act could not be amended. 16 B. 550; 97 P.R. 1907; 21 I.C. 407; 56 A. 390; I.L.R. (1941) All. 193 (F.B.) and I.L.R. (1947) Lah. 417, Dist.; 1938 Mad. 115, not Foll.; 17 All. 196, relied upon; 1929 Sind 120 and 1933 Sind 200, approved. (*Abdur Rahman, Ag. C.J., Cornelius and Mahomed Khurshid Zaman, JJ.*) MAHOMED SAADAT ALI KHAN *v.* ADMINISTRATOR, CORPORATION OF CITY OF LAHORE. Pak. L.R. (1948) Lah. 225= A.I.R. 1949 Lah. 186.

———O. 22, R. 3 (2)—*Applicability—Substitution sought on basis of presumption of death—Evidence Act, S. 108—Limitation Act, S. 3.*

In a case where substitution is sought to be made on the basis of a presumption of death under S. 108 of the Evidence Act, there is no scope for operation of either the dismissal of the application as contemplated in S. 3 of the Limitation Act, or of abatement as provided for in O. 22, R. 3 (2), C. P. Code. (*Das, Gupta and Mitra, JJ.*) JYOTIRMOY NAG *v.* BISWANATH BOSE. 53 C.W.N. 713.

———O. 22, R. 3—*Application to be brought on record as legal representative—Dismissal—Appeal held to have abated—Proper remedy.*

Where pending the disposal of an appeal, the appellant dies and a person claiming to be the legal representative of the appellant, applies to the Court to be brought on record, but his application is dismissed on the ground that he was not the legal representative and consequently the appeal is held to have abated his only remedy is to appeal against the order of abatement as it is equivalent to a decree, and not to seek to revise or appeal against the order of dismissal of his application. (*Horwill, J.*) RAMIREDDI *v.* RAMAKRISHNAREDDI. 61 L.W. 846=A.I.R. 1949 Mad. 404=1949 M.W.N. 65=(1948) 2 M.L.J. 473.

———O. 22, R. 3—*Application under by widow of plaintiff in suit for partition against his sons, his brother and his son—Right to sue, if survives to widow.*

On the death of a plaintiff in a suit for partition by him against his own sons, his brother and his son, his widow applied to be added as his legal representative and to continue the suit asking the share to which she is entitled under the Hindu Women's Property Act. On a contention that the plaintiff's right to sue does not survive to the widow.

Held: There is no legal impediment to the widow being added as legal representative of her husband and to ask for the share to which she is entitled in law on the death of her husband in the same suit which he instituted during his lifetime. In a suit for partition such as this it is sometimes difficult to pick out particular members of a family as legal representatives of a deceased plaintiff. The additional criterion is in such a case to whom the right to sue survives. The husband's right to file the partition suit survives to his widow. (*Mack, J.*) SUBBARAMI REDDI *v.* SANKARAMMA. 1950 M.W.N. 47 (1)=(1949) 2 M.L.J. 821.

———O. 22, Rr. 3 (1) and 11—*Co-defendants-appellants—Death of one and failure to bring on record his legal representatives—Abatement.*

Where one of the co-defendants-appellants dies during the pendency of their appeal and his legal representatives are not brought on record in time there would be no abatement as the remaining appellant may be treated as the surviving appellant entitled to prosecute the appeal under sub-R. (1) of R. 3 of O. 22 read with R. 11 of the same order. (*Lal, J.M. I and Faiyaz ali, J.M. II.*) SADHU *v.* CHINNI SINGH. 1949 R.D. 274.

———O. 22, R. 3, and S. 2 (11)—*Death of heirless tenant—Zamindar if can be brought on record as his "legal representative".*

In view of the provisions of O. 22, R. 3, C. P. Code read with the definition of "legal representative" as given in S. 2 (11) of the Code, a Zamindar cannot be brought on record as the legal representative on the death of an heirless tenant. (*Singhal, M.*) Bhagwan Din *v.* Rampal Singh. 1948 A.W.R. (Rev.) 28=1948 R. D. 76.

———O. 22, R. 3—*Death of one of several appellants—Rights of remaining appellants to prosecute appeal.*

The appeal does not abate in a case where one of several appellants whose interests are identical dies during the pendency of the appeal. His death would not affect the rights of other remaining appellants to prosecute the appeal. 1949 R.D. 274, rel. on. 1949 R.D. 185, rel. on. (*Zaidi, J.M. I and Prasad, J.M. II.*) Abdul Aziz *v.* Roop Ram. 1950 R.D. 72.

———O. 22, R. 3—*Death of one of two appellants who are own brothers—Abatement.*

Where one of two appellants who are own brothers dies, the appeal could not abate where the interests of the two are identical. The other can proceed with the appeal. 1945 R. D. 185, rel. on. (*Zaidi, J.M. I.*) Bandhan *v.* Shanker. 1950 R. D. 48.

———O. 22, R. 3—*Death of one of two brothers appellants—Abatement.*

Where one of two brothers appellants dies, it cannot be said that the appeal abates because the other brother is on the record and he is his heir and legal representative. 1949 R.D. 244, rel. on. (*Zaidi, J.M. I and Prasad, J.M. II.*) Ganga Din *v.* Kashi Nath Chaube. 1950 R. D. 50.

———O. 22, R. 3—*Death of plaintiff benamidar—Substitution of real owner—Permissibility.*

If the plaintiff in a suit is a benamidar and the real owner has allowed him to sue in that character, the real owner cannot on the benamidar's death be allowed to be substituted as his legal representative under O. 22, R. 3, read with S. 2 (11), C. P. Code. The benamidar's heirs may be taken to be inheriting the benamidar's character along with his other estate and so entitled to continue the suit as legal representatives. If the real owner does not want them to continue but desires after the benamidar's death himself to litigate in respect of the subject-matter, he should bring a separate suit. (*Sarwate, J.*) Shakuntala Bai *v.* Shankarrao. 4 D.L.R. (Nag.) 45 =A.I.R. 1949 Nag. 176=1948 N.L.J. 523.

———O. 22, Rr. 3, 5 and 9—Decision that particular person is not legal representative—Observation by judge that right to sue did not survive—Right to appeal. *See* Q. D. 1941-45, Vol. I; Col. 1224) Ramcharan Das *v.* Hira Nand. I.L.R. (1946) Lah. 427=222 I.C. 177=1946 Lah. (Rul.) 164.

———O. 22, R. 3 and S. 115—*Dismissal of petition to be brought on record as legal representative—Pending appeal also dismissed as abated—No appeal against order of dismissal of appeal—Competency of revision against order refusing to bring the petitioner on record as legal representative—Transfer of Property Act (IV of 1882), S. 6 (e)—Testator devising a share in partnership property as well as right to sue for such property—Valid devise—Indian Partnership Act (IX of 1932)—Interest in partnership tangible and transferable.*

A revision lies against an order refusing to bring a person on record as the legal representative of the deceased party.

It is open to any party to choose his own remedies against adverse orders passed and to proceed in such manner as he may be advised. A party may prefer a revision against the order passed refusing him to be brought on record and may not choose to prefer an appeal against the order of abatement which followed the dismissal of the petition under Order 22, rule 3 of the Code. When he does so, he submits himself to risk by reason of his own choice. There is nothing that compels the party to file an appeal against the order of abatement in order to enable him to be heard on the revision petition.

Where what is transferred under a will is a half share in the partnership of a rice mill with all its assets and liabilities and also a right of continuing an appeal in regard to the mill and enjoyment of all the profits arising therefrom it is not a mere right to sue but the tangible interest in the property and a transferable right to sue, and the mischief of section 6 (*e*) of the Transfer of Property Act is not attracted. (1941) 1 M. L. J. 22, distinguished; (1924) 47 M.L.J. 93=L.R. 52 I.A. 1=I.L.R. 48 Mad. 230 (P. C.); (1947) 2 M.L.J. 374 and (1948) 1 M.L. J. 298, followed.

A reading of the sections of the Partnership Act, such as 4, 6, 29 and 69 makes it clear that an interest in partnership is nothing but an existing interest and tangible property which can be assigned. It does not make any difference that the suit to establish such interest had been dismissed at the time of the transfer, when the decision was under appeal and therefore not become final. (*Basheer Ahmed Sayeed, J.*) Srinivasa Mudaliar *v.* Abraham Pillai. 1950 M.W.N. 248=A.I.R. 1950 Mad. 824=(1950) 1 M.L.J. 309.

———O. 22, R. 3—*Execution application—If abates on the death of decree-holder—Substitution of legal representative in execution.*

An execution application does not abate by reason of the death of the decree-holder and hence an execution application cannot be dismissed for default if the reason for this default is death. The legal representative of a decree-holder dying during execution proceedings can be substituted and allowed to continue it. (*Davies.*) Sri Kishen *v.* Bhora Lal. 1946 A. M.L.J. 22.

———O. 22, Rr. 3, 4 and 11—*Partial abatement of appeal—When operates as abatement of entire appeal.*

The question whether partial abatement operates as an abatement of the entire appeal depends on the nature of the claim and the circumstances of each particular case. It will also depend on the nature of the decree appealed against and the relief claimed in appeal. A partial abatement of an appeal as against a deceased respondent would operate as an abatement of the entire appeal, if it is not possible to work out the rights of the parties actually before the Court without interfering with the interest of the legal representative of the deceased respondent. I.L.R. (1938) Nag. 370, rel. on. (*Sen, J.*) Ganpat *v.* Shri Maruti Deosthan, Tandulwadi. I.L.R. (1949) Nag. 437=1949 N.L.J. 487=4 D.L.R. (Nag.) 183.

———**O. 22, Rr. 3 and 9 (2)**—*Right to apply to bring deceased appellant's legal representatives on record if limited only to his legal representatives—Maintainability of such an application at the instance of one respondent who has filed cross-objections in the appeal seeking relief against another respondent.*

On the death of an appellant, one respondent who had filed cross-objections in the appeal seeking relief against the other respondent filed an application to bring on record the legal representatives of the deceased appellant within the time allowed by law. On an objection by the other respondent that such an application was not maintainable at the instance of a person who was not a legal representative of the deceased appellant,

Held: Where there is no abatement the right to apply to bring the legal representatives of the deceased appellant on record is not limited to his legal representatives and hence there could be no objection whatever to the maintainability of such an application by one of the respondents when there has been no abatement.

While R. 9 (2) of O. 22 of the C. P. Code limits an application to set aside an abatement to the legal representatives of a deceased plaintiff, there is no similar limitation in respect of an application to bring on record the legal representatives of the deceased plaintiff or deceased appellant. (*Gentle, C.J. and Rajamannar, J.*) Arunachalam Aiyar *v.* Lakshminarasimham. I.L.R. (1948) Mad. 100=A.I.R. 1948 Mad. 82=60 L.W. 249 (1)=1947 M.W.N. 569=(1947) 1 M.L.J. 276.

———**O. 22, Rr. 3 and 11**—Scope and effect of—Appeal—Death of one appellant—Abatement—Whole appeal—If abates—Rule—O. 41, R. 4—If controls O. 22, Rr. 3 and 11. *See* C. P. Code, O. 41, R. 4. 4 D.L.R. (Nag.) 130.

———**O. 22, Rr. 3 and 10**—*Scope of R. 10 Application to bring legal representative on record—Petition presented under Rr. 3 and 10—Affidavit disclosing application to be one under R. 3—Order passed by Court—Appealability.*

R. 10 of O. 22, C. P. Code, does not apply to those cases which are specified in the rules that precede it. It has therefore to be taken as providing for cases of assignment, creation and devolution of interest other than those mentioned in Rr. 2, 3, 4, 7 and 8.

If in spite of the fact that the petition to bring the legal representative on record really falls under R. 3 of O. 22, C. P. Code, the Court deals with it as if it lay under R. 10 an appeal will be competent. But where the affidavit accompanying the petition shows that it was made under R. 3 the mere fact that the petition was in terms presented under Rr. 3 and 10 will not make the order passed one under R. 10 so as to render the decision on it appealable. (*Shehabud-din, J.*) Venkatarama Pillai *v.* Parasurama Pillai. 1947 M.W.N. 369=A.I.R. 1948 Mad. 81=(1947) 1 M.L.J. 348.

———**O. 22, R. 3**—*Scope—If affected by O. 41, R. 3—Failure to implead legal representatives on death of one of several appellants—Appeal against decree proceeding on common ground—Power of Appellate Court to hear appeal and reverse—Whole appeal, if abates.*

The finality of a decree as between the parties, as a result of abatement by operation of O. 22, R. 3, C. P. Code, is in no way modified by the provisions of O. 41, R. 4, C. P. Code; the latter rule has no application to the case of an appellant against whom the decree has become final because his legal representatives were not brought on the record in due time after his death.

Where pending an appeal by several appellants against a decree which proceeds on grounds common to all, one of the appellants dies and in consequence of his legal representatives not being brought on record in time, the appeal abates as far as he is concerned, such abatement operates as an abatement of the appeal as a whole. O. 41, R. 4, C. P. Code, does not apply to such a case, and does not give power to the Appellate Court to reverse or vary the decree in favour of all the appellants or defendants. 32 C.W.N. 299; 37 C.W.N. 756, foll.; 58 Cal. 1341; 61 Cal. 879, not foll.; 19 Pat. 870 (F.B.), rel. on. (*Das Gupta, J.*) Dharanidhar Sarkar *v.* Kamala Ranjan Roy. 4 D.L.R. (Cal.) 96.

———**O. 22, R. 3**—*Several legal representatives—Application if should be by all—Appeal under U. P. Ten. Act—Death of appellant—Application by only one of two heirs—Sufficiency.*

In view of the words "on an application made in that behalf" in R. 3 of O. 23, C. P. Code, where there are several legal representatives it is not necessary that the application need be made by all the legal representatives. Where in an appeal under the U. P. Tenancy Act an appellant dies leaving two heirs, it will be enough, if one of the heirs makes an application for substitution and there will be no abatement. 1949 R.D. 124, rel. on. (*Zaidi, J.M. I and Prasad, J.M. II.*) Manogi Kurmi *v.* Janardan. 1950 R.D. 33.

———**O. 22, Rr. 3 and 11**—*Suit claiming rights of irrigation in respect of particular plots—Death of one of plaintiffs-Appellants—Appeal, if abates in toto.*

Where in an appeal by the plaintiffs in a suit claiming rights of irrigation in respect of particular plots, one of the plaintiffs dies and his heirs are not substituted within time, the appeal does not abate generally but abates only in so far as the claim of the deceased plaintiff is concerned. (*Sharpe, J.*) Bholanath Ghosh *v.* Momena Khatun. 223 I.C. 470=1946 Cal. (Rul.) 178=50 C.W.N. 682=A.I.R. 1946 Cal. 444.

———**O. 22, Rr. 3 and 10**—*Transferee of legal representative if entitled to apply for substitution.*

A transferee from the legal representative of a deceased party has no right to apply for substitution under R. 10 of O. 22 or R. 3 of that order. 15 P. 82, ref. to. (*Sen and Chunder, JJ.*) Anil Chandra Banerjee *v.* Gopinath Mukherjee. 5 D.L.R. (Cal.) 108=A.I.R. 1950 Cal. 376=86 C.L.J. 293.

———**O. 22, R. 4**—*Abatement—Failure to bring on record legal representatives of deceased* pro forma *respondent.*

An appeal will not abate because of the failure to bring on record legal representatives of a deceased *pro forma* respondent whose absence would not affect the merits of the case. (*Lal, J.M. I and Faiyez Ali, J.M. II.*) Basdeo Rai *v.* Ramakant Rai. 1949 R.D. 212.

———**O. 22, Rr. 4 and 11**—*Abatement of appeal* in toto *or in part—Test.*

The question whether the whole appeal abates or only a part of it because of the appellant's failure to bring on record within time the legal representatives of one of the deceased respondents, must be decided in each case on its own facts. If a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned *without interfering with the rights of others*, then the appeal can continue; if not, it abates as a whole. The Court must see that it does not pass a decree which it may find itself incapable of executing owing to the circumstance that the lower Court's decree in favour of the deceased respondent has become final in consequence of the partial abatement of the appeal against him. I.L.R. (1938) Nag. 370, foll. (*Bose, Ag. C. J. and Mudholkar, J.*) Warriskhan *v.* Ahmadullakhan. I.L.R. (1949) Nag. 313=1949 N.L.J. 620.

———**O. 22, R. 4**—*Abatement of appeal—Total or partial—Determination—Rules for—Failure to add legal representatives of one of the respondents.*

The doctrine of conflict of judgments is generally a safe guide to decide the question whether the abatement of an appeal is partial or total.

Where on the death of one of the two respondents in an appeal, whose interests cannot be separated from that of the other respondent, his heirs are not brought on record in time, the whole appeal abates. (*Oak, J.C.*) Ratan Lal *v.* Choga. A.I.R. 1950 Ajmer 43.

———**O. 22, R. 4**—*Abatement on the death of a respondent—Whole appeal if abates.*

It is only when it is not possible to go on with the appeal in the absence of the heirs of the deceased respondent that the whole appeal must fail. Where an appeal could very well proceed against the remaining respondents in the absence of the heirs of the deceased respondent the appeal would able only as against deceased respondent. (*Lal, J.M. I and Haider, J.M. II.*) Shabbir Husain *v.* Sarwan Singh. 1948 R.D. 281.

———**O. 22, R. 4**—*Abatement owing to death of a* pro forma *respondent—Effect on the appeal as against others.*

Where one of the respondents who is not a necessary party and is only added as a *pro forma* party respondent dies and his legal representatives are not brought on record the appeal abates only as against him and the appeal as against the rest is not affected. 1948 R.D. 270. Rel. on. (*Lall, J.M. I and Haidar, J.M. II.*) Yusuf *v.* Turabuddin. 1949 R.D. 40.

———**O. 22, R. 4**—*Abatement—Sufficient cause for condonation of delay—Question to be decided on the facts of each case—Onus.*

It will depend on the circumstances of each case whether the alleged ignorance of the existence of certain legal representatives who were not brought on record was a *bona fide* one or not, in other words whether the applicant, could by the exercise of due diligence have traced out the legal representatives within the period of limitation or not. The burden of proving sufficient cause for condonation of delay would always lie in such cases on the applicant. (*Lal, J. M. I.*) Sheo Prasad *v.* Syed Bakar Husain. 1949 R.D. 186.

———**O. 22, R. 4**—*Appeal—Abatement as against some respondents who are joint holders—Effect—Appeal as a whole—If abates.*

Where in an appeal from a decree in a suit for account, some of the respondents die and their heirs are not brought on the record, and it appears that the shares of the deceased are unascertained, it must be held that the appeal abates as a whole, because under no circumstances can a decree be affirmed as to the unascertained shares of some joint shareholders and reversed as to the unascertained shares of the other joint holders. (*Fazl Ali, C.J., and Ray, J.*) Firangi Ram Modi *v.* Basudeo Modi. 26 P.L.T. 235 =1945 P.W.N. 452=A.I.R. 1946 Pat. 132.

———**O. 22, R. 4**—*Appeal—Abatement—Test.*

The real test so far as the question of an abatement of an appeal is concerned is whether the legal representatives of the deceased parties who have not been brought on the record are likely to lose by the success of the appeal and also whether the success of the appeal if allowed to proceed would result in two or more inconsistent decrees. (*Sultan Ahmad, M.*) Shri Lal *v.* Hirday Narain. 1948 R.D. 173=1948 A. W.R. (Rev.) 159.

———**O. 22, Rr. 4 and 11 and S. 153**—*Appeal filed against dead respondent—Substitution of his legal representatives—Power of Court—Appellant, if liable to pay additional court-fees—Limitation Act, S. 5.*

If a party has made an error in inserting the name of a dead person as respondent in his memorandum of appeal without knowing that the man was dead, the Court has power to direct an amendment of the cause title by striking out the name of the dead person and adding the names of his legal representatives provided that a case under S. 5 of the Limitation Act is established, and no additional court-fees are payable by the appellant. The Court cannot direct an amendment of the cause title in such circumstances by the exercise of the powers conferred by S. 153, C. P. Code. (1946) F.C.R. 32 and 49 M. 18, ref. to. (*Mitter and Sharpe, JJ.*) Santi Prasanna Mukherji *v.* Harendra Nath. I.L.R. (1948) 1 Cal. 25.

———**O. 22, R. 4 and U. P. Tenancy Act (XVII of 1939), S. 180**—*Appeal in suit under S. 180 of the U. P. Tenancy Act—Death of* pro forma *respondent—L. Rs., if to be brought on record.*

On the death of a *pro forma* respondent in an appeal in a suit under S. 180 of the U. P. Tenancy Act on a question as to whether his legal representatives should be brought on record.

Held, that as the success of the appeal would not be to the detriment of the legal representatives of the deceased, they need not be brought on record and the appeal will simply abate as against the deceased under Cl. (3) of R. 4 of O. 22, C. P. Code. (*Khadkamkar, S.M. and Lal, J.M. I.*) Amir Singh *v.* Nihal Singh. 1948 R.D. 270=1948 A.W.R. (Rev.) 164 (2).

———**O. 22, R. 4**—*Applicability—Partition suit—Death of party—Effect—Application to bring on record legal representative—Necessity—Limitation—O. 22, R. 10.*

O. 22, R. 4, C. P. Code, connotes a stage in a suit before the decree is passed. Where in a partition suit a preliminary deccree has been passed, there is no question of any "right to sue" surviving, as contemplated by O. 22, R. 4. Such a case falls not within the purview of O. 22, R. 4 (or of R. 3), but within R. 10 of O. 22, C. P. Code; and there is, in such cases, no period of limitation fixed in respect of matters falling under O. 22, R. 10. (*R. C. Mitter and Kamal Chunder, JJ.*) Bhusan Chandra *v.* Chhabimoni Dasi. 3 D.L.R. (Cal.) 18=A.I.R. 1948 Cal. 363=53 C.W.N. 582.

———**O. 22, Rr. 4 and 9**—Applicability—Suit against dead man—Power to add legal representatives. *See* C. P. Code, O. 1, R. 10. I.L.R. (1945) Kar. 321.

———**O. 22, R. 4**—*Application for substitution of heirs—If can be treated as application under R. 9 for setting aside abatement on its being found to be beyond time.*

Where an application under R. 4 of O. 22, C. P. Code for substitution of heirs is found to be filed beyond the preschibed period of 90 days, it can be treated as an application under R. 9 of O. 22 to set aside abatement. (*Haider, J.M. II. and Lal, J. M. I.*) Guptu Singh *v.* Jogi Singh. 1948 A.W.R. (Rev.) 271=1948 R.D. 445.

———**O. 22, R. 4**—*Application to add heirs of deceased respondent made by the heirs themselves and not by the appellant—Abatement.*

Though the appellant does not apply to add the heirs of a deceased respondent as parties, if the application is made by the heirs themselves to come on record as parties, there can be no abatement. (*Zaidi, J.M. I.*) Nand Ram *v.* Begraj Singh. 1950 R.D. 105.

———**O. 22, Rr. 4, 9 and 11 and Limitation Act (IX of 1908), S. 5**—*Application to set aside abatement of appeal condoning delay—Duty of advocate of the deceased party to report the death of his cleient—Sufficient cause for not making application in time.*

There is no doubt, no rule of law or procedure which casts a duty on a member of the bar appearing for a client to report to the Court that he is dead. But it is not open to an advocate, knowing that his client is dead, to make no report about it and to wait for the statutory period of 90 days to expire and then come forward on behalf of the legal representatives in strenuous opposition to a petition to set aside the abatement condoning the delay.

The failure of the legal representatives of the deceased party to instruct his advocate about his death can be taken into consideration in deciding whether under S. 5 of the Limitation Act the other party has sufficient cause for not making the application in time. (*Mack, J.*) Krishniya Chetty *v.* Varadachari. 1949 M.W.N. 579 (2) =A.I.R. 1950 Mad. 52=(1949) 2 M.L.J. 246.

———**O. 22, R. 4**—*Application under—Proper presentation—Whether can be sent by post.*

An application under O. 22, R. 4, C. P. Code, is a proceeding in a Court of civil jurisdiction and, therefore, it would have to be presented, having regard to S. 141, C. P. Code, in the manner prescribed in the Code of Civil Procedure for plaints. The application has to be filed either by the applicant in person or by his duly authorised agent or by an advocate of the High Court and it cannot be sent directly to the Registrar by post. (*Khosla and Kapur, JJ.*) Ahsan Elahi *v.* Mehr Elahi. 52 P.L.R. 100=A.I.R. 1950 E. P. 302=5 D.L.R. (Simla) 100.

———**O. 22, R. 4**—*Death of a respondent having no effect on an appeal—L. R.s not brought on record—Appeal, if abates.*

Where one of the respondents dies and his death has no effect upon the case, then failure to bring his legal representatives on record would not make the appeal abate. (*Misra and Madeley, JJ.*) Mahomed Mohsin *v.* Ainul Husain. 22 Luck. 283=1947 O.W.N. 91=1947 O.A. (C. C.) 67=1947 A.W.R. (C.C.) 67=1947 R.D. 97.

———**O. 22, R. 4**—*Death of respondent in appeal against joint decree in favour of Hindu reversioners—Legal representatives not brought on record in time—Appeal, if abates* in toto.

Where pending an appeal against a joint decree in favour of certain Hindu reversioners, one of the latter dies and his legal representatives are not brought on record within time, the whole appeal does not abate; it abates only to the extent of the share decreed in favour of that respondent. (*Gulam Hasan, C.J. and Kidwai, J.*) Jainath Kuar *v.* Danpal Singh. 22 Luck. 249=231 I.C. 203=1947 O.A. (C.C.) 83=1947 A.W.R. (C.C.) 83=1947 O.W.N. 197=A.I.R. 1947 Oudh 164.

———**O. 22, Rr. 4 and 11**—*Death of respondent during pendency of appeal in suit for account—Failure to bring on record some of the heirs within time—Appeal, if abates* in toto.

In an appeal in suit for accounts, one of the respondents died during the pendency of the appeal and some of his heirs were not brought on record in time.

Held, that the whole appeal failed as it could not be proceeded with in the absence of all the necessary parties. (*Ghulam Hasan and Kaul, JJ* Kunj Behari Lal *v.* Ajodhia Prasad. 21 Luck. 453=A.I.R. 1947 Oudh 28=1946 A.L.W. (C.C.) 130=1946 O.A. (C.C.) 146=1946 A. W.R. (C.C.) 146=1946 O.W.N. 181=224 I. C. 412=1946 Oudh (Rul.) 186.

———**O. 22, Rr. 4 and 11**—*Death of Hindu respondent, member of a joint family—Failure to implead his widow among heirs—Effect.*

Where a member of a joint family who is a respondent in an appeal dies, failure to include his widow as one of the heirs in the application for the substitution of heirs would entail the abatement of the appeal. (*Nehru, A.M.*) Gauri Shankar *v.* Parmarath Singh. 1947 A.W.R. (Rev.) 94 (1).

———**O. 22, Rr. 4 and 11**—*Death of one of several respondents—Legal representatives not brought on record in time—Whole appeal, when abates.*

Where the interests of the respondents are inextricably joint and one of them dies and his legal representatives are not brought on record within the time allowed by law, the whole appeal would abate. (*Sultan Ahmad, M.*) Parsottam *v.* Sheo Mural Lal. 1948 R.D. 138=1948 A. W.R. (Rev.) 128.

———**O. 22, R. 4**—*Effect of abatement of revision against one of the joint-decree-holder respondents.*

Where a revision abates as against one of the joint-decree-holder respondents, the whole revision abates. 1935 O.W.N. 297 and 1941 O.W.N. 418, Rel. on. (*Chandiramoni, J.*) Bhajju Lal *v.* Bechey Singh. A.I.R. 1950 All. 665.

———**O. 22, R. 4**—*Failure to implead Legal Representative of deceased respondent—Not wilful—Absence of negligence—Effect.*

Where the failure to implead the legal representatives of a deceased respondent is not wilful and does not amount to negligence, it cannot result in an abatement. 1948 R.D. 367, rel. on. (*Zaidi, J. M. I and Prasad, J.M. II.*) Raghunath Singh *v.* Tapesar Kunwar. 1949 R.D. 431.

———**O. 22, R. 4**—*Failure to implead the widow of a Hindu along with his sons—Effect.*

As all the legal representatives of a deceased person have to be impleaded the failure to implead the widow of a deceased Hindu along with his sons would result in the abatement of the suit or appeal as the widow would also be his legal representative so far as his separate property is concerned. 1948 A.W.R. 246. Rel. on. (*Lal, J.M. I and Haider, J.M. II.*) Rahiman *v.* Nanak. 1949 R.D. 35 (2).

———**O. 22, Rr. 4 and 11**—*Joint decree in favour of several persons—Appeal against—Abatement as against one of the decree-holder respondents—Effect on appeal as against others.*

Where in an appeal against a joint decree in favour of several respondents, the appeal abates as against one of the respondents the result would be that the appeal abates against all the rest. 1936 Oudh 209. Rel. on. (*Haider, J.M.*) Gajadhar *v.* Munder. 1949 R.D. 18.

———**O. 22, R. 4 and U. P. General Clauses Act (I of 1904), S. 13**—*"Legal representative" in R. 4 of O. 22—If includes all legal representatives.*

The term "legal representative" used in R. 4 of O. 22, C. P. Code, should under S. 13 of the U. P. General Clauses Act be taken to include the plural and as it is not qualified by any other term or clause it should be taken to mean all legal representatives. (*Lal, J.M. I.*) Raghunath *v.* Mullu Singh. 1948 A.W.R. (Rev.) 246=1948 R.D. 448.

———**O. 22, R. 4**—*Legal representative of deceased defendant already on record as plaintiff—Whether may apply at any time to be impleaded as legal representatives—Power of Court to set aside abatement.*

Where the plaintiff is a legal representatives of the deceased defendant, he, being already on record in his capacity as plaintiff, can apply to be brought on record as legal representative of the defendant at any time (i.e.), even after the exppiry of the period of limitation prescribed for such application. If an order of abatement has been passed in such a case, the Court has wide powers to set it aside. I.L.R. (1940) Bom. 487, applied. 26 S.L.R. 81, referred to. (*Thadani and Constantine, JJ.*) Hatimshah *v.* Ahmedshah. A.I.R. 1949 Sind 23.

———**O. 22, Rr. 4 and 11 and S. 151**—*Power to re-open final decree under S. 151—Final decree in partition suit—Appeal—Death of respondents—Legal Representatives not brought on record in time—Appeal, if does not abate—Rules as to abatement—Discretion of Court in applying them to cases of Civil Revision Petitions.*

The law provides that a decree once passed except to the extent to which the Code gives the Court power to correct mistakes or accidental slips, could be vacated only either by way of an appeal or by way of a review. A Court has no jurisdiction to reopen under S. 151 of the C. P. Code a decree which has become final, when it is neither alleged nor found that there was any mistake or accidental slip in the proceedings before it.

There is no exception in the case of an appeal against a final decree in a partition suit as regards abatement and if the legal representatives of the deceased respondents are not brought on record the appeal abates.

In the matter of abatement the Court has got a larger discretion in the case of Civil Revision Petitions as the rules relating to abatement applicable to suits and appeals do not strictly apply to Civil Revision Petitions (*Horwill and Satyanarayana Rao, JJ.*) Pulla Madduleti Reddi *v.* Rahiman Bi. I.L.R. (1948) Mad. 560=1947 M.W.N. 772 (2)=60 L.W. 818=A.I.R. 1949 Mad. 199=(1947) 2 M.L.J. 587.

———**O. 22, Rr. 4 and 11**—*Representative suit—Death of one of respondents—Appeal, if abates.*

Where the claim put forward by the respondents is common to all of them and is for and on behalf of a whole community, the appeal does not abate although one of the respondents dies pending appeal and his legal representatives are not brought on the record within the time prescribed. 7 Lah. 12 and 50 A. 792, referred to. (*Kapoor and Soni, JJ.*) Shiv Rattan *v.* S. G. P. Committee. A.I.R. 1950 E. P. 338=5 D.L.R. (Simla) 283.

———**O. 22, R. 4**—*Scope and applicability.*

O. 22, R. 4, C. P. Code, relates only to cases where one of several plaintiffs or defendants can obtain reversal of the whole decree where the decree proceeds on a ground common to all of them. It would not apply to a case where all the plaintiff-appellants proceed against only some of the respondents. (*Prasad, J.M. I. and Rauf, J. M. II.*) Bale *v.* Karan Singh. 1950 R. D. 116.

———**O. 22, Rr. 4 and 11**—*Scope—Appeal—Death of respondent—Some legal representatives only brought on record—Effect—Plea afterwards that appeal abated owing to absence of substitution of other heirs—Sustainability.*

When a party to an appeal dies it is desirable that all his legal representatives should be substituted in his place. It is, however, well settled that if, through some oversight or other, some of such persons only are substituted and others are not, the estate is fully represented by those who are brought on the record and there is no abatement. It is not open to the representatives who are on record to allege subsequently that there were also other heirs and as they were not substituted, the appeal had abated. (*Shearer and Reuben, JJ.*) Balgajan *v.* Sukhu. 26 Pat. 249 =A.I.R. 1948 Pat. 288.

———**O. 22, R. 4**—*Scope—Suit against members of joint Hindu family on mortgage deed executed by them—Death of one defendant pending suit—Decree without order to bring legal representatives on record—If nullity.*

Where in a suit on a mortgage deed executed by the members of a Hindu joint family, one of the defendants dies, and a decree is passed in the suit without the legal representatives of the deceased being brought on record under O. 22, R. 4, C. P. C., it cannot be held that the decree so passed is a nullity, because the legal representatives are already on record the suit being one against the joint family on a mortgage binding on the whole family. Nor is it necessary in such case to order an inquiry as to who are the legal representatives of the deceased, since the surviving members of the family are already on record as parties to the suit. (*Nagarkar, J.C.*) Kanakmal *v.* Udai Chand. 3 D.L.R. (A. and M.) 49=1948 A. M.L.J. 38.

———**O. 22, Rr. 4 and 9**—*Sufficient cause for not applying for substituting of legal representatives in time—Test.*

Where an appellant fails to apply for the substitution of legal representatives of deceased respondent and applies for excusing the delay, to decide the question whether there was sufficient cause for the delay, the test to be applied is whether there was negligence on the part of the applicant and that would depend on the facts of each case. (*Lal, J.M. I and Faiyaz Ali, J.M. II.*) Suraj Narain Singh *v.* Jokhu. 1949 R. D. 367.

———**O. 22, R. 4**—*Sufficient compliance with—Addition of some only of the legal representatives of a deceased respondent.*

The impleading of some only of the Legal representatives of a deceased respondent is not an adequate compliance with the provisions of R. 4 of O. 22, C. P. Code, 1948 R.D. 448, Ref. Nor would it be sufficient compliance with law that a person is added as the guardian of certain minors. (*Lal, J. M. I.*) Sheo Prasad *v.* Syed Bakar Husain. 1949 R.D. 186.

———**O. 22, Rr. 4 and 11**—*Suit for ejectment of trespassers—Appeal—Death of one of the trespasser-respondents—His legal representatives not added as parties—Whole appeal, if and when abates.*

Where in an appeal in a suit for ejectment of trespassers, one of the respondent-trespassers dies and his legal representatives are not brought on record, if they claim to be in possession, they are necessary parties and so no relief could be given to the plaintiffs. In such a case the appeal abates as a whole. 1942 R.D. 480, rel. on. (*Lal, J.M. I.*) Ram Sarup *v.* Shib Charan. 1949 R.D. 259.

———**O. 22, R. 4**—Suit for pre-emption—Sale in favour of several vendees jointly although in specified shares—One of vendees dying *pendente lite* but legal representatives not brought on record—Suit, if abates *in toto*. [*See* Q.D. 1941-1945, Vol. I, Col. 1223.] Ghulam Qadir *v.* Ditta. 18 R.L. 76.

———**O. 22, R. 4**—*Suit instituted against dead man—Power of Court to substitute his representatives as defendants.*

Where the defendant had died before the institution of the suit against him, the Court has no jurisdiction to substitute his representatives as defendants and allow the suit to proceed as against them. (*Khundkur, J.*) Sudhir Kumar De *v.* Amrit Lal Seal. I.L.R. (1946) 2 Cal. 611=50 C.W.N. 801.

———**O. 22, R. 4 (2)**—*Legal representative—Plea open to—Plea not available to deceased—Compentency of legal representative to raise—Suit by legal representative asserting own title—Bar of—S. 47.*

A person impleaded as a legal representative of a deceased defendant under O. 22, R. 4 (2), C. P. Code, can only make a defence in his capacity as such legal representative. It is not open to him to assert his own individual or hostile title in the suit. If any defence was not open to the deceased defendant, his legal representative could also not plead that defence. If the legal representative wants to raise a new point which the deceased could not raise or was estopped from raising, he must get himself impleaded in that capacity or must challenge the decree in a separate suit. Such a separate suit would not be barred by S. 47, C. P. Code.

A mortgagor cannot question his own right to mortgage the property mortgaged. The same disability, attaches to his legal representative.

Once a decree is passed ordering the sale of the mortgaged property for the satisfaction of the mortgage debt, any claim by the legal representative of the deceased mortgagor that the property or any part of it is not liable to sale in execution of the decree, being one challenging the validity of the decree, cannot be raised in execution, though based on the legal representative's individual title. That must be agitated by a separate suit; S. 47, C. P. Code, is no bar to such a suit. (*Lokur, J.*) DARLPPA ALAGOUDIA *v.* MALLAPPA SHIYALINGAPPA. 49 Bom.L.R. 174= A.I.R. 1947 Bom. 307.

———**O. 22, Rr. 4 (3) and 9**—*Applicability—Appeal—Death of sole respondent—Application in time to substitute widow—Another application to implead minor sole legatee under will of deceased within time under guardianship of father—Father appointed sole executor and taking out probate—Application beyond time to implead executor—Abatement—Sufficient cause.*

On the death of a sole respondent in an appeal, the appellant applied within time to bring on record his widow as his legal representative. But as the deceased had made a will before his death, the appellant also applied within time to implead the legatee under the will who was a minor under the guardianship of his father. The latter (father of the legatee) had been appointed sole executor under the will, and applied for probate and was granted a probate. By that time the widow of the deceased had died and the appellant applied to add the executor as a party respondent. But at the time of his last application, the time limited for impleading the legal representative of a deceased party had expired and it was pleaded in defence that the appeal had abated under O. 22, R. 4 (3).

Held: (1) that O. 22, R. 4 (3) did not apply as the appellant had applied within the time limited for substitution and therefore the appeal did not abate; (2) that assuming that the appeal did abate for not impleading the executor within time, the appellant must be held to have acted *bona fide*, and therefore had made out sufficient cause to have the abatement set aside and to have the executor who had taken out probate impleaded in the place of the deceased respondent. A.I.R. 1937 Pat. 612, dist.; 4 Pat. 320, foll. (*Reuben and Jamuar, JJ.*) MADHUSUDAN LAL *v.* SAILENDRA KISHORE. A.I.R. 1950 Pat. 359.

———**O. 22, R. 4 (3)**—*Death of one of the respondents in appeal—Right to sue not surviving against the remaining respondents—Failure to bring legal representatives on record—Effect.*

Where the plaintiff asks for a declaration that he was a co-tenant with the defendants, but the co-tenancy is denied by the latter and an appeal is filed by the plaintiff and one of the respondents dies and his legal representatives are not brought on record in time, the whole appeal abates as the right to sue does not survive against the remaining respondents. (*Pedley, J.M.*) RAM BARAN AHIR *v.* SHEO NATH. 1947 R.D. 27= 1947 A.W.R. (Rev.) 15 (2).

———**O. 22, R. 4 (3)**—*Death of* pro-forma *defendant respondent—Effect on appeal.*

The failure to add the legal representatives of a deceased *pro-forma* defendant respondent in an appeal results in the abatement of the appeal only as against him. The appeal does not abate as a whole. (*Zaidi, J.M. I and Prasad, J.M. II.*) ATAR SINGH *v.* KUNDAN. 1949 R.D. 432.

———**O. 22, R. 4 (3)**—*Scope and effect of—Will by defendant in suit—Death of defendant—Application by legatee to come on record as legatee—Objection by plaintiff alleging will bogus and benami—Order rejecting application—Observation that decree will not bind applicant—Will probated—Application by plaintiff to implead legatee as legal representative beyond limitation—Maintainability—Person on record in one capacity—If can be treated as legal representative in different capacity.*

Where an application by a legatee of properties under a will executed by the defendant in a suit to be impleaded as a party on the death of that defendant is opposed by the plaintiff on the ground that the legatee has no title to the properties and is not the real legal representative of the testator (deceased defendant) and the application is dismissed with the remark that that applicant will not be bound by any decree that may be passed in the suit, it will not be open to the plaintiff at a later stage of the litigation after the will has been probated and after the expiry of time limited to apply to have the legatee impleaded as the legal representative of the deceased. Such an application, is barred, and the suit must be held to have abated, in so far as that party is concerned. The fact that party was already on record in one capacity (in his personal right) would not be sufficient to remove the bar of limitation, when he is sought to be made the legal representative in a different capacity, *e.g.*, as a shebait of an idol. (*Manohar Lal, Ag. C.J. and Ray, J.*) RAMKALI KUER *v.* KALI PRASAD. 227 I.C. 570=13 B.R. 90=1947 Pat. (Rul.) 35 =27 Pat.L.T. 353=A.I.R. 1947 Pat. 257.

———**O. 22, R. 4 (4) (Calcutta)**—*Applicability—Abatement already taken place—Order refusing to set aside abatement—Subsequent application under sub-R. (4)—If competent.*

Even assuming that under sub-R. (4) added by the Calcutta High Court to O. 22, R. 4, C. P. Code, the discretion to exempt the appellant from the necessity of substituting the legal representatives of a deceased respondent who failed to appear and contest the suit at the hearing can be exercised in cases where an abatement has already taken place, the proper stage at which an application under sub-R. (4) should be made is either when the abatement becomes known to the appellant and he does not wish to make an application for setting it aside or when, after making an application for setting aside the abatement and finding that it is not succeeding, he decides to invite the Court to grant him the alternative relief and to exercise its discretion under sub-R. (4). But once an order has been made refusing to set aside an abatement and further declaring by an order of the Court that the appeal as respects the deceased respondent concerned has abated, it is no longer open to the party to make an application under sub-R. (4) nor is it open to the Court to revise the previous order. (*Chakravartti, J.*) SANKARI PRASAD SINGH DEO *v.* KANAI LAL ROY. 52 C.W.N. 599.

———O. 22, R. 5—*Question whether person is legal representative of deceased party—Whether may be left open for decision in suit.*

O. 22, R. 5, C. P. Code, requires the Court, when a question arises as to whether a particular person is the legal representative of the deceased party, to decide that question forthwith. It should not be left open to be decided when the suit is heard. (*Agarwala, Ag., C.J.*) JATO SINGH *v.* MALTI KUER. A.I.R. 1947 Pat. 474.

———O. 22, R. 5—Scope of inquiry—Decision as to legal representative—Finality—If *res judicata*. *See* C. P. CODE, S. 11. 4 D.L.R. (Pat.) 232.

———O. 22, R. 5—*Suit against legal representative—Legal representative described as of unsound mind and represented by guardian* ad litem *—No objection raised by latter—Estate, if represented.*

In a suit brought against *X* as legal representative of the deceased *Y*, *X* was described as a person of unsound mind and was represented by a guardian *ad litem*. The guardian *ad litem* raised no objection that having regard to *X's* particular disability, he was not the legal representative of *Y*.

Held, that if such objection was raised it would have been the duty of the Court under O. 22, R. 5, C. P. Code, to inquire into the question and record a finding, but that in the absence of such objection it could not be subsequently urged that the estate of *Y* was not represented. (*Davis, C.J. and Thadani, J.*) DHOLANDAS HOTCHAND *v.* MT. DADANBAI. A.I.R. 1947 Sind 181.

———O. 22, R. 6—*Applicability—Death of a defendant subsequent to recording of some evidence but before the evidence was finally closed.*

Where though some evidence was recorded before the death of a defendant the evidence was formally closed only long after, O. 22, R. 6, would not apply. (*Lal, J.M. I.*) KANIZ KUBRA BEGAM *v.* DALLU SINGH. 1949 R.D. 289.

———O. 22, R. 6—*Party dying between conclusion of hearing and judgment—Appeal filed by legal representative against decree—Application for substitution—If necessary.*

Where a party dies between the conclusion of the hearing and the pronouncement of the judgment and his legal representative files an appeal against the decree, an application by him for substitution of his name is necessary. (*Blank and Chakravartti, JJ.*) SANAT KUMAR MUKHERJEE *v.* TARAPADA DUTTA. I.L.R. (1947) 1 Cal. 506=A.I.R. 1948 Cal. 36=51 C.W.N. 290.

———O. 22, R. 8 (1)—*Construction and scope—Insolvency of plaintiff — Procedure—Order against Official Assignee without notice—Effect—Subsequent annulment of adjudication—Right of plaintiff to continue suit.*

When an order is made under O. 22, R. 8 (1), C. P. Code, on the insolvency of a plaintiff in a suit, it is not only desirable but very necessary, that it should not be made without hearing the Official Assignee. It is only if the Official Assignee does not choose to be present after being given notice, that an order of dismissal under O. 21, R. 8 (1) would be proper. If the Official Assignee declines to continue the suit or if he fails to give security for costs without any order or notice from the Court, there is an abatement of the suit but not a dismissal. Such an abatement is one which affects only the Official Assignee so long as he is the *dominus litis* of the litigation. If the insolvency comes to an end and the order of adjudication is annulled, the bar against the Official Assignee comes to an end. The plaintiff is then restored to his full rights, and if he wants to proceed with the litigation, there is no impediment, so far as he is concerned, to his proceeding with the litigation. (*Stone, C.J. and Chagla, J.*) VELJI SHIVJI *v.* MATHURADAS HARIDAS. 49 Bom.L.R. 645=A.I.R. 1948 Bom. 47.

———O. 22, R. 9—Applicability—Sufficient cause—Applicant acting *bona fide*. *See* C. P. CODE, O. 22, RR. 4 (3), 9. A.I.R. 1950 Pat. 359.

———O. 22, R. 9—*Application under—Delay in filing—Application for excusing—Materials to be placed before Court for granting request.*

When there is delay and on application under O. 22, R. 9, C. P. Code, is filed beyond time with a prayer for excusing the delay occasioned by the illness of the applicant on the last day of limitation, it is not enough if a mere affidavit is filed. The litigant seeking an indulgence at the hands of the Court should place before it some independent evidence more worthy of reliance than affidavit by himself. (*Ghulam Hasan, C.J. and Kaul, J.*) KALKA SINGH *v.* KUER PRATAP BHAN PRAKASH SINGH. 1947 O.A. (C.C.) 233=1947 A.W.R. (C.C.) 233=1947 O.W.N. 527.

———O. 22, Rr. 9 and 11 and S. 107—*Death of one of defendants while suit pending in trial Court—Appeal by contesting defendants—Application by plaintiff-respondent to set aside abatement of suit—Jurisdiction of appellate Court.*

Where one of the defendants died while the suit was pending in the Court of first instance and the plaintiff-respondent who had no knowledge of his death until after an appeal had been preferred against the decree by the contesting defendants made an application before the appellate Court to set aside the abatement of the suit,

Held, that the Court of first instance had at the time no jurisdiction to entertain an application under O. 22, R. 9 (2), C. P. Code, and the Court of appeal was the only Court entitled to entertain such an application. There was nothing in the actual wording of R. 9 or R. 11 of O. 22 to preclude the Court of appeal from setting aside the abatement of the suit and S. 107, C. P. Code, was wide enough to enable the Court of appeal to do so. (*Lodge, J.*) NABA

Kumar Roy *v.* Prafulla Chandra. 51 C.W.N. 654.

———O. 22, R. 9—*Scope—Partition suit—Abatement on death of defendant—Withdrawal—Second suit—If barred.*

A second suit for partition is not barred in spite of a prior suit for partition having abated on the death of a defendant and having been withdrawn with liberty to bring a fresh suit. Partition is a recurring cause of action so long as the property remains joint. (*Meredith and Sinha, JJ.*) Dilorana *v.* Kunjbehari. 26 Pat. 304=A.I.R. 1948 Pat. 244.

———O. 22, R. 9—*Scope—Suit for redemption—Death of plaintiff—Abatement—Second suit by heirs—Maintainability—T. P. Act, S. 60.*

A second suit for redemption of a mortgage by the heirs of the deceased mortgagor after the abatement of a prior suit by the original mortgagor on the death of the latter, is maintainable. The right of redemption cannot be taken away except in the manner and to the extent provided by S. 60, T. P. Act. The abatement of the suit is not a decree of Court which extinguishes the right of redemption. The procedural effect of O. 22, R. 9, C. P. Code cannot override the express provisions of S. 60, T. P. Act. (*Chagla, Bavdekar and Gajendragadkar, JJ.*) Rajaram Vithal *v.* Ramachandra Pandu. I.L.R. (1948) Bom. 189=2 D.L.R. 372=A.I.R. 1948 Bom. 226=50 Bom. L.R. 45 (F.B.).

——O. 22, R. 9—*Setting aside of abatement—conditional on payment of specified damages to the other side—Opposite party accepting such damages, if can question order setting aside abatement.*

Where an abatement is set aside on payment of specified sum as damages to the other party, though that party accepts the amount it is not thereby precluded from questioning the validity of the order setting aside the abatement. The damages awarded could only be treated as costs of an extra adjournment in the case. (*Lal, J. M. I.*) Kaniz Kubra Begam *v.* Dallu Singh. 1949 R.D. 289.

———O. 22, R. 9—*Setting aside of abatement—Grounds—Ignorance of existence of all heirs.*

Mere ignorance of the existence of all the legal heirs of a deceased respondent is not a valid ground for setting aside the abatement of an appeal occasioned by the failure to implead all the legal representatives in time. (*Lal, J. M. I.*) Raghunath *v.* Mullu Singh. 1948 A.W.R. (Rev.) 246=1948 R.D. 448.

———O. 22, R. 9 (2)—*Abatement of appeal—Setting aside—Sufficient cause.*

The duty is on the person desiring to set aside the abatement of an appeal to prove that he was prevented by sufficient cause from continuing the appeal. To say that he was unaware of the existence of all the heirs of the deceased person is not a valid ground for asking the abatement to be set aside. (*Lal, J.M. I.*) Kanhaiya Lal *v.* Kashi Prasad. 1948 R.D. 277=1948 A.W.R. (Rev.) 236.

———O. 22, R. 9 (2)—*Sufficient cause—Onus.*

The burden of proving that he was prevented by sufficient cause from making an application under 4 (1) of O. 22, lies on the applicant to set aside an abatement. (*Lal, J.M. II.*) Brij Bhushan Lal *v.* Bansidhar. 1948 R.D. 201=1948 A.W.R. (Rev.) 173.

———O. 22, R. 10—*Addition of assignee—Principles.*

The doctrine of *lis pendens* could never be a bar to the bringing on record of the assignee since special provision has been made under O. 22, R. 10, C. P. Code, for this very contingency. There is no doubt that the assignee even if he does not become a party is bound by the decision against the assignor who is already a party to the suit, but the option to become a party or to let the assignor carry on the litigations rests with the assignee and the leave to substitute him in place of the assignor should not be unreasonably refused. I.L.R. 15 Pat. 607, rel. on. (*Nawal Kishore and Bapna, JJ.*) Dr. Niranjan Nath *v.* Sardar Mal. A.I.R. 1950 Raj. 31.

———O. 22, R. 10—*"Any interest—If includes any transferable right to sue—Suit for specific performance—Sale of subject-matter to third party—Right of such party to be impleaded as party to suit.*

Under a compromise decree in an original suit it was agreed that the first plaintiff was to deposit a certain sum of money into Court by a certain date and the defendant was to convey to her the estate. The first plaintiff then entered into an agreement with the second plaintiff purporting to sell the estate to him and obtained a portion of the sale consideration which she deposited in Court in pursuance of the compromise and sued the defendant for specific performance of the compromise. Meanwhile the 2nd plaintiff executed a sale of the estate to one *K* who thereupon applied to the lower Court for impleading him as 3rd plaintiff and his application was allowed. On appeal,

Held, that the words "any interest" in O. 22, R. 10 of the Code includes any transferable "right to sue" and the contention that the words "assignment, creation or devolution of any interest" in the rule refer to an interest in tangible property cannot be accepted and that *K* was properly impleaded. (*Patanjali Sastri and Govindarajachari, JJ.*) Saradambal Ammal *v.* Kandasamy Goundar. I.L.R. (1948) Mad. 486=2 D.L.R. 432=A.I.R. 1949 Mad. 23=60 L.W. 705 (2)=1947 M.W.N. 648=(1947) 2 M.L.J. 374.

———O. 22, R. 10—Applicability—Assignee of the right to recover the money due to a principal from an agent. *See* T. P. Act (IV of 1882), S. 6. (1948) 1 M.L.J. 298.

———O. 22, R. 10—Applicability—Death of an heirless tenant who had filed a suit under S. 180 of the U.P. Tenancy Act. Zamindar if can claim to continue suit. *See* U. P. Ten. Act, (XVII of 1939), S. 180 and C. P. Code, O. 22, R. 10. 1948 A.W.R. (Rev.) 28.

———O. 22, R. 10—Applicability—Death of party between passing of preliminary and final decree. *See* C. P. Code, O. 22, Rr. 1 to 4 and 10. 1946 N.L.J. 499.

———**O. 22, R. 10**—Applicability—Partition suit—Preliminary decree—Subsequent death of party—Effect—Abatement—Further continuance—Procedure—Application to bring legal representative on record—Necessity—Limitation. See C. P. Code, O. 22, R. 4. 3 D.L.R. (Cal.) 18.

———**O. 22, R. 10**—*Application under—Limitation, if any.*

The right to apply under R. 10 of O. 22 accrues from day to day. Further the bar contemplated by S. 3 of the Limitation Act is against the institution of a suit and not against the continuation of the suit against a party. (*Kaul and Chandiramoni, JJ.*) Bajrang Bahadur *v.* Rameswar Baksh Singh. 1950 A.W.R. 563.

———**O. 22, Rr. 10 and 11**—*Assignment of interest during pendency of suit—Assignor not defending appeal—Right of assignee to be brought on record to defend appeal.*

The person to or upon whom an interest has come or devolved during the pendency of a suit or appeal is bound by the decision in the suit or appeal, though *eo nomine* he is not added as a party. But there is nothing to prevent a suit or appeal being continued without such person being brought on record. It is only when the presence of such person on record becomes necessary owing to special circumstances that the Court may be inclined to permit such persons to be brought on record. It may be, the person himself may apprehend that his interest may not be sufficiently safeguarded by the parties on record, or the other side may desire to obviate any trouble or obstruction in execution proceedings. Mere omission to make an application under O. 22, R. 10, C. P. Code, will not by itself lead to any consequences, will not confer any right on parties or take away any rights from them. Accordingly there is no reason why a person in whose favour a transfer is made during the pendency of a suit should not choose to come on record only at the stage of an appeal or second appeal, if and when he considers that his presence has become necessary. The provisions of O. 22, Rr. 10 and 11 are of an enabling character. There is nothing in them to compel an action at the risk of the loss of any right. (1938) 1 M.L.J. 882: 1924 Cal. 90; I.L.R. (1944) Nag. 520 and 1946 Lah. 33, approved. 1934 All. 442, dissented from. (1940) 2 M.L.J. 349, overruled. (*Rajamannar, C.J. and Viswanatha Sastri, J.*) Chakrapani Iyer *v.* Ammalu Amma. I.L.R. (1949) Mad. 763=62 L.W. 195=1949 M.W.N. 295=A.I.R. 1949 Mad. 870=4 D.L.R. (Mad.) 125=(1949) 1 M.L.J. 245.

———**O. 22, Rr. 10 and 11**—*Assignment pending suit—Power of appellate Court to implead assignee as party to appeal—Nature of provision.*

An appellate Court has jurisdiction to implead an assignee as a party to the appeal although the assignment was made in his favour during the pendency of the suit. R. 11, O. 22, C. P. Code, directs the word "suit" in R. 10 to be so read as to include an appeal, and not that the word "appeal" should be substituted for the word "suit". The provisions contained in Rr. 10 and 11 do not make it incumbent upon an assignee to make an application during the pendency of the suit or appeal. They are of an enabling character and entitle him to do so if he so desires. He may not, however, choose to make an application if he finds that his interests are being well looked after by his assignor. As long as he is of that view, it is unnecessary for him to make an application for being brought on the record. But when he makes the application and the Court is not inclined to reject it either on the merits or in its exercise of proper judicial discretion, it cannot be turned down on the ground that it is not competent as the assignment was made in his favour during the pendency of the suit and he was making an application under Rr. 10 and 11 during the pendency of an appeal from a decree passed in that suit. He would be, after all, bound by the judgment and it is only right that he should be allowed to come on the record and protect his interests if he desires so to do. (*Harries, C.J. and Abdul Rahman, J.*) Lakshmi Narain *v.* Emperor. 221 I.C. 556=1946 Lah. (Rul.) 115=A.I.R. 1946 Lah. 33.

———**O. 22, R. 10**—*Factum of assignment—Question of fact.*

Where a person applies to be impleaded as a party to a proceeding on the ground that the plaintiff's rights had been assigned to him during the pendency of the suit, the question whether the plaintiff's rights had been assigned to him is a question of fact to be gone into by the trial Court. (*Abdur Rahman, J.*) Kartar Singh *v.* Sanjhe Khan. 222 I.C. 129=1946 Lah. (Rul.) 145=A.I.R. 1946 Lah. 263.

———**O. 22, Rr. 10 and 11**—*Joinder of assignee in appeal.*

O. 22, R. 10 must be read with R. 11, and so read, it is clear that an assignee can be impleaded in the course of appeal. (*Din Mahomed, Mahajan and Khosla, JJ.*) Mahomed Saeed *v.* Abdul Alim. I.L.R. (1946) Lah. 805=1947 Lah. (Rul.) 105=228 I.C. 326=48 P.L.R. 400 =A.I.R. 1947 Lah. 40 (F.B.).

———**O. 22, R. 10**—Locus standi *to apply—Person deriving interest from legal representative of deceased party.*

Under O. 22, R. 10, C. P. Code, the person who comes forward claiming as legal representative or assignee must derive his right directly and not through an intermediary from the party to the suit or proceedings. A person who derive his interest from the legal representative of such party is not entitled to be substituted under this rule. If such a person is permitted to come in, it would be open to any legal representative, who does not apply to be substituted within time, to transfer his interest to somebody and defeat the law prescribing abatement of the suit. (*Niyogi, J.*) Champalal *v.* Sonabai. I.L.R. (1946) Nag. 43=222 I.C. 298=1946 Nag. (Rul.) 62=1946 N.L.J. 8=A.I.R. 1946 Nag. 164.

———**O. 22, R. 10**—*Order under—Second appeal.*

No appeal lies from an order passed in an appeal against an order under O. 22, R. 10, C. P. Code. (*Niyogi and Sen, JJ.*) EKNATH RANJI WANJI *v.* HANMANTRAM. 227 I.C. 146=1946 N.L.J. 499=A.I.R. 1947 Nag. 75=1946 Nag. (Rul.) 281.

———O. 22, R. 10—Scope and applicability of. *See* C. P. CODE, O. 22, RR. 3 AND 10. (1947) 1 M.L.J. 348.

———O. 22, R. 10—*Scope—Application to be impleaded as party as assignee pending suit—Order disallowing such application—Appeal.*

An application made by a person to be impleaded as a party to a proceeding on the ground that the plaintiff's rights had been assigned to him during the pendency of the suit, can only be made under O. 22, R. 10 C. P. Code, and not under O. 1, R. 10, of that Code. An appeal against an order disallowing such an application has been expressly provided for in O. 43. (*Abdur Rahman, J.*) KARTAR SINGH *v.* SANJHE KHAN. 222 I.C. 129=1946 Lah. (Rul.) 145=A.I.R. 1946 Lah. 263.

———O. 22, R. 10—*Substitution of assignee—*Locus standi *of assignor to continue or take part in proceedings.*

Where there has been a substitution of the assignee under O. 22, R. 10, C. P. Code, in the place of a party to suit, the latter has thereafter no *locus standi* in the proceedings entitling him to continue or take part in it. He must first get the order of substitution vacated and then if he succeeds can take further steps in the proceedings. (*Jhala, J.*) HUSSAINMIYAN *v.* RAHIMABAI. 3 Sau.L.R. 6.

———O. 22, R. 12—*Appeals from orders in execution proceedings—If proceedings in execution.*

Appeals from orders in execution proceedings are not proceedings in execution within the meaning of O. 22, R. 12, C. P. Code, and are, therefore, not excluded from the rules relating to abatement contained in that order. (*Din Mahomed, Ram Lall and Cornelius, JJ.*) AJUDHIA PERSHAD RAM PERSHAD *v.* SHAM SUNDER. I.L.R. (1947) Lah. 417=229 I.C. 307=1947 Lah. (Rul.) 168=A.I.R. 1947 Lah. 13 (F.B.).

———O. 22, R. 12—*Applicability—Appeals from orders in execution proceedings.*

The expression "proceedings in execution of a decree" in R. 12 of O. 22, C. P. Code, does not include appeals from orders passed in such proceedings, and, therefore, the provisions as to abatement contained in Rr. 3 and 4 of O. 22 will apply to appeals arising in execution proceedings. (*Sen and Gajendragadkar, JJ.*) TRIMBAK NARHAR *v.* GOPAL NARAIN. 49 Bom.L.R. 333=A.I.R. 1947 Bom. 480.

———O. 22, R. 12—*Applicability—Appeals and revisions from orders passed in execution proceedings.*

R. 12 of O. 22, C. P. Code, applies also to appeals and revisions from orders passed in execution proceedings and hence no question of abatement can arise in such appeals or revisions. 1943 R.D. 139, Rel. on. 1948 R.D. 106, Refd. (*Lal,*

J.M. I.) MURAT NARAIN SINGH *v.* LAXMI NATH. 1949 R.D. 365.

———O. 22, R. 12—*Applicability—"Proceedings in execution"—Meaning of—Application under O. 21, R. 90 and appeal from order thereon—Nature of—Abatement—C. P. Code, S. 141.*

The phrase "proceedings in execution" in O. 22, R. 12, C. P. Code, cannot be interpreted as meaning a proceeding seeking to apply for execution of a decree or order; it means a proceeding which relates to a period before the execution of a decree or order has been finally disposed of. In this sense, an application under O. 21, R. 90 C. P. Code, is an application for execution. The rules as to abatement contained in O. 22, C. P. Code, cannot therefore apply to a proceeding under O. 21, R. 90 or to an appeal from an order on such application. Nor can S. 141, C. P. Code, be availed of to apply O. 22, to such proceedings, because S. 141 does not apply to proceedings in suits; it relates only to original matters in the nature of suits, namely, proceedings in probate, guardianship, and so on. 6 P.L.J. 253, diss.; 2 Pat. 243; 1 P.L.J. 232, dist.; 12 All. 179; 17 All. 106; 41 Cal. 1; 2 Pat. 243; 9 Pat. 372; 13 Pat. 777; 14 Pat. 488; 6 P.L.J. 358, ref. (*Sinha and Reuben, JJ.*) LAXMI NARAYAN *v.* DIPAN RAI. 5 D.L.R. (Pat.) 139=A.I.R. 1950 Pat. 290.

———O. 23,. R. 1—Abandonment of claim—Failure to deposit commission fee within time prescribed—If would amount to. *See* C.P. CODE (V OF 1908), O. 32, R. 7. (1946) 2 M.L.J. 219.

———O. 23, R. 1—*Applicability—Withdrawal of claim in respect of which Court-fee not paid—Fresh suit in respect of that claim--If barred.*

Where a claim in respect of which the requisite Court-fee was not paid was withdrawn without the permission of the Court by the amendment of the plaint, a fresh suit in respect of that claim is not barred by O. 23, R. 1, C. P. Code. The claim in question never came before the Court, because the requisite Court-fee was never paid. Once the Court-fee is paid and other defects in the plaint are removed, it can only be dismissed or withdrawn or disposed of in the other ways provided by the Code. But if the Court-fee is not paid, it is liable to be "rejected", and the rejection does not bar the bringing of a fresh suit on the same cause of action. (O. 7, Rr. 11 and 13, C. P. Code.) (*Shearer and Reuben, JJ.*) RAM LAKSHMAN JANKI *v.* MAKUND LAL SAHU. 27 Pat. 751=A.I.R. 1949 Pat. 358.

———O. 23, R. 1—*Applicability—Withdrawal of claim to set-off—Leave to file fresh suit not obtained—Subsequent suit—Maintainability.*

A defendant who prefers a counter-claim is in the position of a plaintiff. Where such defendant allows a decree to be passed declaring his set-off to be withdrawn and there is no permission granted to institute fresh proceedings in respect of the same, he is precluded from instituting a fresh suit in respect of such claim. (*Leach, C. J. and Lakshmana Rao, J.*) PONNIRULA PILLAI *v.* WESTERN INDIA OIL DISTRIBUTING CO. I.L.R. (1947) Mad. 18=226 I.C. 386=1946 Mad. (Rul.) 259=59 L.W. 205=1946 M.W.N. 235=A.I.R. 1946 Mad. 470=(1946) 1 M.L.J. 264.

———O. 23, R. 1—*Applicability—Withdrawal of suit against* pro forma *defendant without Court's permission—Fresh suit—If barred—Suit for declaration by vendor's sons against vendee—Pre-emptor who has filed suit also impleaded—Suit withdrawn against latter—Fresh suit against him after he obtains decree—If barred.*

The word "defendant" means a person against whom some claim is made or relief is claimed. Under O. 23, R. 1, C. P. C., the withdrawal of a suit against a *pro forma* defendant, (*i.e.*) a person who is neither necessary not proper party and against whom no relief is asked for without the permission of the Court, is of no consequence and does not preclude the institution of a fresh suit against him in respect of the same subject-matter. This is implicit in the language of the rule itself There must be some claim or relief asked for which could be withdrawn or abandoned and its reassertion is prohibited unless the Court permitted it.

While a suit for pre-emption was pending, the sons of the vendor brought a suit for a declaration that the sale was not binding upon them after their father's death. The vendee and the pre-emptor were impleaded as defendants in that suit. Subsequently at the request of the plaintiffs, a compromise decree was passed in their favour against the vendee and the name of the pre-emptor was struck out as no relief was claimed against him. After the pre-emptor suceeded in getting a decree, the plaintiffs instituted against the pre-emptor a fresh suit claiming that the sale of the property in suit by their father was not binding upon them. The defendant contended that the previous suit against him was withdrawn without the permission of the Court to file a fresh suit and consequently no other suit on the same subject-matter was competent. Overruling that contention,

Held, that the second suit was not barred under O. 23, R. 1, C. P. Code, as at the time of the withdrawal of the first suit the defendant, though on record, had no interest or right whatsover in the property and therefore no relief was available or claimed against him. The plaintiff's right to proceed against the defendant accrued only long after the withdrawal of the first suit when he became entitled to the property by actually depositing the amount in Court and obtaining possession in accordance with the pre-emption decree. The plaintiffs no doubt came to the Court again on the same allegations but the person against whom relief was claimed was different. It might be that the defence also was the same but that did not matter if the real defendant in the second suit was different and not claiming through the one in the first suit. (*Sharif. J.*) Surat Singh *v* Ram Singh. 224 I.C. 572=1946 Lah. (Rul.) 422=A.I.R. 1947 Lah. 25.

———O. 23, R. 1—Application under—No opposition—Order for withdrawal—Revision—Interference. *See* C. P. Code, S. 115 and O. 23, R. 1. 1946 A.L.J. 479.

———O. 23, R. 1—*Application under—Prayer for permission to withdraw and file fresh suit—Power of Court to grant one of the prayers alone.*

Where an application is made under O. 23, R. 1, C. P. Code, for premission to withdraw a suit and it is further prayed that the applicant should be permitted to file a fresh suit, the Court has either to accept or reject *in toto* both the prayers. It has no power to accept one part of the prayer and reject the other part of it. (*Haider, J.M. II and Lal, J.M. I.*) Nem Singh *v.* Ninuan. 1949 R.D. 132 (2).

———O. 23, R. 1 (2)—*Formal defect—Connotation—Instances of formal defect—Withdrawal when not justified.*

The expression "formal defect" connotes defects of varying kinds not affecting the merits of the case. A defect which goes to the root of the plaintiff's claim is not a formal defect. Defects such as omission to obtain permission if necessary of the necessary authority before bringing the suit, misjoinder of parties or causes of action or erroneous valuation of the subject-matter of the suit or the institution of the suit in a Court which has no jurisdiction to entertain the suit, are defects of a formal nature and such a suit can be allowed to be withdrawn. But where the suit has failed because the plaintiff failed to produce evidence which he was bound to produce in support of his claim, he cannot be permitted to withdraw the claim with liberty to bring a fresh suit in respect of the subject-matter. (*Bind Basni Prasad, J.*) Thakur Pd. *v.* Rasool Bux. 1950 A.W.R. 471=A.I.R. 1950 All. 489.

———O. 23, R. 1—*"Formal defect"—Non-joinder of parties.*

The defect contemplated by O. 23, R. 1 (2) is one by reason of which the suit must fail. Non-joinder of parties is not a formal defect within the meaning of O. 23, R. 1, as the suit could not fail by reason of non-joinder. (*Chagla, C. J. and Coyajee, J.*) Asian Assurance Co., Ltd. *v.* Madholal. 52 Bom.L.R. 386=A.I.R. 1950 Bom. 378.

———O. 23, R. 1 (2)—*Ground for withdrawal—Availability of a different remedy by reason of a change in the law—Suit pending for five years.*

Where a suit has been pending for five years, it cannot be allowed to be withdrawn under O. 23, R. 1 (2), C. P. Code, on the ground that by reason of a change in the law the plaintiff has now obtained a better and more summary remedy. (*Trivedi, J.C.*) Gajsinhji Harsinhji *v.* The Kutch Govt. A.I.R. 1950 Kut. 81.

———O. 23, R. 1—*Grounds for withdrawal—Statement of grounds for the granting of permission—Necessity.*

It is the obvious intention of O. 23, R. 1, C. P. Code, not only that the Court should give adequate grounds for its permission, but that the applicant for withdrawal should also state fully his grounds for the application. It is not enough for the applicant merely to state that there was a *Nuks Qanuni* in his suit without specifying in any way what that defect might be. (*Nethersole, S.M. and Nehru, A.M.*) Nannhuan *v.* Nainsukh. 1947 A.W.R. (Rev.) 67 (2).

———**O. 23, Rr. 1 and 2**—*Leave to withdraw suit with liberty to file fresh suit after arguments in appeal—No satisfactory reasons given—Legality.*

Any Court allowing a party to withdraw a suit with liberty to file a fresh suit at such a late stage as afer the closing of the arguments in appeal, is bound under O. 23, R. 1, C. P. Code, to give reasons for its being satisfied that the suit must fail by reason of some formal defect or that there were other sufficient grounds for allowing the withdrawal and it would be acting without jurisdiction and with material irregularity in allowing the withdrawal at that stage if sufficient reasons falling within O. 23, Rr. 1 and 2 (*a*) or (*b*), C. P. Code, are not given. (*Panchapakesa Ayyar, J.*) VENKATA REDDI *v.* LAKSHMI REDDI. 1949 M.W.N. 45=A.I.R. 1949 Mad. 441=(1949) 1 M.L.J. 68.

———**O. 23, R. 1 (2)**—*Leave under—Granting of—Appreciable portion of evidence adduced found insufficient to establish the case propounded in plaint—Leave to institute fresh suit on same cause of action—If can be granted.*

Where after an appreciable portion of the material evidence has been adduced the plaintiff finds that the evidence is insufficient to establish the case propounded by him in the plaint it will be contrary to the letter as well as the spirit of sub-rule (2) of O. 23, R. 1 of the C. P. Code to permit the plaintiff to institute a fresh suit on the same cause of action. (*Yahya, Ali, J.*) SIVAGAMINATHA PILLAI *v.* VENKITASWAMI NAICKER. 61 L.W. 647=1948 M.W.N. 697 (1)=A.I.R. 1949 Mad. 295=(1948) 2 M.L.J. 367.

———**O. 23, R. 1**—*Liberty to bring fresh suit on payment of costs before fresh suit—Fresh suit without payment—Competency—Payment of costs after filing and acceptance by defendant—Effect—Waiver—If removes bar.*

Where a suit is allowed to be withdrawn with leave to bring a fresh suit on the same cause of action under O. 23, R. 1, C. P. Code; and an order is made that the costs of the suit should be paid to the defendant before the institution of the second suit, the condition imposed in that order should be strictly complied with, and if it is not fulfilled the second suit is not properly filed and is liable to be dismissed; and the defect cannot be cured by payment of costs during the pendency of the fresh suit.

It is, however, competent to the defendant to waive the condition imposed for his benefit; and if he accepts the costs paid subsequent to the suit in fulfilment of the condition imposed by the order permitting withdrawal of the first suit, such action on his part removes the bar for the institution of the second suit; and the second suit would then be competent and can be proceeded with and tried. 56 All. 10; 1936 Mad. 24; 1935 Nag. 56, diss. 19 C.L.J. 529, not foll.; 11 Bom. 153; 55 Bom. 206; 59 Bom. 733; 2 Bom.L.R. 25; 6 Bom.L.R. 434; 27 Bom.L.R. 529; 34 Bom.L.R. 236; 41 Bom.L.R. 1269; 43 Bom.L.R. 758; 45 Bom.L.R. 768; 45 M.L.J. 646, ref. (*Rajadhyaksha and Chainani, JJ.*) RAMKRISHNA TIMMAPPA *v.* HANUMANT PATGAVI. I.L.R. (1949) Bom. 428=A.I.R. 1950 Bom. 113=51 Bom.L.R. 757.

———**O. 23, R. 1**—*Liberty to bring fresh suit granted on payment of costs—Non-payment of costs—Fresh suit, if competent.*

Where the plaintiff is permitted to withdraw his suit with liberty to institute a fresh suit and the payment of costs to the defendant is made a condition precedent to the institution of such suit, a second suit would not be competent if the condition as to the payment of costs has not been fulfilled. (*Ram Labhaya, J.*) SAJEED GUL *v.* MASHAL. A.I.R. 1947 Pesh. 43=2 D.L.R. 262.

———**O. 23, R. 1**—*"Other sufficient cause"—Meaning of—Plaintiff suing for possession on unregistered document—Whther can be permitted to withdraw and sue on oral sale completed by delivery of possession.*

It is now settled law that the words "other sufficient cause" in O. 23, R. 1, C. P. Code, do no include any cause whatever but only causes which are at least analogous to a formal defect. A plaintiff who has brought a suit for possession based on an unregistered receipt should not be permitted to withdraw the suit so that he could bring a fresh suit based on an oral sale completed by delivery of possession backed by the collateral evidence in the unregistered receipt. This is to give a new turn to the case and can hardly be called a formal defect or a defect analogous to a formal defect. It is a defect of substance, to plead one's own case on an unregistered document making it the root of title. (*Hidayatullah, J.*) SATYANARAYAN HIRALAL *v.* CHHOTELAL ONKAR PRASAD. I.L.R. (1948) Nag. 966=A.I.R. 1949 Nag. 10=1948 N.L.J. 325.

———**O. 23, R. 1**—*Permission to file fresh suit—Absence of formal defect or sufficient ground for allowing fresh suit to be filed.*

Permission to file a fresh suit cannot be granted under R. 1 of O. 23, C. P. Code, where no formal defect or sufficient ground for allowing fresh suit to be filed is shown. (*Sultan Ahmad, J.M.I and Lal, J.M.II.*) CHAUDRY DUDH NATH *v.* BHAGWATI. 1948 A.W.R. (Rev.) 134 (2)=1948 R.D. 203 (1).

———**O. 23, Rr. 1 and 2 and Limitation Act (IX of 1908), S. 14, Expl. III**—*Plaintiff voluntarily abandoning suit against one of the defendants—Liberty to file a fresh suit—Fresh suit filed beyond time—S. 14 of the Limitation Act not applicable—Case governed by O. 23, R. 2—Unregistered lease for quarrying limestone—Admissibility.*

The terms of an unregistered lease provided that the respondent should have the right to quarry limestone in the petitioner's land in consideration of payment of rent to the petitioner and seigniorage to the Government. The respondent having failed to pay seigniorage, the petitioner was obliged to pay the same and sued the respondent. There was a previous suit to which the respondent was a paprty, but no objection being taken by him, of misjoinder, the plaintiff (petitioner) voluntarily abandoned his claim against him, the lower Court ordering that the plaintiff was at liberty to file a fresh suit against the respondent if not barred by limitation.

On a question whether the plaintiff was entitled to deduct the time occupied by the trial of the former suit under Explanation III, to S. 14 of the Limitation Act.

Held: (*i*) the case falls under O. 23, R. 1, C. P. Code, with the consequence that R. 2 governs the case so far as limitation is concerned and not S. 14 of the Limitation Act. The plaintiff is not entitled to deduct the time occupied by the trial of the previous suit.

(*ii*) As the payment to the Government is just as much part of the consideration as payment of rent to the petitioner and it is an obligation affecting immovable property, the lease being unregistered was not admissible in evidence. (*Wadsworth, J.*) Pankala Rao *v.* Venkatasubbayya. 60 L.W. 648=1947 M.W.N. 616=(1947) 2 M.L.J. 337.

——**O. 23, R. 1**—*Powers of appellate Court.*

An appellate Court has undoubtedly power to allow a suit to be withdrawn under O. 23, R. 1, C. P. Code. (*Hidayatullah, J.*) Satyanarayan Hiralal *v.* Chhotelal Onkar Prasad. I.L.R. (1948) Nag. 966=A.I.R. 1949 Nag. 10 =1948 N.L.J. 325.

——**O. 23, R. 1 (3)**—*Power of Court to allow withdrawal—Effect of withdrawal.*

No one can be compelled to sue another. Under sub-R. (3) of R. 1 of O. 23, C. P. Code, the Court has no option in the matter of the exercise of the right of withdrawal by a party.

The effect of withdrawal of a suit is its dismissal against the party eliminated by the withdrawal and consequences of sub-R. (3) of R. 1 of O. 23 follow. (*Trivedi, J.C.*) Shamji Bhimji *v.* Govind Bhimji. A.I.R. 1950 Kut. 63 (1).

——**O. 23, R. 1**—*Procedure—Application and order for withdrawal of suit—If can be made in chambers and* ex parte.

An order under O. 23, R. 1, C. P. Code, cannot under the High Court Rules be made in chambers. An application under the rule must be made in open Court and the order too must be made in open Court and not in chambers. Nor can such an order be made *ex parte* without hearing the other side. (*Chagla, C.J. and Coyajee, J.*) Asian Assurance Co., Ltd. v. Madholal. 52 Bom.L.R. 386=A.I.R. 1950 Bom. 378.

——**O. 23, R. 1 and O. 7, R. 11**—*Relinquishment of part of claim after order passed for deficiency in Court-fee to be made up—Permissibility—Partition suit.*

Under O. 23, R. 1, C. P. Code, a plaintiff in a partition suit has a right to relinquish part of his claim in order to bring it within the Court-fee paid even after an order has been made under O. 7, R. 11, C. P. Code, for the deficiency in the Court-fee to be made up. (*Teja Singh and Khosla, JJ.*) Gainda Mal *v.* Madan Lal. 50 P.L.R. 118=A.I.R. 1948 E. P. 30=3 D.L.R. (Simla) 41.

——**O. 23, R. 1 and O. 7 R. 11**—Right to abandon part of claim—Application for amendment of plaint—Necessity—Additional court-fee demanded—Part of claim and a defendant given up to avoid payment of the extra court-fee demanded—Dismissal for non-payment of deficit court-fee—Legality. [*See* Q.D. 1941-1945, Vol. Col. 1233.] Ramakrishna Reddi *v.* Veerareddi. 224 I.C. 280=1946 Mad. (Rul.) 170=A.I.R. 1946 Mad. 126.

——**O. 23, R. 1** —*Scope of the power to allow withdrawal—Allowing withdrawal of second appeal to enable appellant to file a review application in the lower appellate Court—If justified.*

The power to allow withdrawal of a suit is specifically dealt with by the Code and unless the conditions prescribed by the Code do exist, the High Court has no jurisdiction to allow the withdrawal merely because unless that is done no review of the judgment and decree of the lower appellate Court can be sought by a party and he will be put to considerable hardship.

In second appeal before the High Court the appellant wished to withdraw the appeal in order that he might file a fresh suit for a declaration that there had been no encroachment of land as contended by the Government, or file an application for review before the lower appellate Court, and he relied upon the report of a certain commissioner appointed by the High Court in an interlocutory application which would go to show that there was no such encroachment.

Held: The requirements of O. 23, R. 1 which have to be borne in mind in considering such a request for withdrawal are not fulfilled in the present case. The Court cannot in order to enable the appellant to file a review application override the provisions of O. 23, R. 1. Considerations of hardship have no place in the application of the provisions of the Code, where they are perfectly clear and on considerations of hardship it is not open to any Court to exercise inherent powers on matter specifically dealt with by the C. P. Code itself. (*Raghava Rao, J.*) Ahmad Koya Mollah *v.* Calicut Municipal Council. 63 L.W. 1015=5 D.L.R. (Mad.) 349=(1950) 2 M.L.J. 369.

——**O. 23, R. 1**—*Scope—Representative suit—Withdrawal without consulting all persons interested.*

A representative suit cannot be permitted to be withdrawn under O. 23, R. 1, C. P. Code, without all the persons represented by the plaintiffs being consulted on the matter. (*Chagla, C.J. and Coyajee, J.*) Asian Assurance Co., Ltd. *v.* Madholal. 52 Bom.L.R. 386=A.I.R. 1950 Bom. 378.

——**O. 23, R. 1**—*Subject-matter of suit—What is.*

'Subject-matter of suit' is not the same thing as property. It is more correct to think of it in terms of title and causes of action. In other words, it has reference to the right which the plaintiff seeks to enforce. (*Sinha, J.*) Bhondu *v.* Raj Singh. 1947 A.L.J. 414=A.I.R. 1948 All. 60 =1947 A.W.R. (H.C.) 295.

——**O. 23, R. 1**—*Suit for injunction—Filing of written statement—Plaintiff's application to withdraw suit in its present form and file a fresh* *suit on the same subject-matter—How far such a permission could be granted.*

In order to seek permission of the Court under O. 23, R. 1 of the C. P. Code for withdrawing a suit filed and for filing a fresh suit on the same subject-matter, there must be something in the nature of a formal defect before such permission can be granted.

Where the plaintiffs, sons of the 1st defendant's brother, claimed to restrain by injunction the 1st defendant's sons from interfering with their possession of the house in question and the defendants filed a written statement to the effect that they had an equal share in the house, on the question whether the plaintiffs could be permitted to withdraw their suit and file a fresh one on the same subject-matter because of the necessity to secure a wider consideration of matters raised by the written statement,

Held, that such an application could not be granted as the Court had no jurisdiction to grant leave to file a fresh suit when there was no formal defect in the plaint. The Court if it thought fit could only permit plaintiffs to amend their plaint in such a way as to satisfy their desire to secure a wider consideration of the matters. (*Horwill, J.*) Varadarajulu Naidu *v.* Narayanaswami Naidu. A.I.R. 1950 Mad. 40=5 D.L.R. (Mad.) 59=1949 M.W.N. 673=(1949) 2 M.L.J. 457.

———**O. 23, R. 1**—*Withdrawal of suit—Limits to the right of a plaintiff—Suit for partition—Plaintiff praying for sale of suit property under the Partition Act—Defendant applying for its purchase—Plaintiff, if can be allowed to withdraw his suit at that stage.*

A plaintiff in a suit can withdraw his suit of his own accord without the permission of the Court. The only penalty attached to a withdrawal of the suit is that he is precluded from bringing a fresh suit on the same cause of action unless he obtains the leave of the Court for instituting a fresh suit under the provisions of O. 23, R. 1, C. P. Code. It is, therefore, normally speaking, the right of the plaintiff to withdraw his suit without reference to the convenience of the defendant and without obtaining beforehand the permission of the Court. But there is a limit to the exercise of this right of withdrawal. Where the litigation has reached a stage at which the rights of parties have become fixed, for example, by the passing of a preliminary decree or adjustment by a compromise, it is not open to the plaintiff to withdraw his suit thereafter and thereby seek to wipe off the effect of the adjudication rendered by the Court creating rights in the parties. But where, however, the rights of the parties have not assumed any definite shape either under a decree of Court or under a compromise entered into between them with reference to the subject-matter of the suit, it is competent to the plaintiff to withdraw his suit and he cannot be forced to remain on the record at the instance of the defendant to prosecute the suit.

Where in a suit for partition and possession of a half share in a house the plaint averred that the house was incapable of being divided by metes and bounds and prayed that it might be sold under the Partition Act and the defendant applied under S. 3 of the Act for its purchase and had asked for the appointment of a Commissioner for determining the valuation, on a question whether at that stage the plaintiff could be allowed to withdraw his suit,

Held, that the stage reached in the litigation was not such as to deprive the plaintiff of his right to withdraw his suit. Though an advantage had accrued to the defendant by reason of the admission made in the plaint and in the course of the proceedings, that, however, did not clothe the defendant, with any enforceable right and did not prevent the plaintiff from exercising the right of a suitor to withdraw his suit. (*Viswanatha Sastri, J.*) Hasan Badsha *v.* Sultan Raziah Begam. 62 L.W. 313=A.I.R. 1949 Mad. 772=1949 M.W.N. 609=(1949) 1 M.L.J. 515.

———**O. 23, R. 1(2)**—*Order under—No reasons given—Validity.*

Where an order under O. 23, R. 1 (2) is made but no reasons are given at all, it has to be set aside. (*Lal, J.M. I and Haider, J.M. II.*) Ram Kumar *v.* Hira Lal. 1948 A.W.R. (Rev.) 245=1948 R.D. 364.

———**O. 23, R. 1 (2)**—*Reasons for alowing drawal not given—Material irregularity justifying with isterference in revision.*

Where the District Munsiff merely set out the prayer and reasons for permission to withdraw the suit with leave to file a fresh suit and also the objections of the defendant, but said nothing more than that the petition is allowed, *held,* that failure to state what the defect is or are sufficient and what grounds have moved the Court to grant permission to withdraw from the suit, is a material irregularity justifying interference in revision by the High Court. (*Happell, J.*) Abdul Razack Ravuthar *v.* Mahammad Hanif Sahib. 59 L.W. 404=1946 M.W.N. 576=229 I.C. 267=1947 Mad. (Rul.) 133=A.I.R. 1947 Mad. 59=(1946) 2 M.L.J. 113.

———**O. 23, R. 1 (2) (b) and S. 107**—*"Other sufficient grounds"—Interpretation—Power of appellate Court.*

The "other sufficient grounds" contemplated in O. 23, R. 1 (2) (*b*), C. P. Code, need not be *ejusdem generis* with or analogous to the "formal defect" referred to in R. 1 (2) (*a*). The words "other sufficient grounds" are much wider in signification and cover all those cases which appear to Court as affording such grounds. Where a party runs a very great risk of losing a very valuable estate merely for the blunder of their counsel in not drafting a proper plaint and not claiming proper reliefs, it is a fit case in which the power vested in the appellate Court by virtue of O. 23, R. 1, read with S. 107 (2), C. P. Code, should be exercised in his favour. (*Din Mahomed and Mahomed Shariff, JJ.*) Gurprit Singh *v.* Punjab Provincial Government. 48 P.L.R. 183=A.I.R. 1946 Lah. 429=227 I.C. 401=1947 Lah. (Rul.) 1.